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**THE**  
**ENGLISH AND EMPIRE DIGEST**  
**WITH**  
**COMPLETE AND EXHAUSTIVE**  
**ANNOTATIONS.**

**VOLUME XXIX.**

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# THE ENGLISH AND EMPIRE DIGEST

WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXIX.

*INNS AND INNKEEPERS.*

*INSURANCE.*

*INTERPLEADER.*

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A. O. (preceded by date)	...	...	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	...	...	...	...	Eng.
A. Jur. Rep.	...	...	Australian Jurist Reports	...	...	...	...	Aus.
A. L. T.	...	...	Australian Law Times	...	...	...	...	Aus.
A. R.	...	...	Ontario Appeals	...	...	...	...	Can.
Act.	...	...	Acton's Reports, Prize Causes, 2 vols., 1809—1841	...	...	...	...	Eng.
Ad. & El.	...	...	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	...	...	...	...	Eng.
Adam	...	...	Adam's Justiciary Reports (Scotland), 1893—(current)	...	...	...	...	Scot.
Add.	...	...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	...	...	...	...	Eng.
Agra	...	...	Agra High Court	...	...	...	...	Ind.
Agra F. B.	...	...	Agra High Court, Full Bench	...	...	...	...	Ind.
Alc. & N.	...	...	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	...	...	...	...	Ir.
Alc. Reg. Cas.	...	...	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	...	...	...	...	Ir.
Aleyn	...	...	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	...	...	...	...	Eng.
All.	...	...	New Brunswick Reports (Allen)	...	...	...	...	Can.
Alta. L. R.	...	...	Alberta Law Reports	...	...	...	...	Can.
Amb.	...	...	Ambler's Reports, Chancery, 1 vol., 1716—1783	...	...	...	...	Eng.
And.	...	...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	...	...	...	...	...
Andr.	...	...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	...	...	...	...	...
Anst.	...	...	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	...	...	...	...	Eng.
App. Cas.	...	...	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	...	...	...	...	Eng.
App. Ct. Rep.	...	...	Appeal Court Reports	...	...	...	...	N.Z.
App. D.	...	...	South African Law Reports, Appellate Division	...	...	...	...	S. Af.
Architects' L. R.	...	...	Architects' Law Reports, 4 vols., 1904—1909	...	...	...	...	Eng.
Argus L. R.	...	...	Argus Law Reports	...	...	...	...	Aus.
Arkley	...	...	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	...	...	...	...	Scot.
Arm. M. & O.	...	...	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	...	...	...	...	Ir.
Arn.	...	...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	...	...	...	...	Eng.
Arn. & H.	...	...	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	...	...	...	...	Eng.
Ashb.	...	...	Ashburner's Principles of Equity, 1902	...	...	...	...	Eng.
Asp. M. L. C.	...	...	Aspinall's Maritime Law Cases, 1870—(current)	...	...	...	...	Eng.
Atk.	...	...	Atkyns' Reports, Chancery, 3 vols., 1736—1754	...	...	...	...	Eng.
Ayl. Pan.	...	...	Ayliffe's New Pandect of Roman Civil Law	...	...	...	...	Eng.
Ayl. Par.	...	...	Ayliffe's Parergon Juris Canonici Anglicani	...	...	...	...	Eng.
B.	...	...	Barber's Gold Law	...	...	...	...	S. Af.
B. & Ad.	...	...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	...	...	...	...	...
B. & Ald.	...	...	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—	...	...	...	...	...
C.	...	...	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822	...	...	...	...	...
B. & C. R. (preceded by date)	...	...	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)	...	...	...	...	Eng.
B. & S.	...	...	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	...	...	...	...	Eng.
B. C. R.	...	...	British Columbia Reports	...	...	...	...	Can.
B. Dig.	...	...	Bose's Digest	...	...	...	...	Ind.
B. L. R.	...	...	Bengal Law Reports	...	...	...	...	Ind.
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B. L. R. P. C.	...	...	Bengal Law Reports, Privy Council	...	...	...	...	Ind.
B. L. R. Sup. Vol.	...	...	Bengal Law Reports, Supp. Vol.	...	...	...	...	Ind.
B. W. C. C.	...	...	Butterworths' Workmen's Compensation Cases, 1907—(current)	...	...	...	...	Eng.
Bac. Abr.	...	...	Bacon's Abridgment	...	...	...	...	Eng.
Ball Ct. Cas.	...	...	Ball Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	...	...	...	...	Eng.



Baild. ...	...	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. ...	...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ...	...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. ...	...	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust. ...	...	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. ...	...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B. ...	...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes ...	...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt. ...	...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat. ...	...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav. ...	...	Beavan's Reports. Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ...	...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw. ...	...	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ...	...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ...	...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ...	...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ...	...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ...	...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe ...	...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. ...	...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben. ...	...	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1379	Eng.
Benl. ...	...	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber. ...	...	New Brunswick Reports (Berton)	Can.
Bing. ...	...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C. ...	...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm. ...	...	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ...	...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ...	...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com. ...	...	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ...	...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli. ...	...	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S. ...	...	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
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Bott. ...	...	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke ...	...	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ...	...	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract. ...	...	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr. ...	...	Sir R. Brooke's Abridgement	Eng.
Bro. C. C. ...	...	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
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C. L. J. N. S.	...	...	Canada Law Journal, New Series, 1865—(current)	...	...	Can.
C. L. J. O. S.	...	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	...	Can.
C. L. R.	...	...	Common Law Reports, 3 vols., 1853—1855	...	...	Eng.
C. L. R.	...	...	Commonwealth Law Reports	...	...	Aus.
C. L. R.	...	...	Calcutta Law Reporter	...	...	Ind.
C. L. T.	...	...	Canadian Law Times	...	...	Can.
C. L. T. Occ. N.	...	...	Canadian Law Times, Occasional Notes	...	...	Can.
C. P.	...	...	Upper Canada Common Pleas	...	...	Can.
C. P. D.	...	...	Law Reports, Common Pleas Division, 5 vols., 1875—1880	...	...	Eng.
C. P. D.	...	...	Cape Provincial Division Reports	...	...	S. Af.
C. R. [date] A. C.	...	...	Canadian Reports, Appeal Cases	...	...	Can.
C. T. R.	...	...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	...	...	S. Af.
C. W. N....	...	...	Calcutta Weekly Notes	...	...	Ind.
Cab. & El.	...	...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	...	...	Eng.
Cald. Mag. Cas.	...	...	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	...	...	Eng.
Calth.	...	...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	...	...	Eng.
Cam. Cas.	...	...	Cameron's Supreme Court Cases	...	...	Can.
Cam. I rac.	...	...	Cameron's Supreme Court Practice	...	...	Can.
Camp.	...	...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	...	...	Eng.
Can. Com. Cas.	...	...	Commercial Law Reports of Canada	...	...	Can.
Can. Crim. Cas.	...	...	Canadian Criminal Cases, Annotated	...	...	Can.
Can. Gaz.	...	...	Canadian Gazette	...	...	Can.
Can. Ry. Cas.	...	...	Canadian Railway Cases	...	...	Can.
Car. & Kir.	...	...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	...	...	Eng.
Car. & M.	...	...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	...	...	Eng.
Car. C. L.	...	...	Carrington's Treatise on Criminal Law	...	...	Can.
Card. Doc. Ann.	...	...	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	...	...	Eng.
Carl.	...	...	New Brunswick Reports (Carleton)	...	...	Can.
Carp. Pat. Cas.	...	...	Carpmael's Patent Cases, 2 vols., 1602—1842	...	...	Eng.
Cart.	...	...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	...	...	Eng.
Cart.	...	...	Cases on British North America Act (Cartwright)	...	...	Can.
Carth.	...	...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	...	...	Eng.
Cary	...	...	Cary's Reports, Chancery, 1 vol.	...	...	Eng.
Cas. in Ch.	...	...	Cases in Chancery, fol., 3 parts, 1660—1697	...	...	Eng.
Cas. Pract. K. B.	...	...	Cases of Practice, King's Bench, 1 vol., 1655—1775	...	...	Eng.
Cas. Sett.	...	...	Cases of Settlements and Removals, 1 vol., 1685—1727	...	...	Eng.
Cas. temp. Finch	...	...	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	...	...	Eng.
Cas. temp. King	...	...	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	...	...	Eng.
Cas. temp. Talb.	...	...	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	...	...	Eng.
Cass. Dig.	...	...	Cassells' Digest	...	...	Can.
Ch. (preceded by date)	...	...	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	...	...	Eng.
Ch. App.	...	...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	...	...	Eng.
Ch. Cas. in Ch.	...	...	Choyce Cases in Chancery, 1557—1606	...	...	Eng.
Ch. Ch.	...	...	Upper Canada Chancery Chambers Reports	...	...	Can.
Ch. D.	...	...	Law Reports, Chancery Division, 45 vols., 1875—1890	...	...	Eng.
Ch. Rob.	...	...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	...	...	Eng.
Char. Cham. Cas.	...	...	Charley's Chamber Cases, 2 vols., 1875—1876	...	...	Eng.
Char. Pr. Cas.	...	...	Charley's New Practice Reports, 3 vols., 1875—1876	...	...	Eng.
Chip.	...	...	New Brunswick Reports (Chipman)	...	...	Can.

# xxii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. ...	...	Irish Law Reports, 13 vols., 1838—1851	...	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	...	Ind.
I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	...	...	Ind.
I. L. R. (Vol.) Calc.	...	Indian Law Reports, Calcutta	...	...	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	Ind.
I. L. R. (Vol.) Pat.	...	Indian Law Reports, Patna	...	...	Ind.
I. L. R. (Vol.) Ran.	...	Indian Law Reports, Rangoon	...	...	Ind.
I. L. T. ...	...	Irish Law Times, 1867—(current)	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 ( <i>e.g.</i> , [1894] 1 I. R.)	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	Eng.
J. R.	...	Jurist Reports	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	Eng.
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	Can.

Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Knox	...	Knox's Reports	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.
L. & G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Can.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R.	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	...	Leader Law Reports	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	...	La Themis	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 8 vols., 1694—1732	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee temp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.



xxiv      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	...	...	Legal Reporter	...	...	...	...	...	Ir.
Legge	...	...	Legge's Reports	...	...	...	...	...	Aus.
Leon.	...	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	...	...	...	...	Eng.
Lev.	...	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	...	...	...	...	Eng.
Lew. C. C.	...	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	...	...	...	...	Eng.
Ley	...	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	...	...	...	...	Eng.
Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	...	...	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	...	...	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	...	...	...	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	...	...	...	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	...	...	...	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	...	...	...	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	...	...	...	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	...	...	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	...	...	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	...	...	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	...	...	...	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	...	...	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	...	...	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	...	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	...	...	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	...	...	...	Eng.
M. C. R.	...	...	Montreal Condensed Reports	...	...	...	...	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	...	...	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	...	...	...	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	...	...	...	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	...	...	...	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	...	...	...	...	Eng.
Mac. & H.	...	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	...	...	...	Eng.
M'Cle.	...	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	...	...	...	...	Eng.
M'Cle. & Yo.	...	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	...	...	...	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	...	...	...	...	Scot.
Macl. & Rob.	...	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	...	...	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	...	...	...	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	...	...	...	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	...	...	...	...	Eng.
Mad.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	...	...	...	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	...	...	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	...	...	...	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	...	...	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	...	...	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	...	...	...	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	...	...	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	...	...	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	...	...	...	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	...	...	...	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	...	...	...	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	...	...	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	...	...	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	...	...	...	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports	...	...	...	...	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	...	...	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	...	...	...	...	Eng.

Men.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	S. Af.
Mer.	...	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	...	Eng.
Milw.	...	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	...	Ir.
Mod. Rep.	...	...	Modern Reports, 12 vols., 1669—1755	...	...	Eng.
Mol.	...	...	Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831	...	...	Ir.
Mont.	...	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	...	Eng.
Mont. & A.	...	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	...	Eng.
Mont. & B.	...	...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	...	...	Eng.
Mont. & Ch.	...	...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	...	...	Eng.
Mont. & M.	...	...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	...	...	Eng.
Mont. D. & De G.	...	...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	...	...	Eng.
Moo. & P.	...	...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	...	...	Eng.
Moo. & S.	...	...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	...	...	Eng.
Moo. Ind. App.	...	...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	...	...	Eng.
Moo. P. C. C.	...	...	Moore's Privy Council Cases, 15 vols., 1836—1863	...	...	Eng.
Moo. P. C. C. N. S.	...	...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	...	...	Eng.
Mood. & M.	...	...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	...	...	Eng.
Mood. & R.	...	...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	...	...	Eng.
Mood. C. C.	...	...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	...	...	Eng.
Moore, C. P.	...	...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	...	...	Eng.
Moore, K. B.	...	...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	...	...	Eng.
Mor. Dict.	...	...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	...	...	Scot.
Morr.	...	...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	...	...	Eng.
Mos.	...	...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	...	...	Eng.
Mun. Rep.	...	...	Municipal Reports	...	...	Can.
Murd. Epit.	...	...	Murdoch's Epitome	...	...	Can.
Murp. & H.	...	...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	...	...	Eng.
Murr.	...	...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	...	...	Scot.
My. & Cr.	...	...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	...	...	Eng.
My. & K.	...	...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	...	...	Eng.
N. (preceded by date)	...	...	Northern Ireland Law Reports, 1925 --(current) ( <i>e.g.</i> , [1925] N.)	...	...	Ir.
N. A. C.	...	...	Native Appeal Cases	...	...	S. Af.
N. & S.	...	...	Nichols and Stop's Reports (Tasmania)	...	...	Tasmania
N. B. Dig.	...	...	New Brunswick Digest (Stevens)	...	...	Can.
N. B. Eq. Rep.	...	...	New Brunswick Equity Reports	...	...	Can.
N. B. R.	...	...	New Brunswick Reports	...	...	Can.
N. B. R. (All.)	...	...	New Brunswick Reports (Allen)	...	...	Can.
N. B. R. (Ber.)	...	...	New Brunswick Reports (Berton)	...	...	Can.
N. B. R. (Carl.)	...	...	New Brunswick Reports (Carleton)	...	...	Can.
N. B. R. (Chip.)	...	...	New Brunswick Reports (Chipman)	...	...	Can.
N. B. R. (Han.)	...	...	New Brunswick Reports (Hannay)	...	...	Can.
N. B. R. (Kerr)	...	...	New Brunswick Reports (Kerr)	...	...	Can.
N. B. R. (P. & B.)	...	...	New Brunswick Reports (Pugsley and Burbidge)	...	...	Can.
N. B. R. (P. & T.)	...	...	New Brunswick Reports (Pugsley and Trueman)	...	...	Can.
N. B. R. (Pug.)	...	...	New Brunswick Reports (Pugsley)	...	...	Can.
N. B. R. (Tru.)	...	...	New Brunswick Reports (Trueman)	...	...	Can.
N. L. R.	...	...	Natal Law Reports	...	...	S. Af.
N. P. D.	...	...	South African Law Reports, Natal Provincial Division	...	...	S. Af.
N. S. R.	...	...	Nova Scotia Reports	...	...	Can.
N. S. R. (Coch.)	...	...	Nova Scotia Reports (Cochran)	...	...	Can.
N. S. R. (G. & O.)	...	...	Nova Scotia Reports (Geldert and Oxley)	...	...	Can.
N. S. R. (G. & R.)	...	...	Nova Scotia Reports (Geldert and Russell)	...	...	Can.
N. S. R. (James)	...	...	Nova Scotia Reports (James)	...	...	Can.
N. S. R. (Old.)	...	...	Nova Scotia Reports (Oldrights)	...	...	Can.
N. S. R. (R. & C.)	...	...	Nova Scotia Reports (Russell and Chesley)	...	...	Can.
N. S. R. (R. & G.)	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	Can.
N. S. R. (Thom.)	...	...	Nova Scotia Reports (Thomson)	...	...	Can.
N. S. W. Adm. or Ad.	...	...	New South Wales Reports, Admiralty	...	...	Aus.
N. S. W. B.	...	...	New South Wales Reports, Bankruptcy	...	...	Aus.
N. S. W. Bkpty. Cas.	...	...	New South Wales Bankruptcy Cases	...	...	Aus.
N. S. W. Eq.	...	...	New South Wales Reports, Equity	...	...	Aus.
N. S. W. Ind. Arbtrn. Cas.	...	...	New South Wales Industrial Arbitration Cases	...	...	Aus.
N. S. W. L. R.	...	...	New South Wales Law Reports	...	...	Aus.
N. S. W. Land App. Cts.	...	...	New South Wales Land Appeal Courts	...	...	Aus.
N. S. W. S. C. R. (Eq.)	...	...	New South Wales Supreme Court Reports (Equity)	...	...	Aus.
N. S. W. S. C. R. (L.)	...	...	New South Wales Supreme Court Reports (Law)	...	...	Aus.
N. S. W. S. C. R. N. S.	...	...	New South Wales Supreme Court Reports, New Series	...	...	Aus.
N. S. W. W. N.	...	...	New South Wales Weekly Notes	...	...	Aus.
N. W.	...	...	North-Western Provinces High Court Reports	...	...	Ind.
N. W. T. R.	...	...	North-West Territories Reports	...	...	Can.
N. Z. Jur.	...	...	New Zealand Jurist	...	...	N.Z.
N. Z. Jur. Mining Law	...	...	New Zealand Jurist Mining Law	...	...	N.Z.

# xxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	...	New Zealand Jurist, New Series	...	...	...	N.Z.
N. Z. L. R. ...	...	New Zealand Law Reports, 1883—(current)	...	...	...	N.Z.
N. Z. L. R. C. A. ...	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	...	...	...	N.Z.
Nels. ...	...	Nelson's Reports, Chancery, 1 vol., 1625—1693	...	...	...	Eng.
Nev. & M. K. B. ...	...	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	...	...	...	Eng.
Nev. & M. M. C. ...	...	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	...	...	...	Eng.
Nev. & P. K. B. ...	...	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	...	...	...	Eng.
Nev. & P. M. C. ...	...	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837	...	...	...	Eng.
New Mag. Cas. ...	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	...	...	...	Eng.
New Pract. Cas. ...	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1849	...	...	...	Eng.
New Rep. ...	...	New Reports, 6 vols., 1862—1865	...	...	...	Eng.
New Sess. Cas. ...	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	...	...	...	Eng.
Nfld. L. R. ...	...	Newfoundland Reports	...	...	...	Nfld.
Nolan ...	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	...	...	...	Eng.
Notes of Cases ...	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	...	...	...	Eng.
Noy ...	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	...	...	...	Eng.
O. B. & F. ...	...	Ollivier Bell and Fitzgerald's Reports	...	...	...	N.Z.
O. B. S. P. ...	...	Old Bailey Session Papers	...	...	...	Eng.
O. Bridg. ...	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	...	...	...	Eng.
O. F. S. ...	...	Reports of the High Court of the Orange Free State, 1879—1883	...	...	...	S. Af.
O. L. R. ...	...	Ontario Law Reports	...	...	...	Can.
O'M. & H. ...	...	O'Malley and Hardcastle's Election Cases, 1869—(current)	...	...	...	Eng.
O. P. D. ...	...	South African Law Reports, Orange Free State Provincial Division	...	...	...	S. Af.
O. R. ...	...	Ontario Reports	...	...	...	Can.
O. R. ...	...	Official Reports of the South African Republic, 1894—1899	...	...	...	S. Af.
O. R. C. ...	...	Reports of the High Court of the Orange River Colony	...	...	...	S. Af.
O. S. ...	...	Upper Canada Queen's Bench, Old Series	...	...	...	Can.
O. W. N. ...	...	Ontario Weekly Notes	...	...	...	Can.
O. W. R. ...	...	Ontario Weekly Reporter	...	...	...	Can.
Old. ...	...	Nova Scotia Reports (Oldrights)	...	...	...	Can.
Ont. Dig. ...	...	Digest of Ontario Case Law, 4 vols., 1823—1900	...	...	...	Can.
Owen ...	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	...	...	...	Eng.
P. (preceded by date) ...	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.)	...	...	...	Eng.
P. & B. ...	...	New Brunswick Reports (Pugsley and Burbidge)	...	...	...	Can.
P. & T. ...	...	New Brunswick Law Reports (Pugsley and Trueman)	...	...	...	Can.
P. Cas. ...	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	...	...	...	Eng. & Col.
P. D. ...	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	...	...	...	Eng.
P. E. I. ...	...	Prince Edward Island Reports	...	...	...	Can.
P. R. ...	...	Ontario Practice	...	...	...	Can.
P. Wms. ...	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	...	...	...	Eng.
Palm. ...	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	...	...	...	Eng.
Park. ...	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	...	...	...	Eng.
Pat. App. ...	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	...	...	...	Eng.
Pater. App. ...	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	...	...	...	Scot.
Peake ...	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	...	...	...	Eng.
Peake, Add. Cas. ...	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	...	...	...	Eng.
Peck. ...	...	Peckwell's Election Cases, 2 vols., 1803—1806	...	...	...	Eng.
Pelham ...	...	Pelham (S. A.) Reports	...	...	...	Aus.
Per. & Dav. ...	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	...	...	...	Eng.
Per. & Kn. ...	...	Perry and Knapp's Election Cases, 1 vol., 1833	...	...	...	Eng.
Per. C. S. ...	...	Perrault's Conseil Supérieur	...	...	...	Can.
Per. P. ...	...	Perrault's Prévosté de Quebec, 1726—1756	...	...	...	Can.
Ph. ...	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	...	...	...	Eng.
Phil. El. Cas. ...	...	Philipps' Election Cases, 1 vol., 1780	...	...	...	Eng.
Phillim. ...	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	...	...	...	Eng.
Phillim. Eccl. Jud. ...	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	...	...	...	Eng.
Phip. ...	...	Phipson's Digest of Natal Reports, 1858—1859	...	...	...	S. Af.
Pig. & R. ...	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	...	...	...	Eng.
Pitc. ...	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	...	...	...	Scot.
Plowd. ...	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	...	...	...	Eng.
Poll. ...	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	...	...	...	Eng.
Poph. ...	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	...	...	...	Eng.
Pow. R. & D. ...	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	...	...	...	Eng.

Pratt	...	...	Pratt's Supplement to Bott's Poor Laws, 1833	...	...	Eng.
Prec. Ch.	...	...	Precedents in Chancery, fol., 1 vol., 1689—1722	...	...	Eng.
Price	...	...	Price's Reports, Exchequer, 13 vols., 1814—1824	...	...	Eng.
Price	...	...	Price's Mining Commissioners' Cases	...	...	Can.
Pug.	...	...	New Brunswick Reports (Pugsley)	...	...	Can.
Py. R.	...	...	Pykes' Lower Canada Reports	...	...	Can.
Q. B.	...	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	...	...	Eng.
Q. B. (preceded by date)	...	...	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.)	...	...	Eng.
Q. B. D.	...	...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	...	...	Eng.
Q. J. P.	...	...	Queensland Justice of Peace Reports	...	...	Aus.
Q. L. J.	...	...	Queensland Law Journal and Reports, 11 vols., 1879—1901	...	...	Aus.
Q. L. R.	...	...	Quebec Law Reports	...	...	Can.
Q. L. R. (Beor)	...	...	Queensland Law Reports by Beor, 1876—1878	...	...	Aus.
Q. P. R.	...	...	Quebec Practice Reports	...	...	Can.
Q. R. (Vol.) K. B. or Q. B.	...	...	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	...	...	Can.
Q. R. (Vol.) S. C.	...	...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	...	...	Can.
Q. S. C. R.	...	...	Queensland Supreme Court Reports, 5 vols., 1860—1881	...	...	Aus.
Q. S. R.	...	...	Queensland State Reports	...	...	Aus.
Q. W. N.	...	...	Weekly Notes, Queensland	...	...	Aus.
R.	...	...	The Reports, 15 vols., 1803—1895	...	...	Eng.
R.	...	...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	...	...	S. Af.
R. (Ct. of Sess.)	...	...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	...	...	Scot.
R. A. C.	...	...	Ramsay, Appeal Cases	...	...	Can.
R. & C.	...	...	Nova Scotia Reports (Russell & Chesley)	...	...	Can.
R. & G.	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	Can.
R. C.	...	...	La Revue Critique de Législation et de Jurisprudence de Canada	...	...	Can.
R. de J.	...	...	Revue de Jurisprudence	...	...	Can.
R. de L.	...	...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	...	...	Can.
R. E. D.	...	...	New South Wales, Reserved and Equity Decisions	...	...	Aus.
R. E. D.	...	...	Ritchie's Equity Decisions (Russell)	...	...	Can.
R. J. R. Q.	...	...	Quebec Revised Reports	...	...	Can.
R. L. N. S.	...	...	Revue Légale, New Series, 1895—(current)	...	...	Can.
R. L. O. S.	...	...	Revue Légale, Old Series, 21 vols., 1869—1892	...	...	Can.
R. P. C.	...	...	Reports of Patent Cases, 1884—(current)	...	...	Eng.
R. R.	...	...	Revised Reports	...	...	Eng.
Rast.	...	...	Rastell's Entries	...	...	Eng.
Rayn.	...	...	Rayner's Tithe Cases, 3 vols., 1575—1782	...	...	Eng.
Real Prop. Cas.	...	...	Real Property Cases, 2 vols., 1843—1847	...	...	Eng.
Rep. Ch.	...	...	Reports in Chancery, fol., 3 vols., 1615—1710	...	...	Eng.
Rep. in C. of A.	...	...	Reports in Courts of Appeal	...	...	N.Z.
Res. & Eq. Jud.	...	...	New South Wales Reserved and Equity Judgments	...	...	Aus.
Reserv. Cas.	...	...	Reserved Cases	...	...	Ir.
Rick. & M.	...	...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	...	...	Eng.
Rick. & S.	...	...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	...	...	Eng.
Ridg. L. & S.	...	...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	...	...	Ir.
Ridg. Parl. Rep.	...	...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	...	...	Ir.
Ridg. temp. H.	...	...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	...	...	Eng.
Ritch. Eq. Rep.	...	...	Ritchie's Equity Reports	...	...	Can.
Rob. Eccl.	...	...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	...	...	Eng.
Rob. L. & W.	...	...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	...	...	Eng.
Robert. App.	...	...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	...	...	Scot.
Robin. App.	...	...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	...	...	Scot.
Roll. Abr.	...	...	Rolle's Abridgment of the Common Law, fol., 2 vols.	...	...	Eng.
Roll. Rep.	...	...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	...	...	Eng.
Rom.	...	...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	...	...	Eng.
Roscoe's B. C.	...	...	Roscoe, Digest of Building Cases	...	...	Eng.
Rose	...	...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	...	...	Eng.
Ross, L. C.	...	...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	...	...	Eng.
Rowe	...	...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	...	...	Eng.
Rul. Cas.	...	...	Campbell's Ruling Cases, 25 vols.	...	...	Eng.
Russ.	...	...	Russell's Reports, Chancery, 5 vols., 1824—1829	...	...	Eng.
Russ. & M.	...	...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	...	...	Eng.



# xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry.	...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	...	Russell's Election Reports...	Can.
Ry. & Can. Cas.	...	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas.	...	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
Ryde & K. Rat. App.	...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App.	...	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	...	South African Law Journal	S. Af.
S. A. L. R.	...	South Australian Law Reports	Aus.
S. A. L. R.	...	South African Law Reports	S. Af.
S. A. R.	...	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	...	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.)	Aus.
S. C.	...	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	...	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	...	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	...	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R.	...	Canada, Supreme Court Reports	Can.
S. L. T.	...	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	...	Queensland State Reports	Aus.
S. R.	...	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	...	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	...	New South Wales, State Reports	Aus.
S. R. Q.	...	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	...	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	...	South-West Africa Law Reports	S.-W. Af.
Saint	...	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
Salk.	...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	...	Saskatchewan Law Reports	Can.
Sau. & Sc.	...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	...	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	...	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M.	...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say.	...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur.	...	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	...	Scottish Law Reporter, 1865—1924	Scot.
Sc. R. R.	...	Scots Revised Reports	Scot.
Sch. & Lef.	...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	...	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	Eng.
Sea. & Sm.	...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P.	...	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.)	...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & Macl.	...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	...	Sheppard's Touchstone of Common Assurances	Eng.
Show.	...	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

Sim. ...	...	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. & St. ...	...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S. ...	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin. ...	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat. ...	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ...	Ir.
Sm. & G. ...	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B. ...	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C. ...	...	Smith's Leading Cases, 2 vols. ...	Eng.
Smith, Reg. Cas. ...	...	C. L. Smith's Registration Cases, 1895—(current) ...	Eng.
Smythe ...	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ...	Ir.
Sol. Jo. ...	...	Solicitors' Journal, 1856—(current) ...	Eng.
Spence ...	...	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ...	...	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ...	...	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.) ...	Aus.
Stair Rep. ...	...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ...	...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ...	Eng.
State Tr. ...	...	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S. ...	...	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart ...	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ...	...	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ...	...	Story's Commentaries on Equity Jurisprudence ...	Eng.
Stra. ...	...	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. ...	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ...	...	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ...	Can.
Stuart, K. B. ...	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ...	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ...	...	Swabey's Report, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr. ...	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ...	...	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ...	...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ...	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ...	Eng.
T. H. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ...	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	Eng.
T. L. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ...	...	The Times Law Reports, 1884—(current) ...	Eng.
T. P. ...	...	Reports of the Supreme Court of the Transvaal, 1910—(current) ...	S. Af.
T. P. D. ...	...	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ...	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ...	Eng.
T. S. ...	...	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ...	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Eng.
Tas. L. R. ...	...	Tasmanian Law Reports ...	Aus.
Taunt. ...	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ...	...	Tax Cases, 1875—(current) ...	Eng.
Tay. ...	...	Taylor's King's Bench Reports ...	Can.
Temp. Wood ...	...	Manitoba Reports <i>temp.</i> Wood ...	Can.
Term Rep. ...	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ...	...	Territories Law Reports ...	Can.
Thom. ...	...	Nova Scotia Reports (Thomson) ...	Can.
Toth. ...	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr. ...	...	Townsend, Modern State Trials ...	Eng.
Trem. P. C. ...	...	Tremaine Pleas of the Crown, 1 vol., 1667 ...	Eng.
Trist. ...	...	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
Tru. ...	...	New Brunswick Reports (Trueman) ...	Can.
Tudor, L. C. Merc. Law. ...	...	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop. ...	...	Tudor's Leading Cases on Real Property ...	Eng.
Turn. & R. ...	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ...	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ...	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	Eng.
U. C. Jur. ...	...	Upper Canada Jurist ...	Can.
U. C. L. J. N. S. ...	...	Canada Law Journal, New Series, 1865—(current) ...	Can.

U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	...	Can.
Udal	...	Fiji Law Reports (Udal)	...	Fiji.
V. L. R.	...	Victorian Law Reports	...	Aus.
V. R.	...	Victorian Reports	...	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	...	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	...	Aus.
V. R. (Law)	...	Victorian Reports (Law)	...	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1750	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A' B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) (e.g., [1866] W. N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A' B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1740—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1844	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.

Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841-1843	
Y. & C. Ex.	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols. 1833—1841	Eng.
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 vols , 1826—1830	Eng.
Y. B.	...	Year Books ...	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series) ...	Eng.
Y. B. (Sel. Soc.)...	...	Year Books (Selden Society)	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	Eng.
You.	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	Eng.



# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv.—xxxi., *ante*.)

A.-G.				for Attorney-General.
Act.				„ Actiengesellschaft.
Admlty.				„ Admiralty.
Affd.				„ Affirmed.
Affg.				„ Affirming.
Akt.				„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.				„ Anonymous.
Apld.				„ Applied.
Appet.				„ Applicant.
Appln.				„ Application.
Appln.				„ Application to Register a Trade Mark.
Appit.				„ Appellant.
Apprvd.	.			„ Approved.
Arbn.	.	.		„ Arbitration.
Archbp.	.			„ Archbishop.
Art.	.			„ Article.
Ass. Tax Case				„ Assessed Tax Case.
Assce.	.	.		„ Assurance.
Assocn.	.			„ Association.
B. C.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	„ Building Society.
Bp.	.	.	.	„ Bishop.
C. A.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	„ Chancery Division.
Co.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	„ Commissioners.
Consd.	.	.	.	„ Considered.
Corpn.	.	.	.	„ Corporation.
Ct.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	„ Court of Review.
D. C.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	„ Doubted.
	.	.	.	„ Defendant.

Distd. . . . .	for Distinguished.
Div. Ct. . . . .	„ Divisional Court.
Eccl. Comrs. . . . .	„ Ecclesiastical Commissioners.
Eccl. Ct. . . . .	„ Ecclesiastical Court.
Ex. Ch. . . . .	„ Exchequer Chamber.
<i>Ex p.</i> . . . . .	„ <i>Ex parte</i> .
Exch. . . . .	„ Exchequer.
Exor. . . . .	„ Executor.
Exorship. . . . .	„ Executorship.
Expld. . . . .	„ Explained.
Extd. . . . .	„ Extended.
Extrix. . . . .	„ Executrix.
<i>Fi. fa.</i> . . . . .	„ <i>Fieri facias</i> .
Folld. . . . .	„ Followed.
G. & S. W. Ry. Co. . . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . . . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co. . . . .	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland . . . . .	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . . .	„ Great Western Railway Co.
Govt. . . . .	„ Government.
Grdns. . . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
I. R. Comrs . . . . .	„ Inland Revenue Commissioners.
Insee. . . . .	„ Insurance.
JJ. . . . .	„ Justices.
Jud. Act . . . . .	„ Judicature Act.
K. B. Div. . . . .	„ King's Bench Division.
L. & B. Ry. Co. . . . .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. . . . .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co. . . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . . .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. . . . .	„ London, Chatham & Dover Railway Co.
L. C. C. . . . .	„ London County Council.
L. Elec. Ry. Co. . . . .	„ London Electric Railway Co.
L. G. Board . . . . .	„ Local Government Board.
L.J. . . . .	„ Lord Justice.
L.JJ. . . . .	„ Lords Justices.
L. M. & S. Ry. Co. . . . .	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. . . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. . . . .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	„ Magistrates.
Mentd. . . . .	„ Mentioned.
Met. Dist. Ry. Co. . . . .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . . .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . . .	„ Midland Railway Co.
Mtge. . . . .	„ Mortgage.
Mtgee. . . . .	„ Mortgagee.
Mtgor. . . . .	„ Mortgagor.
N. B. Ry. Co. . . . .	„ North British Railway Co.
N. E. Ry. Co. . . . .	„ North Eastern Railway Co.
N. F. . . . .	„ Not Followed.
N. P. . . . .	„ Nisi Prius.
Overd. . . . .	„ Order.
	„ Overruled.



# ABBREVIATIONS.

XXXV

P. C.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	„ <i>Quære</i> .
R. C.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	„ Revised Statutes of Canada.
R. S. O.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	„ Reversed.
Revsg.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	„ Workmen's Compensation Act.





## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.



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## Part I.—In General.

### 1.—INNS.

*See* Innkeepers' Liability Act, 1863 (c. 41), s. 4; Inland Revenue Act, 1880 (c. 43).

**1. What is an inn—Place for accommodation of all travellers & wayfarers.]—**(1) If the horse of a guest at an inn be stolen, the innkeeper is not liable if the horse were put to pasture at the guest's request; otherwise if the innkeeper had put the horse to grass of his own head.

(2) If the goods of a neighbour, who lodges at the inn as a friend at the request of the innkeeper, be stolen, the innkeeper is not liable. If a neighbour, who is no traveller, as a friend at the request of the innkeeper lodges there & his goods be stolen, etc., he shall not have an action.

(3) An innkeeper is bound to answer for himself & for his family, for the chambers & stables; for they are *infra hospitium*.

(4) It is no excuse for the innkeeper that he delivered the guest the key of the chamber in which he is lodged, & that he left the chamber door open.

(5) Although the guest does not deliver his goods to the innkeeper to keep, nor acquaints him with them; yet, if they be carried away or stolen, the innkeeper is liable.

(6) If the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged.

(7) The innkeeper requires his guest to put his goods in such a chamber under lock & key, & then he will warrant them, otherwise not; the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged.

(8) The innkeeper's liability extends to all movable goods, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, etc.

(9) If the guest be beaten in the inn, the innkeeper shall not answer for it.

(10) The words are *ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes et in eisdem hospitantes*, by which it appears that common inns are instituted for passengers & wayfaring men.—*CALYE'S CASE* (1584), 8 Co. Rep. 32 a; 77 E. R. 520; *sub nom.* *WINDHAM & MEADS CASE*, 4 Leon. 96.

*Annotations:—As to (1) Rejd. Lane v. Cotton* (1700), 1 Com. 100; *Jones v. Tyler* (1834), 1 Ad. & El. 522; *Allen v. Smith* (1862), 6 L. T. 459; *Mulliner v. Florence* (1878), 38 L. T. 167. *As to (2) Expd. Scarborough v. Cosgrove*, [1905] 2 K. B. 805. *As to (3) Rejd. Harland's Case* (1641), Clay. 97. *As to (4) Distd. Burgess v. Clements* (1815),

4 M. & S. 306. *Expd. Oppenheim v. White Lion Hotel Co.* (1871), L. R. 6 C. P. 515. *Consd. Herbert v. Markwell* (1881), 45 L. T. 649. *Rejd. Cashill v. Wright* (1856), 6 E. & B. 891. *As to (5) Follid. Bennett v. Mellor* (1888), 5 Term Rep. 27; 5 Q. B. 164. *As to (6) Apld. Burgess v. Clements* (1815), 4 M. & S. 306. *Consd. Splice v. Bacon* (1877), 36 L. T. 896. *As to (7) Apld. Holder v. Soulby* (1860), 18 C. B. N. S. 254. *Distd. Morgan v. Ravey* (1861), 6 H. & N. 265. *Consd. Oppenheim v. White Lion Hotel Co.* (1871), L. R. 6 C. P. 515. *As to (8) Apld. Kent v. Shuckard* (1831), 2 B. & Ad. 803. *Consd. Threfall v. Borwick* (1875), L. R. 10 Q. B. 210. *As to (9) Rejd. Maclean v. Segar*, [1917] 2 K. B. 325. *As to (10) Apld. R. v. Rymer* (1877), 2 Q. B. D. 136; *Lamond v. Richard* (1897), 66 L. J. Q. B. 315. *Rejd. Holder v. Soulby* (1860), 8 C. B. N. S. 254; *Strauss v. County Hotel Co.* (1883), 12 Q. B. D. 27; *Orchard v. Bush*, [1898] 2 Q. B. 284. *Generally, Mentd. Symons v. Darknoll* (1629), Palm. 523; *R. v. Westbear* (1740), Sess. Cas. K. B. 233; *Ryall v. Rowles* (1750), 1 Ves. Sen. 348; *R. v. Sadl & Morris* (1787), 1 Leach, 468; *R. v. Powell* (1852), 5 Cox, C. C. 396; *Bank of Ireland v. Evans' Trustees* (1855), 25 L. T. O. S. 272; *Nugent v. Smith* (1875), 1 C. P. D. 19.

2. ———.]—*R. v. RYMER*, No. 108, *post*.

3. ———.]—A house of public entertainment in London, where beds, provisions, etc., are furnished for all persons paying for the same, but which was merely called a tavern & coffee-house, & was not frequented by stage coaches & waggons from the country, & which had no stables belonging to it, is to be considered an inn, & the owner is subject to the liabilities of innkeepers, & has a lien on the goods of his guest for the payment of his bill, & that even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in London.

An inn is a house, the owner of which holds out that he will receive all travellers & sojourners who are willing & sojourners who are willing to pay a price adequate to the sort of accommodation provided & who come in a situation in which they are fit to be received (BEST, J.).

A lodging house keeper makes a contract with every man that comes whereas an innkeeper is bound without without any special contract to provide lodging & entertainment for all at a reasonable price (BEST, J.).—*THOMPSON v. LACY* (1820), 3 B. & Ald. 283; 106 E. R. 667.

—*Consd. Cunningham v. Philip* (1896), 12 T. L. R. 352. *Apld. Orchard v. Bush*, [1898] 2 Q. B. 284. *Bower v. Milcrest* (1922), 11 L. J. C. C. 50. *Rejd. Smith v. Scott* (1832), 2 Moo. & S. 35; *Sunbolt v. Alford* (1838), 3 M. & W. 248; *Lamond v. Richard* (1897), 76 L. T. 141.

4. ——— **Alehouse.**]—An inn not to use the trade of an alehouse, the same being for travellers.—*ANON.* (1611), 1 Bulst. 109; 80 E. R. 806.

5. ———.]—A house may be an inn for

### PART I. SECT. 1.

**11. What is an inn—Place for accommodation of all travellers & wayfarers.]—**A railway station hotel be-

longing to a railway co., which issued a general invitation to the travelling public to resort thereto, was subject to the obligations imposed by the law on "common inns," including the

obligation to provide accommodation for travellers resorting thereto.—*ROTHFIELD v. NORTH BRITISH Ry. Co.* (1920), 57 Sc. L. R. 661.—*SCOT.*

b. *What is part of inn—Dancing room.*—Where a building used as a dancing-room was built separate from a house licensed as a tavern but had communication therewith through a porch, & there was no other entrance to the dancing-room:—*Held*: it was a part of the house, & the proprietor was liable to a fine under a bye-law of the city of St. John for allowing music to be played therein.—*Ex p. HARLEY* (1862), 5 All. 264.—CAN.



*Sect. 1.—Inns. Sects. 2 & 3. Part II. Sect. 1:*

ANON., Godb. 345; Palm. 367; 2 Roll. Rep. 345.

*Annotations:—Mentd.* R. v. Harvey (1731), Sess. Cas. K. B. 122; R. v. Kingston (1806), 8 East, 41.

21. —.]—PARKER v. FLINT, No. 6, *ante*.

## SECT. 2.—INNKEEPERS.

*See Innkeepers Liability Act, 1863 (c. 41), s. 4.*

22. **Who is an innkeeper.**—An innkeeper cannot be a bkpt., for he is not like a trader; he must receive all comers & feed them & lodge them taking a reasonable rate; which if he do not, he is indictable (EYRE, J.).

An innkeeper cannot make a contract *ad libitum*; nor does he buy or sell at large but to guests only (HOLT, C.J.).

He [an innkeeper] is bound to provide for travellers (HOLT, C.J.).

They [innkeepers] may detain the person of the guest who eats, or the horse which eats, till payment (EYRE, J.).—NEWTON v. TRIGG (1691), 1 Salk. 109; 1 Show. 268; 3 Lev. 309; Comb. 181; Carth. 149; 3 Mod. Rep. 327; 91 E. R. 100; *sub nom.* LUTON v. BIGG, Skin. 291.

*Annotations:—Consd.* Saunderson v. Rowles (1767), 4 Burr. 2064; Sunbolf v. Alford (1838), 3 M. & W. 248. *Refd.* Meggot v. Mills (1697), 1 Ld. Raym. 286.

23. — **Hotel keeper.**—*Semble:* a hotel-keeper is subject to the same liabilities as an innkeeper, but he should be declared against as an innkeeper.—JONES v. OSBORN (1785), 2 Chit. 484.

24. — **Not manager of hotel.**—DIXON v. BIRCH, No. 222, *post*.

*As to what is an inn.*—*See* Sect. 1, *ante*.

## SECT. 3.—GUESTS AND TRAVELLERS.

25. **Definition — “Guests” — Distinguished from lodgers.**—PARKER v. FLINT, No. 6, *ante*.

26. —.]—ORCHARD v. BUSH & Co., No. 164, *post*.

27. — **“Travellers.”**—R. v. RYMER, No. 108, *post*.

28. —.]—LAMOND v. RICHARD, No. 58, *post*.

29. **Persons staying without innkeeper's permission.**—(1) If a man comes with a horse carrying a pack or other goods to an inn to lodge, & the innkeeper tells him the inn is full of guests & he cannot receive him, if the man leaves his horse & goods within the hostel & stays in a room by the permission of another person & not assigned to him

by the innkeeper or his servants, if his pack or goods is stolen the innkeeper is not chargeable.

(2) If the cause of refusal be false the guest may have his action on the case for his refusal.—WHITE'S CASE (1558), 2 Dyer, 158 b; 73 E. R. 343; *sub nom.* BIRD v. BIRD, 1 And. 29; Ben. 60; *sub nom.* BYRD v. BYRD, Benl. 18.

*Annotations:—As to (1) Refd.* Calye's Case (1584), 8 Co. Rep. 32 a. *As to (2) Refd.* Lane v. Cotton (1700), 1 Salk. 17; Johnson v. Mid. Ity. (1849), 4 Exch. 367.

30. —.]—For if an hostler refuse a guest, his house being full & yet the party say he will shift, etc., if robbed, the hostler is discharged (JONES, J.).—LOVETT v. HOBBS (1680), 2 Show. 127; 89 E. R. 836.

31. **Neighbour lodging with innkeeper — At innkeeper's request.**—CALYE'S CASE, No. 1, *ante*.

32. **Boarder.**—DROPE v. THAIRE (1626), Benl. 173; 2 Dyer, 158 b, n.; Lat. 126; Noy, 79; Poph. 178; 79 E. R. 1274.

*Annotations:—Refd.* York v. Girdstone (1704), 1 Salk. 388; Strauss v. County Hotel Co. (1883), 32 W. R. 170.

33. —.]—The liability of an innkeeper for goods stolen is only to travellers. If a person board or sojourn for a certain time in an inn & his goods are stolen the action is not maintainable.—v. INNKEEPER (1627), Het. 49; 124 E. R. 334.

34. **Whether relationship established — Leaving horse in inn.**—YORKE v. GRENAUGH, No. 264, *post*.

35. — **Leaving luggage in hotel.**—Pltf. arrived at Carlisle with the intention of spending the night at defts.' hotel, which adjoined the railway station. He delivered his luggage to one of the porters of the hotel, but, after reading a telegram which was waiting for him, decided not to spend the night at Carlisle, & went into the coffee-room to order some refreshments. He was not able to obtain in the coffee-room exactly what he required, & went into the station refreshment-room, which was under the same management as the hotel, & connected with it by a covered passage. Shortly afterwards he went out, telling the porter to lock up his luggage, & it was locked up in a room near the refreshment-room. On his return he found that part of it was missing:—*Held:* at the time of the loss of pltf.'s goods there was no evidence of the relation of landlord & guest between him & defts. so as to make them responsible.—STRAUSS v. COUNTY HOTEL CO. (1883), 12 Q. B. D. 27; 53 L. J. Q. B. 25; 49 L. T. 601; 48 J. P. 69; 32 W. R. 170, D. C.

*Annotations:—Distd.* Orchard v. Bush (1898), 67 L. J. Q. B. 650. *Consd.* Grant v. Cardiff Hotels Co. (1921), 37 T. L. R. 775. *Mentd.* Newwith v. Over Darwen Industrial Co-op. Soc. (1894), 63 L. J. Q. B. 290.

## PART I. SECT. 2.

22 i. **Who is an innkeeper.**—If the owner or occupier holds out that he will receive travellers in his house & will provide them with everything they require on their journey he is an innkeeper & his house is an inn.—MILLER v. FEDERAL COFFEE PALACE (1889), 15 V. L. R. 30.—AUS.

22 ii. —.]—A man may be an innkeeper, though he take out a license in the name of another.—MCKAY v. BROWN (1859), 5 U. C. L. J. O. S. 91.—CAN.

c. — **Question of fact.**—In replevin deft. pleaded that she kept a public boarding & lodging-house, with rooms, etc., for the reception, public entertainment, boarding & lodging of all guests, boarders, etc., who might come to her house, willing

to pay an adequate price; that pltf. was accepted as a guest & boarder in the house for certain reasonable reward, & as such guest brought goods & chattels to deft.'s house, & that she kept & detained them for an account due to her for lodging & entertainment provided for pltf.:—*Held:* the replication did not admit that deft. was an innkeeper. On the issue raised, it was properly left to the jury to find whether deft. was an innkeeper or a lodging-house keeper, & whether pltf. was received at her house as a traveller, or transient boarder, or as a boarder under a special agreement.—LIGHT v. (1866), 6 All. 400.—CAN.

## PART I. SECT. 3.

35 i. **Whether relationship est.**—*Leaving luggage in hotel.*—Pltf.

arrived in Toronto from Ireland, & drove from the railroad station to deft.'s hotel, having a portmanteau, carpet bag, etc., with him. He asked for a room, saying he wanted only to change his dress before going to a friend, had his things taken to it, & after occupying it for an hour went to his friend, with whom he remained. He was furnished with a key for the door but did not use it. Next morning he returned to get his things, but the portmanteau could not be found. Pltf. said he intended to return that night, but he said nothing of his intention to deft.:—*Held:* pltf. was not there as a guest after he had dressed & left the inn; & deft. therefore was not liable as an innkeeper, the portmanteau having been lost after pltf. left.—LYNAR v. MOSSOR (1875), 36 U. C. R. 230.—CAN.

36. — Continuation for indefinite time.]—MEDAWAR v. GRAND HOTEL CO., No. 201, *post*.

37. — Agreement between innkeeper & third person as to payment.]—(1) Where a traveller is provided with accommodation & refreshment in an inn, the fact that the expenses thereof are by agreement between the innkeeper & another person to be paid for by that person does not prevent the relation of innkeeper & guest from arising, & the innkeeper therefore incurs the customary liability for the safe custody of the traveller's goods in the inn.

(2) The responsibility of an innkeeper for the safety of the traveller's property begins the moment the relationship of innkeeper & guest arises & that relationship begins the moment a traveller enters the inn with the intention of using it as an inn & is received on that basis by the innkeeper. The goods of the traveller then become liable to a lien, although the lien does not attach until a debt has been incurred & the fact that some person other than the traveller is to pay for the accommodation does not affect the innkeeper's liability for & lien upon the traveller's goods.—WRIGHT v. ANDERTON, [1909] 1 K. B. 209; 78 J. K. B. 165; 100 L. T. 123; 25 T. L. R. 156; 53 Sol. Jo. 135, D. C.

Annotations:—As to (2) *Consd.* Grant v. Cardiff Hotels Co., [1921] 37 T. L. R. 775. *Apld.* Cryan v. Hotel Rembrandt (1925), 133 L. T. 395.

38. — Special agreement as to payment.]—CHESHAM AUTOMOBILE SUPPLY, LTD. v. BERESFORD HOTEL (BIRCHINGTON), LTD., No. 280, *post*.

39. — Acceptance of guest by innkeeper.]—GRANT v. CARDIFF HOTELS CO., LTD. (1921), 37 T. L. R. 775, D. C.

40. — Guests only dining at hotel.]—On Nov. 11, 1923, pltf. received an invitation for herself & her daughter to dine with two friends, Mr. & Mrs. S.-C., who were then residing at the Hotel R., a residential hotel, the property of defts. On arriving at the hotel they were told by the hotel porter that their friends were in the lounge, & on their asking for the cloak-room the porter directed them to a room on the first floor—room No. 11. Pltf. & her daughter accordingly went to room No. 11 to leave their cloaks there. This room was a bedroom, having a door leading into it from the corridor & another door leading into an adjoining bedroom, No. 10. There was no attendant in charge of No. 11. Having hung their cloaks on the pegs in No. 11, pltf. & her daughter went into the lounge & afterwards dined with their friends. After dinner pltf. asked her daughter

to fetch her glasses from the cloak-room, & apparently pltf.'s cloak was then safe. About 10.30 the daughter went for the cloaks, found her own, but pltf.'s cloak was missing. So that between 9.30 & 10.30 some one had gone into No. 11 & removed pltf.'s cloak. Pltf. thereupon claimed to recover from defts. £150 as damages for the loss of her cloak:—*Held*: (1) by pltf. going to defts.' hotel in the circumstances stated, the relationship of innkeeper & guest was established between defts. & pltf.; (2) defts. were not entitled because there was negligence on their part, not only within the statute, but also at common law; (3) there was in this case, a deposit by pltf. of her cloak for safe custody & consequently the limitation of £30 under Innkeepers' Liability Act, 1863 (c. 4), s. 1, did not apply; (4) pltf. was not bound by the notices affixed in the hotel as there was no evidence that any of the notices were affixed in a place where she, not being a guest residing at the hotel, could see them, or of anything done to call her attention to them. Therefore, defts. had failed to show any special contract between themselves & pltf. whereby they were relieved from their liability to pltf. Pltf. was entitled to recover £80 in respect of the loss of her coat.—CRYAN v. HOTEL REMBRANDT, LTD. (1925), 133 L. T. 395; 41 T. L. R. 287.

41. Continuance of relationship—During temporary absence.]—If a guest leave his goods with an innkeeper, saying that he will return in three days, & before his return his goods are stolen, he cannot maintain an action on the custom of the realm; for at the time the goods were stolen he was not a guest; & therefore as the innkeeper could not gain a profit, he shall not be liable to suffer loss without a special undertaking.—GELLEY v. CLERK (1607), Cro. Jac. 188; Noy, 126; 4 Bac. Abr. 448; 79 E. R. 164.

Annotations:—*Refd.* Watbroke v. Griffith (1609), Moore, K. B. 877; Lane v. Cotton (1701), 1 Ld. Raym. 646; York v. Grindstone (1704), 1 Salk. 388; Strauss v. County Hotel & Wine Co. (1883), 49 L. T. 601. *Mentd.* Boson v. Sandford (1691), 1 Show. 101.

42. Duration of stay to established relationship.]—HARLAND'S CASE (1641), Clay. 97.

43. Whether relationship determined—Question of fact.]—LAMOND v. RICHARD, No. 58, *post*.

44. — — — — —]—PORTMAN v. GRIFFIN (1913), 29 T. L. R. 225, D. C.

Liability of innkeeper to receive & entertain.]—See Part II., Sect. 1, sub-sect. 2, *post*.

Personal safety of guest.]—See Part II., Sect. 2 *post*.

Property of guest.]—See Part II., Sect. 3, *post*.

## Part II.—Duties and Liabilities of Innkeepers.

### SECT. 1.—DUTIES TO RECEIVE AND ENTERTAIN.

#### SUB-SECT. 1.—GUESTS AND TRAVELLERS.

What is an inn.]—See Part I., Sect. 1, *ante*.

Who are guests.]—See Part I., Sect. 3, *ante*.

36 i. — Continuation for indefinite time.]—MACDONELL v. WOODS (1914), 32 O. L. R. 283; 20 D. L. R. 366; 7 O. W. N. 342.—CAN.

d. Determination of relationship—Renting apartments.]—N., a trainer of horses, went to deft., an hotel keeper, & made an arrangement by which deft. was to provide board & lodging to N. & his stable boys, & stabling for his horses at a lump sum of so much

per week. Deft. had nothing to do with the horses beyond providing their stables, N. finding their food & having the keys of their boxes:—*Held*: the relationship between N. & deft. was that of landlord & lodger & not that of an innkeeper & guest.—ALLDIS v. HUXLEY (1891), 12 N. S. W. L. R. 158; 8 N. S. W. W. N. 23.—AUS.

e. — — — — —]—To put an end to the relation of innkeeper & guest,

Refusal by innkeeper to

J. 5, A., *post*.

Innkeeper to supply

Sect. 1, sub-sect. 5, B., *post*.

45. Common law liability to lodge & entertain all persons.]—R. v. COLLINS (1623), Palm. 373; 81

the traveller must be shown to have rented a certain apartment in the inn as tenant for a certain term.—WHITING v. MILLS (1850), 7 U. C. R. 450.—CAN.

#### PART II. SECT. 1, SUB-SECT. 1.

45 i. Common law liability to lodge & entertain all persons.]—The proprietors of an hotel in which the business of a large city hotel of the highest class is carried on in all its branches, are



**Sect. 1.—Duties to receive and entertain: Sub-sects. 1, 2 &**

E. R. 1130; *sub nom.* ANON., Godb. 345; Palm. 367; 2 Roll. Rep. 345.

**Annotations:—Mentd.** R. v. Harvey (1731), Scss. Cas. K. B. 122; R. v. Kingston (1806), 8 East, 41.

46. —.] — NEWTON v. TRIGG, No. 22, *ante*.

47. —.] — PARKER v. FLINT, No. 6, *ante*.

48. —.] — (1) If goods be left with an innkeeper by one who is no guest or traveller & they are lost, he shall not answer for them, because he has no benefit for the keeping & it is not his employment to keep such; but if a horse be left in his stable & he is lost he shall answer for it because he receives profit thereby arising from the meal consumed by the horse (HOLT, C.J.).

(2) If a man bring a horse to an inn & desire the master to put him into a stable till it cools & then send him to grass; if the horse be stolen before he sends him to grass he shall answer for him; though if he had not sent him to grass pursuant to the owner's desire he would not be answerable (HOLT, C.J.).

(3) For he [the innkeeper] is bound to receive all manner of people into his house till it be full. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him (HOLT, C.J.).—LANE v. COTTON (1702), 12 Mod. Rep. 472; 11 Mod. Rep. 12; 1 Com. 100; 1 Ld. Raym. 646; Carth. 487; Holt, K. B. 582; 1 Salk. 17; 88 E. R. 1458.

**Annotations:—As to (1) Reidd.** Muspratt v. Gregory (1836), 1 M. & W. 633. **As to (3) Reidd.** Johnson v. Mid. Ry. (1849), 4 Exch. 367. **Generally, Mentd.** Jones v. Hart (1697), 2 Salk. 441; R. v. Cotton (1751), Park. 112; Perkins, etc., Assignees of Hughes v. Smith (1752), Say 40; Whitfield v. Le Despencer (1778), 2 Cowp. 751; Nicholson v. Mouncey (1812), 15 East, 384; Laugher v. Pointer (1826), 5 B. & C. 547; Duncan v. Findlater (1839), 6 Cl. & Fin. 894; Woods v. Finnis (1852), 16 Jur. 936; Hearn v. L. & S. W. Ry. (1855), 24 L. J. Ex. 180; R. Gibbs (1855), Dears. C. C. 415; R. v. Kay (1857), 1 L. J. M. C. 119; Bennett v. Bayes (1860), 5 H. & N. 1; Mersey Docks Trustees v. Gibbs (1866), 11 H. L. Cas. 687; R. v. Treasury Lords Comrs. (1872), 41 L. J. Q. B. 178; Bainbridge v. Postmaster General, [1906] 1 K. B. 178; Clarke v. West Ham Corp., [1909] 2 K. B. 858; Bamfield v. Goole & Sheffield Transport Co., [1910] 2 K. B. 91; G. N. Ry. v. L. E. P. Transport & Depository, [1922] 2 K. B. 742.

49. —.] — YORKE v. GRENAUGH (1703), 2 Ld. Raym. 866; 92 E. R. 79; *sub nom.* YORK v. GRINDSTONE, 1 Salk. 388.

**Annotations:—Expld.** Smith v. Dearlove (1848), 6 C. B. 132. **Reidd.** Judson v. Etheridge (1833), 1 Cr. & M. 743; Turrill v. Crawley (1849), 13 Jur. 878. **Mentd.** Bevan v. Waters (1828), 3 C. & P. 520; Cassils v. Holden Wood Bleaching Co. (1914), 81 L. J. K. B. 834.

50. —.] — The case of the innkeeper does not bear any resemblance . . . for as they cannot refuse to receive guests, so neither can they impose unreasonable terms on them (LORD KENYON, C.J.).

They [innkeepers] are bound by law to receive guests who come to their inns & are also bound to protect the property of those guests (LORD KENYON, C.J.).—KIRKMAN v. SHAWCROSS (1794), 6 Term Rep. 14; 101 E. R. 410.

—**Mentd.** Oppenheim v. Russell (1802), 3 Bos.

51. —.] — R. v. IVENS, No. 76,

52. —.] — A person who keeps a public inn is bound to admit all persons who apply peaceably to be admitted as guests.

A declaration against an innkeeper stated, that

"innkeepers" & subject as such, to the obligation imposed on innkeepers by the law of Scotland to receive without favour all travellers for whom accommodation is available, subject, however, to the discretionary right to

any appet. who is believed to be undesirable & in view of the nature of the ment & the class of guests by whom it frequented.—ROTHFIELD v. BRITISH RY. Co., [1920] S. C. 805;

deft. kept an inn, & that pltf. at night, was travelling, & the inn being shut up, pltf. knocked at the door, in order that he should be admitted as a guest, & that, although deft. heard the knocking, & had notice of the premises, she would not admit pltf. into the inn. Deft. pleaded that she did not hear the knocking & had no notice of the premises:—**Held:** on this issue, it was for the jury to say, whether deft. heard the knocking, & if so, whether deft. ought to have concluded from it that the person so knocking at the door was a person requiring to be admitted as a guest.—HAWTHORNE v. HAMMOND (1844), 1 Car. & Kir. 404, N. P.

53. —.] — BROADWOOD v. GRANARA, No. 230, *post*.

54. —.] — DANSEY v. RICHARDSON, No. 17, *ante*.

55. —.] — GORDON v. SILBER, No. 259, *post*.

56. —.] — SEALEY v. TANDY, No. 11, *ante*.

57. —.] — BROWNE v. BRANDT, No. 75, *post*.

58. —.] — **Attaches only as long as guest a traveller.**—The common law liability of an innkeeper to receive & lodge a guest attaches only so long as the guest is a traveller, & a person who has been received at an inn as a traveller does not necessarily continue to reside there in that character. Whether at any given time during his residence he is still a traveller is a question of fact, & one of the ingredients for determining this fact is the length of time that has elapsed since his arrival. If the guest has lost the character of traveller the innkeeper is not bound to supply him with lodging, but is entitled, on giving reasonable notice, to require him to leave.—LAMOND v. RICHARD, [1897] 1 Q. B. 541; 66 L. J. Q. B. 315; 76 L. T. 141; 61 J. P. 260; 45 W. R. 289; 13 T. L. R. 235; 41 Sol. Jo. 292, C. A.

**Annotations:—Distd.** Chesham Automobile Supply v. Beresford Hotel (Birmingham) (1913), 29 T. L. R. 584. **Reidd.** Sealey v. Tandy (1901), 85 L. T. 459.

59. **Liability to provide particular class of room.**—BURGESS v. CLEMENTS, No. 176, *post*.

60. —.] — Although a traveller is entitled to reasonable accommodation in an inn, he is not entitled to select a particular apartment, or to insist on occupying a bedroom for the purpose of sitting up all night, so long as the innkeeper is willing & offers to furnish him with a proper room for that purpose.

**Semble:** in order to support an indictment, or sustain an action against an innkeeper, refusing to receive a guest, or for turning him out of doors, the declaration should aver that a sum was made of a reasonable sum to defray the expense of his entertainment, or show such special circumstances as rendered a tender impossible.—FELL v. KNIGHT (1841), 8 M. & W. 269; 10 L. J. Ex. 277; 5 Jur. 554; 151 E. R. 1039.

61. —.] — SCRIVENOR v. REED, No. 83, *post*.

62. **Statutory obligation to receive soldiers.**—There is a statutory obligation under Army Act, 1881 (c. 58), s. 103, on the constable in charge at any place mentioned in the route issued to the commanding officer of any portion of Her Majesty's regular forces to give billets for all the officers, soldiers, & horses mentioned in the route, & for whom quarters are required; & the billet list made out under sect. 107 by the police authority of any such place is not conclusive as to the number of

Sc. L. R. 661.—SCOT.

1. **Liability to provide & to inform customers as to their position of the lavatories, which he is**

officers, soldiers, or horses for whom the keeper of a victualling house shown in the list may be required to find accommodation on an emergency. Such list merely determines the proportion in which the billets are to be distributed among the keepers of victualling houses, & does not relieve them from their liability to take in, or otherwise find accommodation for, according to the proportion shown in the list, any number for whom quarters are required.—*SHARRATT v. SCOTNEY*, [1892] 2 Q. B. 479; 67 L. T. 472; 56 J. P. 680; 40 W. R. 645; 8 T. L. R. 560; 36 Sol. Jo. 504, D. C.

**63. Servant.]**—*BENNETT v. MELLOR*, No. 102, *post*.

#### SUB-SECT. 2.—ANIMALS AND PROPERTY.

**64. To receive horses.]**—This is a common inn, & debt., a common innkeeper, & this his retainer here, is grounded upon the general custom of the land; he is to receive all guests & horses that come to his inn; he is bound, as he is an innkeeper to receive them, & therefore there is very great reason for him to retain him, until he be satisfied for his meat which he has eaten, & that the true owner of the horse cannot have him away, until he have satisfied the innkeeper for his meat.

*Communia hospitium*, are compellable to receive guests & their horses; & so he is to answer for them, which are brought thither; the custom of London is good & reasonable, how long to stay, not till he eats out more than his head; the innholder may sell him presently, & this is justifiable. Here in this case, the innkeeper said to plff.: "Prove the horse to be yours, pay for his meat, & you shall have him"; this is no denial, nor yet any conversion, he claims no property at all; he only detains the horse, till he be satisfied for his meat, & so he may well do by the law; he may keep him till he be paid for his meat, because he is compellable at the first to receive him (*MOUNTAGUE, C.J.*).—*ROBINSON v. WALTER* (1617), 3 Bulst. 269; Poph. 127; 1 Roll. Rep. 449; 81 E. R. 227.

*Annotations*:—*Folld. Yorke v. Grenaugh* (1703), 2 Ld. Raym. 866. *Consd. Turrill v. Crawley* (1849), 13 Q. B. 197; *Robins v. Gray*, [1895] 2 Q. B. 501. *Refd. Threfall v. Borwick* (1872), 26 L. T. 794.

**65. —.]**—*SAUNDERS v. PLUMMER*, No. 194, *post*.

**66. —.]**—*Qu.*: whether alehouse keepers be bound to receive horses as well as soldiers quartered on them.—*R. v. DIMPSEY* (1787), 2 Term Rep. 96; 100 E. R. 52.

*Annotation*:—*Mentd. R. v. Seale* (1807), 8 East, 568.

**67. —.]**—The claim of an innkeeper to lien rests on a foundation peculiar to itself, viz. because he is bound to receive the guest & his horse (*PARKE, B.*).—*SCARFE v. MORGAN* (1838), 4 M. & W. 270; 1 Horn & H. 202; 7 L. J. Ex. 324; 2 Jur. 569; 150 E. R. 1430.

*Annotations*:—*Mentd. Jackson v. Cummins* (1830), 5 M. & W. 342; *Dirks v. Richards* (1842), 6 Jur. 562; *Beaumont v. Brengel* (1847), 5 C. B. 301; *Skinner v. Lambert* (1850), 10 L. T. O. S. 244; *Short v. Mercer* (1851), 20 J. Ch. 289; *Kerford v. Mondel* (1859), 28 L. J. Ex. 103; *Weeks v. Goode* (1859), 6 C. B. N. S. 367; *Rumsey v. N. E. Ry.* (1863), 14 C. B. N. S. 641; *Taylor v. Chester* (1869), L. R. 4 Q. B. 309; *Hatton v. Car Maintenance Co.* (1914), 110 L. T. 765.

(1904), 1 C. L. R. 146.—**AUS**

has the  
for

change it & assign him another. He cannot be treated as a trespasser for the

*v. WALKER* (1867), 26 U. C. R. 502.—**CAN.**

**PART II. SECT. 1, SUB-SECT. 3.—A.**  
(a).

**72 i. General rule.]**—The proprietors of an hotel have a discretionary right to reject any appet. who is believed to be undesirable &

**68. — & carriage—Carriage to be cared for & cleaned.]**—An innkeeper has a lien on the carriage of a guest, for his charges in respect of the housing & care of the carriage, even though the carriage is not the property of the guest, but only hired by him for a limited period.

There is no distinction, as to the innkeeper's exercise of his right of lien, between the goods of a guest & the goods of a third person in the apparent possession of a guest. A carriage now is in the situation in which a horse was in former times. A horse was, & a carriage is, the common means of travelling. When a person comes to debt.'s hotel with a carriage, she is not in a different position from a traveller in former times coming with a horse. A carriage is taken in, & if taken in, it must be taken care of. The innkeeper must keep it in safety; & more than that, he must take care of it, & clean it, & keep it fit for the use of the guest; & for doing these things there is a distinct charge made in the bill. If the innkeeper would be justified in detaining the horse for its keep & for the care bestowed upon it, he may detain it for the housing & the care of the carriage (*COLERIDGE, J.*).

*Qu.*: whether he has a lien on it for the board & lodging, etc., of the guest.—*TURRILL v. CRAWLEY* (1849), 13 Q. B. 197; 18 L. J. Q. B. 155; 12 L. T. O. S. 398; 13 Jur. 878; 116 E. R. 1238; *sub nom. TURNILL v. CRAWLEY*, 13 J. P. 747.

*Annotation*:—*Consd. Threfall v. Borwick* (1872), L. R. 7 Q. B. 711.

**69. — & harness—May demand expenses beforehand.]**—*MULLINER v. FLORENCE*, No. 246, *post*.

**70. To receive luggage—If room available.]**—*THREFALL v. BORWICK*, No. 258, *post*.

**71. — Luggage of another — Unless unreasonable.]**—*ROBINS & CO. v. GRAY*, No. 240, *post*.

#### SUB-SECT. 3.—REFUSAL TO PERFORM DUTY.

##### A. Grounds for Refusal.

###### (a) To Receive Guests.

**72. General rule.]**—*RANCE v. HASTINGS CORPN.* (1913), 136 L. T. Jo. 117.

**73. "Reasonable grounds"—House full.]**—*LANE v. COTTON*, No. 48, *ante*.

**74. —.]**—*MEDAWAR v. GRAND HOTEL CO.*, No. 201, *post*.

**75. —.]**—An innkeeper, the bedrooms in whose inn are occupied, is not bound to receive a guest who desires to sleep the night at the inn.

The true view of the common law rule was that if an inn was not full the landlord was bound to admit travellers . . . he could not pick & choose (*LORD ALVERSTONE, C.J.*).—*BROWNE v. BRANDT*, [1902] 1 K. B. 696; 71 L. J. K. B. 367; 86 L. T. 625; 50 W. R. 654; 18 T. L. R. 399; 46 Sol. Jo. 339, D. C.

**76. — Drunkenness or indecency.]**—An indictment lies against an innkeeper, who refuses to receive a guest, he having room in his house at the time; & it is not necessary for the guest to tender the price of his entertainment, if his rejection is not on that ground, & it is no defence for the innkeeper, that the guest was travelling

in view of the nature of the establishment & the class of guests by whom it is frequented.—*ROTHFIELD v. NORTH BRITISH RY. CO.*, [1920] S. C. 805; 57 Sc. L. R. 661.—**SCOT.**

**b. "Reasonable grounds"**  
*ance to other guests—Conduct of notorious money-lender.]*—*Held*: the proprietors of an hotel were justified in rejecting a

**Sect. 1.—Duties to receive and entertain: Sub-sect. 3, A. (a) & (b), B. (a) & (b); sub-sect. 4. Sect. 2: Sub-sect. 1.]**

on a Sunday, & at an hour of the night after the innkeeper's family had gone to bed; nor is it any defence that the guest refused to tell his name & abode, as the innkeeper had no right to insist upon knowing those particulars; but if the guest come to the inn drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him.—*R. v. IVENS* (1835), 7 C. & P. 213. *Annotation*:—*Consd. Fell v. Knight* (1841), 8 M. & W. 269.

**77. — Travelling on Sunday.]—R. v. IVENS, No. 76, ante.**

**78. — Late hour.]—R. v. IVENS, No. 76, ante.**

**79. — Refusal by guest of name & abode.]—R. v. IVENS, No. 76, ante.**

**80. — Causing disturbance.]—**The landlord of an inn or a public-house, or the occupier of a private house, whenever a person conducts himself, [so as to cause a disturbance & likely to cause a breach of the peace] is justified in telling him to leave the house, & if he will not do so, he is justified in putting him out by force, & may call in his servants to assist him in so doing. He might also authorise a policeman to do it, but it would be no part of a policeman's duty as such, unless the party had committed some offence punishable by law (*PATTESON, J.*).—*WHEELER v. WHITING* (1840), 9 C. & P. 262, N. P.

**81. — —.]—WEBSTER v. WATTS** (1847), 11 Q. B. 311; 17 L. J. Q. B. 73; 10 L. T. O. S. 226; 12 J. P. 279; 12 Jur. 243; 116 E. R. 492.

**82. — Misconduct or impropriety.]—PIDGEON v. LEGG, No. 5, ante.**

**83. — —.]—**(1) A landlord of an inn may, after a request to withdraw, remove a guest from a particular room in an inn, where he has misconducted himself, but he may not remove him from the house.

(2) A guest has no right to select his own accommodation, but it is the duty of the landlord to find such accommodation for the guest as he may choose.—*SCRIVENOR v. REED* (1858), 6 W. R. 603.

**84. — Annoyance to other guests—Dogs.]—R. v. RYMER, No. 108, post.**

**85. — Guest losing character of traveller.]—LAMOND v. RICHARD, No. 58, ante.**

**86. — Danger to inn.]—RANCE v. HASTINGS CORPN. (1913), 136 L. T. Jo. 117.**

#### (b) To Supply Needs.

**87. No payment for goods offered — Corn for horse.]—ANON. (1460), Y. B. 39 Hen. 6, fo. 18, pl. 24.**

*Annotation*:—*Consd. Pinchon's Case* (1611), 9 Co. Rep. 86 b.

**88. — Victuals.]—A.-G. v. CAPEL** (1494), Y. B. 10 Hen. 7, fo. 7, pl. 14.

**89. — —.]—PINCHON'S CASE** (1611), 9 Co. Rep. 86 b; 77 E. R. 859.

*Annotations*:—*Mentd. Marshalsea Case* (1613), 10 Co. Rep. 68 b; *Papworth v. Johnson* (1613), 2 Bulst. 91; *Manby*

Jewish money-lender, whose business transactions had been the subject of adverse criticisms in the public press & whose conduct on previous visits & purpose in frequenting the hotel had occasioned comment & complaint on the part of the other guests.—*ROTHFIELD v. NORTH BRITISH RY. CO.*, [1920] S. C. 805; 57 Sc. L. R. 661.—*SCOT.*

#### PART II. SECT. 1, SUB-SECT. 3.—A. (b).

**k. Refusal to pay—On reasonable demand.]—**A guest who has been received loses the right to be entertained

if he neglect or refuse to pay upon reasonable demand.—*DOYLE v. WALKER* (1867), 26 U. C. R. 502.—*CAN.*

**1. Sunday observance—Hotel not within U. S. U. C., c. 104.]**

Hotel keepers are not within above Act so long as they confine their business to legitimate business of an innkeeper, & they may supply their guests with all that they are entitled to demand as "food & refreshment," even though it involves a sale of goods, but this does not authorise them to sell their merchandise to one who is not a guest.—*R. v. WELLS, R. v. ALDEED, R. v. WALDOCK, R. v. ROE*

*v. SCOT* (1863), 1 Keb. 361; *London (City) v. Wood* (1701), 12 Mod. Rep. 689; *Raymond v. Fitch* (1835), 2 Cr. M. & R. 588; *Phillips v. Homfray* (1883), 24 Ch. D. 439; *Batthyany v. Walford* (1887), 56 L. J. Ch. 881; *Finlay v. Chinney* (1888), 20 Q. B. D. 494.

**90. Needs not within common law liability—Post-horses.]—**An innkeeper, though licensed to let post-horses, is not liable to an action for refusing to supply them for a guest.—*DICAS v. HIDES* (1816), 1 Stark. 247; *Holt, N. P.* 207, N. P.

#### B. Remedies for Refusal.

##### (a) Action.

**91. For wrongful refusal to receive guest.]—ANON. (1460), Y. B. 39 Hen. 6, fo. 18, pl. 24.**

*Annotation*:—*Mentd. Pinchon's Case* (1611), 9 Co. Rep. 86 b.

**92. —.]—R. v. CHESTER (Bp.) (1500), Y. B. 14 Hen. 7, fo. 21, pl. 4.**

*Annotations*:—*Mentd. Albany & St. Asaphs' (Bp.) Case* (1585), 1 Leon. 31; *Sadlers Co.'s Case* (1588), 4 Co. Rep. 54 b; *Corbet's Case* (1600), 4 Co. Rep. 81 b; *Shrewsbury's Case* (1610), 9 Co. Rep. 46 b; *Reynel's Case* (1612), 9 Co. Rep. 95 a; *Ayray's Case* (1614), 11 Co. Rep. 18 b; *Comendam's Case, Woodley v. Exeter (Bp.) & Mannering* (1624), Win. 94.

**93. —.]—WHITE'S CASE, No. 29, ante.**

**94. —.]—R. v. COLLINS** (1623), Palm. 373; 81 E. R. 1130; *sub nom. ANON.*, Godb. 345; Palm. 367; 2 Roll. Rep. 345.

*Annotations*:—*Mentd. R. v. Harvey* (1731), Sess. Cas. K. B. 122; *R. v. Kingston* (1806), 8 East, 41.

**95. —.]—JACKSON v. ROGERS** (1683), 2 Show. 327; 89 E. R. 968.

*Annotations*:—*Mentd. Batson v. Donovan* (1820), 4 B. & Ald. 21; *Johnson v. Mid. Ry.* (1849), 4 Exch. 367; *M'Manus v. L. & Y. Ry.* (1859), 4 H. & N. 327.

**96. —.]—PARKER v. FLINT, No. 6,**

**97. —.]—LANE v. COTTON, No. 48, ante.**

**98. —.]—BENNETT v. MELLOR, No. 162, post.**

**99. —.]—FELL v. KNIGHT, No. 60, ante.**

**100. —.]—**In the case of an innkeeper there no question that the action [for refusing to entertain a guest] will lie (*PARKE, B.*).—*JOHNSON v. MIDLAND RY. CO.* (1849), 4 Exch. 367; 6 Ry. Can. Cas. 61; 18 L. J. Ex. 366; 154 E. R. 1254.

*Annotations*:—*Mentd. Carr v. L. & Y. Ry.* (1852), 7 Exch. 707; *Hearn v. L. & S. W. Ry.* (1855), 10 Exch. 793; *R. v. Gibbs* (1855), 6 Cox, C. C. 455; *Phillips v. Edwards* (1858), 3 H. & N. 813; *M'Manus v. L. & Y. Ry.* (1859), 4 H. & N. 327; *Harrison v. L. B. & S. C. Ry.* (1862), 2 B. & S. 152; *Hales v. L. & N. W. Ry.* (1863), 4 B. & S. 68; *Re Oxlade & N. E. Ry.* (1864), 15 C. B. N. S. 680; *Alton v. Mid. Ry.* (1865), 19 C. B. N. S. 213; *West v. L. & N. W. Ry.* (1870), L. R. 5 C. P. 622; *Dickson v. G. N. Ry.* (1886), 18 Q. B. D. 176; *Clarke v. West Ham Corpn.*, [1909] 2 K. B. 858; *Bamfield v. Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94; *G. N. Ry. v. L. E. P. Transport & Depository*, [1922] 2 K. B. 742.

**101. For refusal to feed horse.]—ANON. (1502), Keil. 50; 72 E. R. 208.**

*Annotation*:—*Reid. Clarke v. West Ham Corpn.* (1909), 101 L. T. 481.

**102. For wrongful refusal to receive horse.]—SAUNDERS v. PLUMMER, No. 194, post.**

**103. Plaintiff must show reasonable tender — Or tender impossible.]—FELL v. KNIGHT, No. 60, ante.**

**104. Whether defendant must show that inn**

(1911), 19 O. W. R. 452; 2 O. W. N. 1232; 24 O. L. R. 77.—*CAN.*

#### PART II. SECT. 1, SUB-SECT. 3.—B. (a).

**91 l. For wrongful refusal to receive guest.]—**Where a traveller is shown to have come to an inn as a guest, & to have stayed there six weeks, paying for his board by the week, two days in advance:—*Held*: If dismissed abruptly without cause, he has a right of action against the landlord on the common law relation of innkeeper & guest.—*WHITING v. MILLS* (1850), 7 U. C. R. 450.—*CAN.*



licensed.]—*R. v. COLLINS* (1623), Palm. 373; 81 E. R. 1130; *sub nom.* ANON., Godb. 345; Palm. 367; 2 Roll. Rep. 345.  
*Annotations*:—*Mentd.* *R. v. Harvey* (1731), Sess. Cas. K. B. 122; *R. v. Kingston* (1806), 8 East, 41.

(b) *Indictment.*

105. **For refusing to receive traveller—Sick person—Must state person a traveller.**—Indictment against an innkeeper for not receiving a sick person, must state he was a traveller.—*R. v. LUELLIN* (1701), 12 Mod. Rep. 445; 88 E. R. 1441.  
*Annotations*:—*Apld.* *R. v. Rymer* (1877), 2 Q. B. D. 136; *Lamond v. Richard*, [1897] 1 Q. B. 541.

106. — **If room available—Whether tender by guest essential—Guest rejected on other grounds.**—*R. v. IVENS*, No. 76, *ante*.

107. — **& accommodate him—Must aver reasonable tender—Or facts sufficient to excuse tender.**—*FELL v. KNIGHT*, No. 60, *ante*.

108. — **& provide reasonable refreshment & accommodation—Absence of reasonable cause for refusal.**—(1) An innkeeper is bound by the common law to receive & provide reasonable refreshment & accommodation for travellers or wayfarers, & cannot lawfully refuse such refreshment or accommodation, unless for reasonable & lawful cause or excuse, & for a breach of such duty is indictable. (2) But the keeper of a refreshment bar attached to an hotel, but not being an hotel itself, but a shop for the sale of spirits, is not an innkeeper within the above rule of law; (3) nor is a neighbouring householder, a near resident in the same town, walking about the town for amusement or recreation, a traveller within the rule; (4) & if a traveller requires such refreshment, etc., at an inn when accompanied by a large dog, & insists, after being requested by the innkeeper to withdraw him, on the dog staying with him in the inn, the presence of such dog affords a reasonable & lawful excuse to the innkeeper to refuse to receive such traveller, or afford him refreshment or accommodation.

(5) An inn at common law is defined to be a place for the accommodation of travellers & wayfarers. A tavern, or shop, or bar, where only liquors are sold by retail is not within the legal meaning of the word "inn" & the proprietor is not bound to comply with all the obligations of an innkeeper at common law.—*R. v. RYMER* (1877), 2 Q. B. D. 136; 46 L. J. M. C. 108; 35 L. T. 774; 41 J. P. 199; 25 W. R. 415; 13 Cox, C. C. 378, C. R.

—*As to* (2) *Refd.* *Strauss v. County Hotel Co.* (1883), 12 Q. B. D. 27; *Orchard v. Bush*, [1898] 2 Q. B. 281; *Sealey v. Tandy*, [1902] 1 K. B. 296. *As to* (3) *Refd.* *Lamond v. Richard*, [1897] 1 Q. B. 541. *As to* (5) *Refd.* *Strauss v. County Hotel Co.* (1883), 12 Q. B. D. 27; *Sealey v. Tandy*, [1902] 1 K. B. 296.

109. **For refusing to receive goods of guest.**—*BROADWOOD v. GRANARA*, No. 239, *post*.

**For charging exorbitant prices.**—See Sect. 1, subsect. 4, *post*.

SUB-SECT. 4.—PRICES.

110. **Must be reasonable.**—For an innholder does not get his living by buying & selling; for although he buy provision to be spent in his house he does not properly sell it but utters it at such rates as he thinks reasonable gains. If an host takes excessive prices he is indictable.—*CRISP v. PRATT* (1639), Cro. Car. 549; 79 E. R. 1072.

*Annotations*:—*Mentd.* *Tucker v. Cosh* (1651), Sty. 288; *Seroope v. Seroope* (1663), 1 Cas. in Ch. 27; *Newton v. Trigg* (1689), 3 Mod. Rep. 328; *Lilly v. Osborn* (1734), 3 P. Wms. 298; *Banks v. Farquharson* (1752), 2 Hov. 178; *Glaister v. Hewer* (1802), 8 Ves. 195; *Doe d. v. Clark* (1822), 5 B. & Ald. 458.

111. —*NEWTON v. TRIGG*, No. 22, *ante*.

112. —*PARKER v. FLINT*, No. 6, *ante*.

113. —*KIRKMAN v. SHAWCROSS*, No. 50, *ante*.

114. —.]—*THOMPSON v. LACY*, No. 3, *ante*.

115. **Indictment for exorbitant prices.**—(1) An innkeeper may be indicted for taking an exorbitant price for oats.

(2) The mansion house of an innkeeper shall be intended his inn.

(3) An indictment against an innkeeper for extortion need not allege that the articles were sold to be used in his house.—*JOHNSON'S CASE* (1621), Cro. Jac. 610; 79 E. R. 520.

*Annotation*:—*Generally*, *Mentd.* *R. v. Haddock* (1737), Andr. 137.

SECT. 2.—PERSONAL SAFETY OF GUEST.

SUB-SECT. 1.—IN GENERAL.

See Fatal Accidents Act, 1846 (c. 93).

116. **Reasonable care—Chandelier falling.**—*COLLIS v. SELDEN*, No. 125, *post*.

117. — **Ceiling falling.**—It is the duty of an hotel keeper to take reasonable care of the persons of his guests, so that they are not injured by reason of a want of such care on his part, whilst they are in the hotel as his guests.

A statement of claim alleged that, while pltf. was using an hotel, of which deft. was the proprietor, as a guest for reward to deft., by the negligence of deft. the ceiling of the room in which pltf. then was, fell upon & injured him:—*Held*: such statement sufficiently showed a cause of action.—*SANDYS v. FLORENCE* (1878), 47 L. J. Q. B. 598; 42 J. P. 712.

*Annotation*:—*Consd.* *Maclean v. Segar*, [1917] 2 K. B. 325.

118. — **Limited to rooms where guests likely to go—Guest entering "service room."**—The general duty of an innkeeper to take proper care for the safety of his guests does not extend to every room in his house, at all hours of night or day, but must be limited to those places into which guests may be reasonably supposed to be likely to go, in a reasonable belief that they are entitled or invited to do so.

A guest in an inn, the property of resp. co., left his bedroom in the middle of the night to go to a water-closet. There were properly lighted & easily accessible closets in the same corridor, but he went into a dark "service room" the door of which was shut but not locked, & fell down the unguarded well of a lift at the end of the room & was killed. The "service room" was not lighted or used at night & visitors had no business there at any time. In an action brought by the personal representatives of deceased under Lord Campbell's Act:—*Held*: there was no evidence of negligence on the part of resps. to go to a jury.—*WALKER v. MIDLAND RY. CO.* (1886), 55 L. T. 489; 51 J. P. 116; 2 T. L. R. 450, H. L.

*Annotations*:—*Consd.* *Maclean v. Segar*, [1917] 3 K. B. 325; *Mersey Docks & Harbour Board v. Proctor*, [1923] A. C. 253. *Refd.* *Dickson v. Scott* (1914), 7 B. W. C. C. 1007.

119. — **Chimney falling.**—*DUCKES v. STRONG & CO.* (1902), cited in Halsbury's Laws of England, Vol. XVII., p. 313, n., C. A.

120. — **Implied warranty as to safety of premises—Defects undiscoverable with reasonable care.**—By reason of the contractual relationship existing between an innkeeper & a guest in the inn there is an implied warranty by the innkeeper that the inn premises are, for the purpose of personal use by the guest, as safe as reasonable care & skill on the part of any one can make them, but

**Sect. 2.—Personal safety of guest: Sub-sects. 1 & 2.**  
**Sect. 3: Sub-sect. 1, A.]**

the innkeeper is not responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises.—*MACLENNAN v. SEGAR*, [1917] 2 K. B. 325; 86 L. J. K. B. 1113; 117 L. T. 376; 33 T. L. R. 351.

*Annotations:—Refd.* Liebig's Extract of Meat Co. v. Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381; Brannigen v. Harrington (1921), 37 T. L. R. 349.

**121. Assault on guest.]—CALYE'S CASE**, No. 1, *ante*.

**122. Lodger.]—PARKER v. FLINT**, No. 6, *ante*.

**123. Invited visitor.]—A declaration alleged that** deft. was possessed of an hotel into which he had invited pltf. to come as a visitor, & in which there was a glass door, which it was necessary for pltf. to open for the purpose of leaving the hotel, & which pltf. by the permission of deft. & with his knowledge, & without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened: nevertheless by & through the mere carelessness, negligence, & default of deft., the door was then in an insecure & dangerous condition & unfit to be opened, & by reason of the door being in such insecure & dangerous condition, & of the then carelessness, negligence, default & improper conduct of deft. in that behalf, a large piece of glass fell from the door & wounded pltf.:—*Held*: the declaration disclosed no cause of action against pltf.—*SOUTHCOTE v. STANLEY* (1856), 1 H. & N. 247; 25 L. J. Ex. 339; 27 L. T. O. S. 173; 156 E. R. 1195.

*Annotations:—Expld.* Corby v. Hill (1858), 4 C. B. N. S. 556. *Consd.* Indermaur v. Dames (1866), L. R. 1 C. P. 274; Watling v. Oastler (1871), L. R. 6 Exch. 73; Sandys v. Florence (1878), 47 L. J. Q. B. 598. *Refd.* Degg v. Mid. Ry. (1857), 26 L. J. Ex. 171; Chapman v. Rothwell (1858), E. B. & E. 168; White v. Phillips (1863), 15 C. B. N. S. 215; Tebbutt v. Bristol & Exeter Ry. (1870), L. R. 6 Q. B. 73; Burr v. Theatre Royal, Drury Lane, [1907] 1 K. B. 544; Latham v. Johnson & Nephew, [1913] 1 K. B. 398. *Mentd.* Cornman v. Eastern Counties Ry. (1859), 29 L. J. Ex. 94; Gallagher v. Humphrey (1862), 27 J. P. 5; Tolhausen v. Davies (1888), 57 L. J. Q. B. 392; Lees v. Dunkerley, [1911] A. C. 5.

**PART II. SECT. 2, SUB-SECT. 2.**

**125 l. Action—Must disclose duty towards plaintiff.]—An innkeeper is not** responsible for neglecting to warn his guest of the breaking out of a fire in the building so as to enable him to escape, & therefore is not liable in an action by the guest's personal representative for damages in consequence of the death resulting from such fire.—*HARE v. HENDERSON* (1878), 43 U. C. R. 571.—**CAN.**

**126 l. ——— Duty to keep premises in secure condition.]—Pltf. went,** as a customer, into deft.'s hotel, where he had been several times before. In passing through the building to go to the urinal he fell through an open trap door, which had been left unguarded, & received injuries:—*Held*: he was entitled to damages from deft.—*HASSON v. WOOD* (1892), 22 O. R. 66.—**CAN.**

**127 l. ——— Proof of negligence.]—Innkeepers are under no more than the** ordinary liability, to those who frequent their inns, for personal injuries suffered by the latter. They are therefore not liable for such injuries unless caused by their negligence or that of their servants. Pltf. suffered injuries in the yard of an inn by falling into a cesspit, the lid of which was not properly secured. It appeared that the lid was in proper order & the innkeeper's servant had seen that it was properly secured on the day of the accident, & that after it had been found to be so

secured it had apparently been removed by the servants of the municipality for the purpose of cleaning out the cesspit:—*Held*: there was no evidence of any negligence on the part of the innkeeper, & he was not liable for the injuries suffered by pltf.—*SIMPSON v. SMITH*, [1921] C. P. D. 48.—**S. AF.**

**m. ——— Death caused by intoxication 27 & 28 Vict. c. 18, s. 40.]—Deceased,** being intoxicated, fell off a bench in the bar-room, & was placed upon the floor in a small room adjoining, with nothing under his head. While there he died from apoplexy or congestion of the brain, brought on, as pltf. alleged, by placing him in an improper position while intoxicated:—*Held*: not a case of death by "accident" within above sect., but of death from natural causes induced by intoxication.—*BOBIER v. CLAY* (1868), 27 U. C. R. 438.—**CAN.**

**n. ——— Liquor supplied by two innkeepers.]—Where a person comes to** his death while intoxicated, & the intoxicating liquor has been supplied to him at two taverns & to excess in each so that an action might have been brought successfully against either of the tavern-keepers under R. S. C., 1887, c. 194, s. 122, they cannot be sued jointly.—*CRANE v. HUNT* (1895), 26 O. R. 641.—**CAN.**

**o. ———.]—In an action by the** administrators of J., deceased, for damages for the death of J., the evidence showed that the proximate

**SUB-SECT. 2.—REMEDY AGAINST INNKEEPER.**

**124. Action—Failure to protect guest.]—PARKER** v. FLINT, No. 6, *ante*.

**125. ——— Must disclose duty towards plaintiff.]—Declaration that deft. wrongfully, negligently,** & improperly hung a chandelier in a public-house, knowing that pltf. & others were likely to be therein & under the chandelier, & that the chandelier unless properly hung was likely to fall upon & injure them; & that, pltf. being lawfully in the public-house, the chandelier fell upon & injured him:—*Held*: the declaration was bad, as it did not disclose any duty by deft. towards pltf. for the breach of which an action could be maintained.—*COLLIS v. SELDEN* (1868), L. R. 3 C. P. 495; 37 L. J. C. P. 233; 16 W. R. 1170.

*Annotations:—Consd.* Parry v. Smith (1879), 4 C. P. D. 325; Heaven v. Pender (1883), 11 Q. B. D. 503; Elliott v. Hall (1885), 15 Q. B. D. 315. *Expld.* Thrussell v. Handyside (1888), 20 Q. B. D. 359; Blacker v. Lake & Elliot (1912), 106 L. T. 533. *Refd.* King v. G. W. Ry. (1871), 24 L. T. 583; Batchelor v. Fortescue (1883), 11 Q. B. D. 474; Latham v. Johnson & Nephew, [1913] 1 K. B. 398; *Mentd.* Francis v. Cockerell (1870), 10 B. & S. 950.

**126. ——— Duty to keep premises in secure condition.]—SANDYS v. FLORENCE**, No. 117, *ante*.

**127. ——— Proof of negligence.]—DUCKES v.** STRONG & Co. (1902), cited in Halsbury's Laws of England, Vol. XVII., p. 313. n., C. A.

**SECT. 3.—PROTECTION OF GUEST'S PROPERTY.**

**1.—AT COMMON LAW.**

**A. In General.**

**Who are guests or travellers.]—See Part I,** Sect. 3, *ante*.

**128. Duty founded upon custom.]—ROBINS &** Co. v. GRAY, No. 240, *post*.

**129. Duty to protect goods.]—W. v. T.** (1308), Y. B. 42 Edw. 3, fo. 11, pl. 13.

*Annotations:—Consd.* Bennett v. Mellor (1793), 5 Term Rep. 273. *Refd.* Calye's Case (1584), 8 Co. Rep. 32 a; Foster v. Jackson (1613), Hob. 52; Richmond v. Smith (1828), 2 Man. & Ry. K. B. 235.

**130. ———.]—DE N. v. DE S.** (1308), 42 Lib. Ass. fo. 260, pl. 17.

*Annotations:—Refd.* Calye's Case (1584), 8 Co. Rep. 32 a; Foster v. Jackson (1613), Hob. 52.

cause of the death was from being intoxicated caused by excessive drinking in defts.' hotel:—*Held*: defts. were liable.—*DE STRUYE v. MCGUIRK* (1912), 21 O. W. R. 138; 3 O. W. N. 685; 25 O. L. R. 491; 2 D. L. R. 100.—**CAN.**

**p. ——— Failure to provide fire escape.]—Where a guest in a burning** hotel is injured in consequence of the proprietor having failed to provide means of fire escape required by Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty. The defence arising from the maxim *volenti non fit injuria* (the guest being aware of the lack of means of fire escape & having made no objection) is not applicable where the injury arises from a breach of a statutory duty. The fact that the guest delayed his exit in order to rescue a fellow guest, & thereby lost his own chance of getting safely out, is not as a matter of law "contributory negligence."—*LOVE v. NEW FAIRVIEW CORPN., LTD.* (1904), 10 B. C. R. 330.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 1.—A.**

**129 l. Duty to protect goods.]—Deft.,** an innkeeper, detained pltf.'s trunk for the amount owed by him for board & lodging. Pltf. assisted in carrying his trunk to the reading room, the ordinary baggage room being full. The trunk was broken open & several articles



—.] — **BARNHOLBY v. WILKINS** (1402), 2 Dyer, 158 b, n.; 73 E. R. 343.

132. —.] — **ANON.** (1409), Y. B. 11 Hen. 4, fo. 45, pl. 18.

*Annotations*:—**Refd.** Calye's Case (1584), 8 Co. Rep. 32 a; Hawkins v. Cutts (1622), Hut. 49; Yorke v. Grenaugh (1703), 2 Ld. Raym. 866.

133. —.] — **v. HORSLOW** (1443), Y. B. 22 Hen. 6, fo. 21, pl. 38.

*Annotation*:—**Refd.** Calye's Case (1584), 8 Co. Rep. 32 a.

134. —.] — A ferryman, common innkeeper, or carrier, shall not be discharged if the goods are stolen; otherwise of a factor.—**SOUTHCOTE'S CASE** (1601), 4 Co. Rep. 83 b; 76 E. R. 1061; *sub nom.* **SOUTHCOT v. BENNET**, Cro. Eliz. 815.

*Annotations*:—**Refd.** Nicholls v. More (1661), 1 Sid. 36; Lane v. Cotton (1701), 1 Com. 100; Coggs v. Barnard (1703), 1 Com. 133; Kettle v. Bromsall (1738), Willes, 118; Austin v. M., S. & L. Ry. (1850), 10 C. B. 454; G. N. Ry. v. L. E. P. Transport & Depository, [1922] 2 K. B. 742. **Mentd.** Symons v. Darknoll (1628), Palm. 523; Bosen v. Sandford (1689), 1 Show. 101; Hartop v. Hoare (1743), 3 Atk. 44; Peck v. North Staffordshire Ry. (1863), 10 H. L. Cas. 473; Donald v. Suckling (1866), L. R. 1 Q. B. 585; Harris v. Perry, [1903] 2 K. B. 219; Shrimpton v. Hertfordshire County Council (1910), 74 J. P. 305; Coldman v. Hill, [1919] 1 K. B. 443; Pratt v. Patrick, [1924] 1 K. B. 488.

135. —.] — **GRIMSTON v. INNKEEPER**, No. 33, *ante*.

136. —.] — H., a carrier, brought an action upon the case against L., an innkeeper, for goods lost out of the inn, viz. certain packs full of linen cloth & other goods, & after a verdict for pltf. it was moved in arrest of judgment, that it did not appear by the declaration what sort of cloth was in the packs, nor of what value the cloth & goods were, & so the declaration was uncertain:—**Held**:

lost:—**Held**: the fact that pltf. had assisted to place the trunk in the reading room, there being no evidence that he requested that it should be placed there, did not show contributory negligence on his part, or that he accepted the risk incurred thereby, nor did it discharge the liability of the landlord to take reasonable care.—**FRANK v. BERRYMAN** (1894), 3 B. C. R. 506.—**CAN.**

129 ii. —.] — **DELAGORGENDIERE v. ACASTER** (1905), 7 W. L. R. 467.—**CAN.**

129 iii. —.] — **BARRIE v. WRIGHT** (1905), 15 Man. L. R. 197.—**CAN.**

129 iv. —.] — An innkeeper is liable at common law for the loss of a guest's chattels which are stolen from the latter's room, in the absence of negligence on the part of the said guest, where the innkeeper does not furnish a key & the means of securing the room against any person entering it. The guest is under no duty to inquire for a key.—**VICARS v. ARNOLD** (1914), 30 W. L. R. 70; 7 W. W. R. 676; 20 D. L. R. 838; 7 Sask. L. R. 298.—**CAN.**

129 v. —.] — Boxes belonging to a guest at a hotel were left by him with the proprietor & taken over by a new proprietor whose servant delivered them, without his knowledge, to a stranger who falsely represented himself to be the owner's brother. The new proprietor ratified the servant's act:—**Held**: the new proprietor was liable for the value of the boxes & their contents.—**HANNEN v. KILLICK**, [1925] 3 D. L. R. 433; 1 W. W. R. 375; 35 B. C. R. 108.—**CAN.**

129 vi. —.] — Suit to recover the value of certain articles stolen from a room at an hotel in B. Deft., the licensed proprietor of the hotel, who was in the habit of entertaining for shorter or longer periods, all comers to pay the usual charges, & an exchange broker, doing

lived at the hotel for a year, paying for his board & lodging at first by the day, & afterwards by agreement at the rate of so

the declaration was good enough, especially now there being a verdict in the case.—**HERBERT v. LANE** (1653), Sty. 370; 82 E. R. 786.

*Annotation*:—**Mentd.** Hartford v. Jones (1697), 2 Salk. 654.

137. —.] — **BENNETT v. MELLOR**, No. 162, *post*.

138. —.] — **KIRKMAN v. SHAWCROSS**, No. 50, *ante*.

139. — **Goods must belong to guests or traveller.**—**LANE v. COTTON**, No. 48, *ante*.

140. — **Although guest provided with key.**—**ANON.** (1566), Moore, K. B. 78; 72 E. R. 453.

141. — **& innkeeper without knowledge of goods.**—**CALYE'S CASE**, No. 1, *ante*.

142. — **Theft by guest's servant.**—**BASSE v. P.** (1444), Y. B. 22 Hen. 6, fo. 38, pl. 8.

*Annotation*:—**Refd.** Calye's Case (1584), 8 Co. Rep. 32 a.

143. —.] — **CALYE'S CASE**, No. 1, *ante*.

144. — **Although innkeeper sick & insane.**—It is no plea for an innkeeper that at the time his guest's goods were lost, he was sick & insane.—**CROSS v. ANDREWS** (1598), Cro. Eliz. 622; 78 E. R. 863.

*Annotation*:—**Refd.** Molton v. Camroux (1848), 2 Exch. 487.

145. —.] — **SAUNDERS v. PLUMMER**, No. 194, *post*.

146. — **Goods in control of guest's servant.**—**DROPE v. THAIRE** (1626), Benl. 173; 2 Dyer, 158 b, n.; Lat. 126; Noy, 79; Poph. 178; 79 E. R. 1274.

*Annotations*:—**Refd.** Strauss v. County Hotel Co. (1883), 32 W. R. 170. **Mentd.** York v. Grindstone (1704), 1 Salk. 388.

147. — **Unless in exclusive possession of guest.**—If a guest at an inn deposit his goods in a

much a month, but neither was pltf. under any obligation to remain, nor debt. to accommodate him for any fixed time:—**Held**: the relation of innkeeper & guest subsisted between the parties; & debt. was *prima facie*, & without proof of actual negligence, liable to make good the loss sustained by pltf.—**WHALEY v. PALANJI PESTANJI** (1866), 3 Bom. O. C. 137.—**IND.**

129 vii. —.] — A traveller arrived at an inn, & immediately on his arrival gave his greatcoat, in the breast-pocket of which was a pocket-book containing bank-notes, in charge to a waiter, though without mentioning that there was money in the greatcoat; the traveller soon after discovered that the pocket-book was taken from the pocket of the coat, & it subsequently appeared that it had been stolen by a servant employed in the inn; the traveller having had part of the money restored to him, pursued the innkeeper for the unrecovered balance:—**Held**: the traveller was entitled to recover under the edict *naulac, caupones*, there being no such negligence on his part as to bar him from availing himself of the benefit of the edict; & the innkeeper was liable also at common law.—**M'PIERSON v. CHRISTIE** (1841), 3 Dunl. (Cl. of Sess.) 930.—**SCOT.**

129 viii. —.] — The rule of Roman Law that innkeepers are responsible, except in case of *damnum fatale* or *major*, for loss of, or damage to goods received by them without proof that they have been negligent, has been incorporated in the Roman Dutch Law in force in South Africa.—**DAVIS v. LOCKSTONE**, [1921] App. D. 153.—**S. AF.**

129 ix. —.] — Pltf., who was employed by F. as his secretary, was, together with F. & his family, allotted a room in deft.'s hotel. F. on behalf of himself & family signed certain conditions absolving deft. from liability for loss occasioned through the act of any third party. Pltf.'s room contained a notice stating that deft. accepted no

responsibility for the loss of goods not lodged with the management of the hotel for safe keeping. It was not shown that pltf.'s attention had been directed to this notice or to the necessity of keeping the door of his room locked. While pltf. was asleep in his room, the door of which had not been locked, articles were stolen from his room. Pltf. sued to recover the value of the goods stolen:—**Held**: as F. had no authority to sign away pltf.'s rights, & there was no evidence of negligence on the part of pltf., judgment should be in his favour.—**TOY v. BLAKE**, [1923] C. P. D. 98.—**S. AF.**

140 i. — **Although guest provided with key.**—A customer staying at an inn, placed his property, consisting of purse with money in it & other articles such as handkerchiefs, gloves, & a tobacco pouch, in a chest of drawers in his room & locked the door. The articles were stolen. These articles were above the value of £10:—**Held**: he could recover the value of these articles from the proprietor of the inn, inasmuch as they were not parcels or packages within Act 78, s. 1.—**MILLER v. FEDERAL COFFEE PALACE** (1889), 15 V. L. R. 30.—**AUS.**

—.] — **left on leaving inn.**—Pltf. had been for some time a guest of deft., an innkeeper, & on leaving the inn, after paying his bill, was allowed to leave a box containing some papers & books alleged to be of value to pltf., in the room of the inn used for storing luggage, etc. Pltf. intended to take it away the day following, but owing to illness he did not call for it for several weeks afterwards, when it was discovered that the box was lost; there was no other evidence of any negligence in the matter:—**Held**: pltf. could not recover.—**PALIN v. REID** (1884), 10 A. R. 63.—**CAN.**

r. —.] — Pltf. had been a guest for some time at a hotel, & on leaving after paying his bill, was allowed to leave a trunk that was locked, & taken to the baggage room

**Sect. 3.—Protection of guest's property: Sub-sect. 1,**

room which he uses as a warehouse, & of which he has the exclusive possession the innkeeper is not liable for the loss.—**FARNWORTH v. PACKWOOD** (1816), 1 Stark. 249; Holt, N. P. 209, N. P.

**148. — Although in actual care of guest.]—**

(1) An innkeeper is liable to answer for goods which are lost by a guest at his inn, from his bedroom, although the goods were, at the time they were taken, in the actual care of the guest.

(2) He is equally liable to answer for money lost as for any other property.—**KENT v. SHUCKARD** (1831), 2 B. & Ad. 803; 109 E. R. 1340; *sub nom.* **KEMP v. SHUCKARD**, 1 L. J. K. B. 1.

*Annotation:—As to (1) Refd. Cashill v. Wright* (1856), 6 E. & B. 891.

**149. — Although in particular place by request of guest.]—**Where a traveller went to an inn, & desired to have his luggage taken into the commercial room, to which he resorted, from whence it was stolen:—*Held*: the innkeeper was responsible, although he proved that, according to the usual practice of his house, the luggage would have been deposited in the guest's bedroom, & not in the commercial room, if no order had been given respecting it.—**RICHMOND v. SMITH** (1828), 8 B. & C. 9; 2 Man. & Ry. K. B. 235; 6 L. J. O. S. K. B. 279; 108 E. R. 946.

*Annotations:—Refd. Dawson v. Chamney* (1843), 5 Q. B. 164; *Armistead v. White* (1851), 20 L. J. Q. B. 524.

**150. — —.]—**An innkeeper held liable for the loss of a parcel left in the lobby, or hall, of the inn.—**CANDY v. SPENCER** (1862), 3 F. & F. 306, N. P.

**151. — Gig stolen from inn yard.]—**An innkeeper on a fair day, upon being asked by a traveller, then driving a gig of which he was owner, "whether he had room for the horse?" put the horse into the stable of the inn, received the traveller with some goods into the inn, & placed the gig in the open street, without the inn yard, where he was accustomed to place the carriages of his guests on fair days. The gig having been stolen from thence:—*Held*: the innkeeper was answerable.—**JONES v. TYLER** (1834), 1 Ad. & El. 522; 3 Nev. & M. K. B. 576; 3 L. J. K. B. 166; 110 E. R. 1307.

**152. — As distinguished from lodging-house keeper.]—****DANSEY v. RICHARDSON**, No. 17, *ante*.

**153. — —.]—**It being clear since *Calye's Case*, No. 1, *ante*, that an innkeeper is under a legal obligation to take due care of the goods of his guests (**BYLES, J.**).—**HOLDER v. SOULBY** (1860), 8 C. B. N. S. 251; 29 L. J. C. P. 246; 2 L. T. 219; 25 J. P. 311; 6 Jur. N. S. 1031; 8 W. R. 438; 141 E. R. 1163.

*Annotations:—Consd. Scarborough v. Cosgrove*, [1905] 2 K. B. 805. *Refd. Re Marlborough Mansions, Victoria Street* (1896), 60 J. P. Jo. 284; *Hollingsworth v. Nichol* (1904), 68 J. P. Jo. 534. *Mentd. Sarson v. Roberts* (1895), 43 W. R. 690.

One thing is clear, namely, that the liability of the landlord of the boarding

house in respect of luggage is not co-extensive with the liability of an ordinary innkeeper (**ROMER, L.J.**).  
A guest lodging with another is not entitled to the same degree of protection as he would be entitled to in an inn (**COLLINS, M.R.**).—**SCARBOROUGH v. COSGROVE**, [1905] 2 K. B. 805; 74 L. J. K. B. 892; 93 L. T. 530; 54 W. R. 100; 21 T. L. R. 754, C. A.  
**155. — Goods of husband & wife.]—****GORDON v. SILBER**, No. 259, *post*.  
**156. — Costs of guest defrayed by third party.]—****WRIGHT v. ANDERTON**, No. 37, *ante*.  
**157. — Temperance hotel.]—****BOWER v. MILCREST** (1922), 11 L. J. C. C. 50.  
**158. As to money.]—**A master may maintain an action against an innkeeper, on the custom of the realm, for money lost while his servant was his guest.—**BEEDELE v. MORRIS** (1609), Cro. Jac. 224; 79 E. R. 194; *sub nom.* **BEDLE v. MORRIS**, Yelv. 162.  
**159. —.]—****KENT v. SHUCKARD**, No. 148, *ante*.  
**160. Act of God or King's enemies excepted.]—****MORGAN v. RAVEY**, No. 221, *post*.

**B. Negligence of Innkeeper.**

*See, generally, NEGLIGENCE.*

**161. Question of fact.]—**What shall amount to gross negligence is a question for the jury.

An admission by an innkeeper that he left money entrusted to him for the purpose of taking up a bill, in his cash-box in his tap-room, where it was lost, together with a much larger sum of his own, is evidence of gross negligence to go to a jury.—**DOORMAN v. JENKINS** (1834), 2 Ad. & El. 256; 4 Nev. & M. K. B. 170; 4 L. J. K. B. 29; 111 E. R.

*Annotations:—Refd. Whitehouse v. Pickett*, [1908] A. C. 357; *Newman v. Bourne & Hollingsworth* (1915), 31 T. L. R. 209. *Mentd. Balfe v. West* (1853), 13 C. B. 466; *Giblin v. McMullen* (1868), L. R. 2 P. C. 317.

**162. Whether proof of negligence essential.]—**

(1) If an innkeeper refuse to take charge of good till a future day because his house is full of parcels, still he is liable to make good the loss if the owners stop as a guest, & the goods be stolen during his stay.

indeed the innkeeper had refused to take in pltf.'s servant as a guest & he had notwithstanding gone into the inn pltf. could not have charged deft. with the loss of his goods; in such a case the innkeeper refuses at his peril & if it be without reason an action lies for the refusal (**GROSE, J.**).

Here the request was merely to take care of pltf.'s goods until next week; if deft. had taking the goods upon that request he could only have been liable as a bailee (**BULLER, J.**).

(2) All the authorities agree it is not necessary to prove negligence in the innkeeper (**BULLER, J.**). **BENNETT v. MELLOR** (1793), 5 Term Rep. 273; 101 E. R. 154.

*Annotations:—As to (1) Distd. Strauss v. County Hotel Co.* (1883), 12 Q. B. D. 27; *Orchard v. Bush*, [1898] 3 Q. B. 284.

would exercise with respect to his own property of a like description: the hotel keeper had satisfied that onus, & the appeal should be allowed.—**BREWER v. CALORI** (1921), 29 B. C. R. 457.—**CAN.**

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**162.1. Whether proof of negligence essential.]—**Pltf., a weekly boarder at hotel, made an arrangement with deft.'s clerk by which, whenever he was absent for a night, his room might be occupied by some other  
:—*Held*: deft. was not liable for

the loss of pltf.'s luggage, which he left in his room during one of his absences, the evidence not showing gross negligence on the part of deft.—**CAMERON v. CAMERON** (1911) W. L. R. 461.—**CAN.**

**11. —.]—**Suit to recover value of certain articles stolen pltf.'s room at an hotel:—*Held*: deft., the licensed proprietor, was without proof of negligence, liable to make good the sustained by pltf.—**WHATELEY v. ANJI PESTANJI** (1866), 3 Bom. O. C. 137.—**IND.**



163. —.]—CUNNINGHAM v. PHILP (1896), 12 T. L. R. 352.

164. —.]—(1) Pltf., being on his way from his place of business in Liverpool to his home outside the town, went into the dining-room of an hotel in Liverpool, kept by defts., to get a meal, & put his overcoat in a place where coats were ordinarily kept in that room. The coat was missing when he had finished his meal. Sleeping accommodation for guests at the hotel was provided if required; but a great number of people used it every day for the purpose of dining there only:—*Held*: there was sufficient evidence to establish the relation of innkeeper & guest between defts. & pltf. so as to make them liable for the loss of the coat without proof of negligence on their part.

If a man is in an inn for the purpose of receiving such accommodation as the innkeeper can give him he is entitled to the protection the law gives to a guest at an inn (KENNEDY, J.).

(2) I think a guest is a person who uses the inn either for a temporary or a more permanent stay in order to take what the inn can give (WILKS, J.). —ORCHARD v. BUSH & Co., [1898] 2 Q. B. 284; 67 L. J. Q. B. 650; 78 L. T. 557; 46 W. R. 527; 14 T. L. R. 425; 42 Sol. Jo. 540, D. C.

*Annotations*:—As to (2) *Folld.* Chesham Automobile Supply v. Beresford Hotel (Birchington) (1913), 29 T. L. R. 584. *Reid.* Jenkyns v. Southampton Steam Packet Co., [1919] 2 K. B. 135.

165. —.]—An innkeeper cannot negative his liability for the safe custody of the goods of a guest by proving that there was no negligence on his part.—BUTLER & Co., LTD. v. QUILTER (1900), 17 T. L. R. 159.

166. **Presumption of negligence—Subject to rebuttal.**—When chattels have been deposited in a public inn, & there lost or injured, the *prima facie* presumption is that the loss or damage was occasioned by the negligence of the innkeeper or his servants. But this presumption may be rebutted; & if the jury find in favour of the innkeeper as to negligence, he is entitled to succeed on a plea of not guilty.—DAWSON v. CHAMNEY (1843), 5 Q. B. 164; 1 Dav. & Mer. 348; 13 L. J. Q. B. 33; 7 J. P. 689; 7 Jur. 1037; 114 E. R. 1210.

265.

*Morgan v. Ravey* (1861), 6 H. & N.

167. **Loss during temporary absence.**—SAND'S CASE (1603), cited in Moore, K. B. 877; 72 E. R. 968.

168. —.]—DROPE v. THAIRE (1626), Benl. 173; 2 Dyer, 158 b, n.; Lat. 126; Noy, 79, D. C. 178; 79 E. R. 1274.

*Annotations*:—*Reid.* Strauss v. County Hotel Co. (1883), 32 W. R. 170. *Mentd.* York v. Grindstone (1704), 1 Salk. 388.

169. **Loss while goods deposited in cloak room.**—CRYAN v. HOTEL REMBRANDT, LTD., No. 40, *ante*.

### C. Negligence of Guest.

170. **General rule.**—MORGAN v. RAVEY, No. 221, *post*.

171. —.]—(1) Liability of an innkeeper for goods lost at his inn. In sect. 1 of Innkeepers Liability Act, 1863 (c. 41), the word "wilful" applies only to the following word "act" & not to the next following words "default or neglect."

(2) An innkeeper was, at common law, an insurer & if goods of a guest were, without negligence on the part of the guest lost at his inn, the innkeeper was liable for their value (BYLES, J.). —SQUIRE v. WHELER, SQUIRE (INFANT) v. SAME (1897), 16 L. T. 93.

69 Sol. Jo. A. C. 337.

v. Grenville Hotel

172. **Sufficiency of evidence to establish.**—Pltf. brought an action against deft. to recover the value of property, consisting of jewellery worth £19 10s. which was stolen during the night from a table in pltf.'s bedroom while he & his wife were staying as guests at deft.'s hotel. There was a bolt inside the door of pltf.'s bedroom & a key on the outside, & a wardrobe with drawers in the room. Pltf. left the key on the outside of the door, but he swore positively that he bolted the door on the inside when he went to bed, at the same time admitting that he had said, in reply to an observation that the door could not be unbolted from outside "If that is so I must have made a mistake." Pltf.'s wife had been wearing valuable jewellery in the hotel during the evening:—*Held*: (1) there was sufficient evidence of negligence on the part of pltf. to be left to the jury; (2) even if leaving the door unbolted was not in itself sufficient evidence, there were other circumstances which coupled with it would be sufficient; (3) it could not be laid down as a proposition of law that leaving the door unbolted was not evidence of negligence; but each case must depend upon its own circumstances.—HERBERT v. MARKWELL (1881), 45 L. T. 649; 46 J. P. 358, D. C.

*Annotation*:—*Generally.* *Reid.* Medawar v. Grand Hotel Co., [1891] 2 Q. B. 11.

173. **Goods left in outer court—Contrary to directions by innkeeper.**—If an innkeeper requires his guest to lock up his goods in such a chamber, or he will not warrant their safety, & the guest suffers them to lie open in an outer court, the innkeeper is not liable if they are stolen.—SANDERS v. SPENCER (1566), 3 Dyer, 266 b; 73 E. R. 591.

*Annotations*:—*Consd.* Calye's Case (1584), 8 Co. Rep. 32 a. *Reid.* Yorke v. Grenaugh (1703), 2 Ld. Raym. 866; Oppenheim v. White Lion Hotel Co. (1871), L. R. 6 515.

174. —.]—CALYE'S CASE, No. 1, *ante*.

175. **Agreement to deliver goods to innkeeper.**—BRAND v. GLASSE (1584), Moore, K. B. 158; 72 E. R. 503.

176. **Neglect to lock up show room.**—(1) An innkeeper is not answerable for the goods of his guest, which are lost through the negligence of the guest, out of a private room in the inn chosen by the guest for the purpose of exhibiting to his customers his goods for sale, the use of which room was granted by the innkeeper, who at the same time told the guest that there was a key, & that he might lock the door, which he neglected to do.

I do not say that if the goods be stolen from the inn, it is not *prima facie* to be taken as happening through the fault of the innkeeper. But there can be no doubt also that there may be circumstances, as if the guest by his own neglect induces the loss or introduces himself the person who purloins the goods, which form an exception to the general liability (LORD ELLENBOROUGH, C.J.).

(2) An innkeeper is not bound by law to find show rooms for his guests but only convenient lodging rooms & lodging (LORD ELLENBOROUGH, C.J.).—BURGESS v. CLEMENTS (1815), 1 Stark. 249, n.; 4 M. & S. 306; 105 E. R. 848.

*As to (1) Consd.* Cashill v. Wright (1856), 6 E. & B. 891. *Reid.* Oppenheim v. White Lion Hotel Co. (1871), 25 L. T. 93; Medawar v. Grand Hotel Co., [1891] 2 Q. B. 11. *As to (2) Distd.* Richmond v. Smith (1828), 8 B. & C. 9. *Reid.* R. v. Rymer (1877), 2 Q. B. D. 136; Lamond v. Richard, [1897] 1 Q. B. 541. *Generally.* *Reid.* Armistead v. White (1851), 15 Jur. 1010. *Mentd.* Bank of Ireland v. Evans' Trustees (1855), 25 L. T. O. S. 272.

177. **Gross negligence of guest.**—Pltf., a commercial traveller, whilst a guest at an inn, placed his gig-box in the commercial room, as was the practice with travellers frequenting the inn.

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The box contained money, & was allowed to remain in the commercial room in the night-time during pltf.'s three days' stay at the inn. The lock of the box was a very insecure one, & could be opened without a key, by pushing back the bolt. On two or three occasions, pltf. opened the box in the room, & counted the money it contained in the presence of several persons:—*Held*: the jury were properly directed that gross negligence on the part of pltf. would relieve the innkeeper from his common law liability; & on the above evidence the jury were warranted in finding that pltf. had been guilty of gross negligence, & deft., therefore, entitled to the verdict, on the plea of not guilty.—*ARMISTEAD v. WILDE* (1851), 17 Q. B. 261; 20 L. J. Q. B. 524; 17 L. T. O. S. 155; 16 J. P. 5; 15 Jur. 1010; 117 E. R. 1280.

*Annotation*:—*Consd.* *Cashill v. Wright* (1856), 6 E. & B. 891.

**178. Omission to take ordinary care.]**—Where the goods of a guest at an inn are lost, the innkeeper is liable as for breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances. Where there is such negligence, the innkeeper is not responsible. Therefore, where an innkeeper set up such negligence, in answer to an action by the owner for the loss of goods, & the judge told the jury that the innkeeper was responsible unless there had been gross negligence on the part of the owner, but did not explain what would constitute gross negligence:—*Held*: a misdirection, inasmuch as the jury might have understood that pltf. was entitled to recover unless there had been an absence, on his part, of even the loosest degree of care.—*CASHILL v. WRIGHT* (1856), 6 E. & B. 891; 27 L. T. O. S. 283; 20 J. P. 678; 2 Jur. N. S. 1072; 4 W. R. 709; 119 E. R. 1096.

*Annotations*:—*Consd.* *Filipowski v. Merryweather* (1860), 2 F. & F. 285. *Folld.* *Oppenheim v. White Lion Hotel Co.* (1871), L. R. 6 C. P. 515. *Refd.* *Spice v. Bacon* (1877), 36 L. T. 896; *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11; *Newman v. Bourne & Hollingsworth* (1915), 31 T. L. R. 209; *R. v. Bateman* (1925), 94 L. J. K. B. 791.

**179. —.]**—Pltf., a traveller, went to an hotel at Bristol, arriving at 11 p.m. In the commercial room he took from his pocket a canvas bag containing £22 in gold, some silver, & a £5 note, & took out 6d. to pay for some stamps. He was then shown to a bedroom on an upper story, the door of which had a lock & a bolt, & the window of which looked out on to a balcony. He was cautioned by the chambermaid that the window was open, but nothing was said about locking the door. On going to bed he closed the door, but did not lock or bolt it, & placed his clothes, the bag of money being in one of the pockets, on a chair at his bed-side. During the night some one

entered his room by the door while he slept, & stole the bag & money. The judge in summing up the case to the jury, after explaining to them the law as to the liability of innkeepers for the safe custody of the property of their guests, told them that the question for their consideration was whether the loss would or would not have happened if pltf. had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances. The jury found for defts.:—*Held*: the direction was right, & the verdict warranted by the evidence.—*OPPENHEIM v. WHITE LION HOTEL CO.* (1871), L. R. 6 C. P. 515; 40 L. J. C. P. 231; 25 L. T. 93; 20 W. R. 34.

*Annotations*:—*Folld.* *Jones v. Jackson* (1873), 37 J. P. 776; *Herbert v. Markwell* (1881), 45 L. T. 649. *Refd.* *Heane v. Norfolk Hotel Co.* (1888), 4 T. L. R. 635; *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11.

**180. — Valuable left exposed in room.]**—*MEDAWAR v. GRAND HOTEL CO.*, No. 201, *post*.

**181. Omission by guest to lock door—Insufficient to discharge liability.]**—When property has been stolen from a guest in an inn, the innkeeper is liable, unless pltf. has contributed, by his own negligence, to the loss, & not locking his door is not such negligence.—*FILIPOWSKI v. MERRYWEATHER* (1860), 2 F. & F. 285, N. P.

**182. — Even though innkeeper diligent.]**—*MORGAN v. RAVEY*, No. 221, *post*.

**183. —.]**—There is no obligation on the part of the guest at an inn, to lock or fasten the door of the room in which he sleeps; & the omission to do so does not discharge the innkeeper from his liability to answer for goods of the guest stolen from the room in which he slept.—*MITCHELL v. WOODS* (1867), 16 L. T. 676.

—.]—*See, also*, Nos. 172, 179, *ante*.

**184. Omission to leave valuables with innkeeper.]**—*MORGAN v. RAVEY*, No. 221, *post*.

**185. —.]**—Where a guest at an inn had an opportunity given him of securing valuables in his possession, by giving them over to the custody of the innkeeper or otherwise, & neglected such opportunity:—*Held*: his conduct amounted to such negligence as to deprive him of his right to recover against the innkeeper, in case of such valuables being lost or stolen.—*JONES v. JACKSON* (1873), 29 L. T. 399; 37 J. P. 776.

*Annotation*:—*Refd.* *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11.

**186. —.]**—*CAREY v. LONG'S HOTEL CO., LTD.* (1890), 6 T. L. R. 415; *affd.* (1891), 7 T. L. R. 213, C. A.

**187. Luggage lost after paying bill.]**—Pltf. who had been staying at deft.'s hotel, paid his bill in the afternoon & directed that his luggage should be brought from his room & placed where he might get it without delay when he returned later in the evening for it. With his knowledge the luggage was placed in the hall near where the hotel porter sat. When pltf. called for the luggage

**PART II. SECT. 3, SUB-SECT. 1.—C.**

**1781. Omission to take ordinary care.]**—Applt., who was a hawker travelling with a hawker's van containing goods, put up for a night at the licensed hotel of resp. Applt. asked resp. where he should put his van, & resp. indicated a shed which was appurtenant to the hotel, but at some distance from it. Applt. placed his van in this shed, leaving the goods in the van. The shed had doors, but no lock. During the night the goods were stolen. Applt. had not mentioned that there were goods in the van. Applt. sued resp. for their value:—*Held*: if applt. had been guilty of negligence resp. would not be liable even if the goods were in

his charge; & the facts justified the finding of negligence on the part of applt.—*SEMELOFF v. CARLSON* (1900), 18 N. Z. L. R. 757.—N. Z.

**1801. — Valuable left exposed in room.]**—Pltf., a guest at an hotel, sued deft., the proprietor of the hotel, for the value of certain rings which she alleged had been stolen from her room. It appeared that pltf. had been wearing the rings up to midnight on a certain evening, & that she then placed them upon her dressing table. Until 7 o'clock the following evening she did not look for them or take any trouble about them at all, though she had been in her room twice during the course of the day:—*Held*: pltf. had been guilty of

such negligence as to disentitle her from succeeding in her action.—*KOENIG v. GODBOLD*, [1923] C. P. D. 526.—S. AF.

**s. Onus of proof.]**—The onus of proving negligence on the part of the guest rests upon the innkeeper.—*VICARS v. ARNOLD* (1914), 30 W. L. R. 70; 7 W. W. R. 676; 20 D. L. R. 838; 7 Sask. L. R. 298.—CAN.

**t. Omission to lock up luggage in wardrobe—Where no key to room.]**—Pltf. was received into deft.'s hotel with his personal baggage. Enclosed in one of the bags was a sum of £6 in money. A room in an annexe to the hotel was given to him to which there was no key, & pltf. stated that he



later in the evening it was missing, & he thereupon sued deft., claiming in respect of the loss. The county ct. judge held that the relationship of innkeeper & guest had ceased to exist when pltf. paid his bill, & that there was contributory negligence on the part of pltf. in the directions given by him as to the place where the luggage should be put:—*Held*: the questions whether the relationship of innkeeper & guest had come to an end, & whether there was contributory negligence on the part of pltf. were questions of fact, & as there was evidence to support the findings of the county ct. judge the appeal must be dismissed.—*PORTMAN v. GRIFFIN* (1913), 29 T. L. R. 225, D. C.

#### D. As to Horses.

**188. General rule.]**—An innkeeper received B. as a guest. B. brought with him a horse, which was delivered to C., who, apparently, acted as ostler at the inn. C. was, in fact, a livery stable keeper, in business for himself at other premises; but, the innkeeper's stables being under repair, C. took care of the horses arriving at the inn, & B.'s horse was taken to C.'s own stables. Afterwards, during the temporary absence of B. from the inn, C. drove the horse out for exercise, & during the drive, the horse was injured:—*Held*: regarding the relation of the innkeeper to C., which relation, apparently, & for anything that B. knew to the contrary, was that of master & servant, the innkeeper, as such, was responsible for the injury to the horse, occasioned whilst under the control of C.—*DAY v. BATHER* (1863), 2 H. & C. 14; 2 New Rep. 37; 9 Jur. N. S. 444; 11 W. R. 575; 159 E. R. 6; *sub nom.* *BATHER v. DAY*, 32 L. J. Ex. 171; 8 L. T. 205.

**189. Responsible for safe keeping.]**—A person who takes in horses to agist, does not, like an innkeeper, insure their safety; he is answerable only in case of negligence.—*BROADWATER v. BLOT* (1817), Holt, N. P. 547, N. P.

*Annotations*:—*Mentd.* *Searle v. Laverick* (1874), L. R. 9 Q. B. 122; *Coldman v. Hill*, [1919] 1 K. B. 443.

**190. — Owner not lodging at inn.]**—A man put his horse in the stable & before he goes to bed or lodging the horse is gone he shall have an action although he did not lodge there (*DODERIDGE, J.*).—*DROPE v. THAIRE* (1626), Benl. 173; 2 Dyer, 158 b, n.; Lat. 126; Noy, 79; Poph. 178; 79 E. R. 1274.

*Annotations*:—*Reid.* *Strauss v. County Hotel Co.* (1883), 32 W. R. 170. *Mentd.* *York v. Grindstone* (1704), 1 Salk. 388.

**191. — Damages for loss of business & wrongful use—No right to retain animal.]**—Pltf. left his horse with an innkeeper to be safely kept at a certain rate. The innkeeper lent the horse on hire to other persons, with the result that it was lamed & pltf. lost business & suffered loss. In an action against the innkeeper he recovered damages. Deft. claimed the right to keep the horse:—*Held*: he could not, for the damages were not given for the horse, but for the wrongful use & loss of business: the case was not an action

of trover, where it would be otherwise.—*BLUNT v. BASSET* (1626), Benl. 171; 73 E. R. 1033.

**192. Horse ridden & whipped till spoiled.]**—An action lies against an innkeeper for so negligently keeping a horse that it was taken out of the stable & ridden & whipped till it was spoiled.—*STANYON v. DAVIS* (1704), Holt, K. B. 13; 6 Mod. Rep. 223; 1 Salk. 404; 90 E. R. 905; *sub nom.* *DAVIS v. STANNION*, 2 Ld. Raym. 1040; *affg.* S. C. *sub nom.* *STANNIAN v. DAVIES* (1702), 11 Mod. Rep. 7.

*Annotations*:—*Mentd.* *R. v. Helling* (1716), 1 Stra. 8; *Emery v. Barlett* (1729), 2 Stra. 827; *Harvey v. Phillips* (1743), 2 Atk. 541; *Woodward v. Walton* (1807), 2 Bos. & P. N. R. 476.

**193. Horse taken out & injured—Arrangement between innkeeper & ostler.]**—*DAY v. BATHER*, No. 188, *ante*.

**194. Liability to administrator of intestate.]**—(1) An innkeeper is liable to the administrator of an intestate for the loss of the intestate's horse whilst in his care; there is a contract or *assumpsit* in law between the innkeeper & the guest; the injury suffered is not a tort only.

(2) The law forces the innkeeper to receive the guest's horse, else an action will lie against him (*BRIDGMAN, C.J.*).

(3) The law forces the innkeeper to preserve the goods of his guest or else an action will lie against him (*BRIDGMAN, C.J.*).

(4) An innkeeper by reason of sickness was of nonsane memory & then the goods of the guest were stolen out of the house; but as long as he kept an inn, the law required the goods of the guest should be safely kept & therefore an action lay against him (*BRIDGMAN, C.J.*).

(5) The law forces the guest to make a recompence. If he pay not, he may detain his horse & is not bound to his action; or of he will bring his action, he may without any special contract have an action for his horse, & all the meat, drink, lodging & other accommodations which he had at the inn (*BRIDGMAN, C.J.*).—*SAUNDERS v. PLUMMER* (1662), O. Bridg. 223; 124 E. R. 557.

**195. Horse put to grass by instructions.]**—*CALYE'S CASE*, No. 1, *ante*.

**196. —.]**—*LANE v. COTTON*, No. 48, *ante*.

**197. —.]**—If a man comes to a common inn to harbour & desires that his horse be put to grass & the innkeeper puts it to grass & the horse is stolen the innkeeper shall not be charged because by the law the innkeeper is not bound to answer for anything out of his inn, but only for those things which are inside.—*MOSLEY v. FOSSET* (1598), 1 Roll. Abr. 4.

**198. Horse put to grass without instructions.]**—*CALYE'S CASE*, No. 1, *ante*.

#### SUB-SECT. 2.—UNDER STATUTE.

##### A. In General.

See Innkeepers' Liability Act, 1863 (c. 41).

**199. "Wilful act, default or neglect" of innkeeper—"Wilful" applicable only to "act."]**—

complained that there was none. In the room there was a wardrobe with a key. That night pltf. went out, & returned about midnight to find his belongings, which had not been locked away in the wardrobe, had been stolen. In the main hotel a notice was posted which read that the proprietor was not hold himself responsible for valuables unless the same were placed in his charge for safe keeping. In an action for the value of the articles stolen including the £6:—*Held*: the

failure of pltf. to lock up his luggage in the wardrobe did not debar pltf. from succeeding in his claim.—*DAVIS v. LOCKSTONE*, [1921] App. D. 153.—S. AF.

#### PART II. SECT. 3, SUB-SECT. 1.—D.

**189 i. Responsible for safe keeping.]**—Pltf. lent or hired his horse to S., who while on a journey, put it up at deft.'s inn, & it was strangled in the stable there, owing, as the jury found, to the

negligence of deft.'s servant in tying it up in the stall:—*Held*: pltf. might maintain an action for damages.—*WALKER v. SHARPE* (1871), 31 U. C. R. 340.—CAN.

#### PART II. SECT. 3, SUB-SECT. 2.—A.

**u. "Wilful act default or neglect" of innkeeper.]**—The liabilities of an hotel keeper to his guests are regulated by Indian Contract Act, & in the absence of any specific agreement in a

*Sect. 3.—Protection of guest's property: Sub-sect. 2, A., B. & C.; sub-sect. 3.]*

**SQUIRE v. WHEELER, SQUIRE (INFANT) v. SAME,** No. 171, *ante*.

**200. ———.]—BEHRENS v. GRENVILLE HOTEL (BUDE), LTD.** (1925), 69 Sol. Jo. 346.

**201. ——— No default by either party.]—**

(1) M. went to an hotel early in the morning & asked for a bedroom. He was told that he could not have a bedroom, but that he could use a room, engaged by persons expected to arrive during the day, for the purpose of dressing, & he was shown up & his luggage was taken to this room. He then dressed & went down to breakfast, leaving the room unlocked & the stand of his dressing-bag outside the bag & exposed upon the dressing-table. After breakfasting he paid for his breakfast & went out, & did not return till late at night. In the meantime the persons who had engaged the room arrived, & one of the hotel servants removed M.'s luggage into the corridor as it was, leaving the dressing-stand out of the bag. On his return M. asked for his room & was told he had none, but one being subsequently found, his luggage was brought to it. M. then found that jewellery had been stolen from a drawer in the dressing-stand, & sued the hotel company for £140 for the loss thereof. A notice pursuant to 26 & 27 Vict. c. 41, s. 3, was exhibited in the hall of the hotel:—*Held*: M. occupied the room as a guest until the arrival of the persons who had engaged the room, & as, in the ordinary course, the relationship of innkeeper & guest continues until the guest's property is brought, & re-delivered to him on his departure, the hotel co. were negligent in placing M.'s goods as they did in the corridor. By so doing they debarred themselves from proving that the loss was contributed to by M.'s negligence, in leaving his goods exposed in the room, & M. was therefore entitled to recover to the extent of £30, the limit prescribed by 26 & 27 Vict. c. 41, s. 1. As, however, M.'s negligence debarred him from proving that the loss occurred wholly by the "wilful act, default, or neglect" of the hotel co., he was not entitled to recover beyond that amount.

(2) An hotel keeper by opening his house as an hotel offers it to the use of the public as such & thereupon the common law of England imposes upon him certain duties, & gives him certain rights (LORD ESHER, M.R.).

(3) If the innkeeper has no room in his house, then he is not bound to take in any person who offers himself as a guest (LORD ESHER, M.R.).

(4) From first to last there was no special contract; there was nothing but the ordinary relation of innkeeper & guest though it was to continue for an indefinite time (LORD ESHER, M.R.).—**MEDAWAR v. GRAND HOTEL CO.**, [1891] 2 Q. B. 11; 60 L. J. Q. B. 209; 64 L. T. 851; 55 J. P. 614; 7 T. L. R. 269, C. A.

*Annotations:—Generally, Refd. Orchard v. Bush* (1898), 78 L. T. 557. *Mentd. Coldman v. Hill*, [1919] 1 K. B. 443.

**202. ——— Property deposited in cloak-room.]—****CRYAN v. HOTEL REMBRANDT, LTD.**, No. 40, *ante*.

**203. Neither party negligent—Damages limited**

given case the rules of that Act will apply. Where, therefore, the property of a guest at a hotel was stolen from his room while he was at dinner in a different part of the hotel occupied, & it was found that the room occupied by him was to the knowledge of the hotel keeper in an insecure condition which

the latter had taken no steps to rectify:—*Held*: the hotel keeper was liable.—**JAN v. CAMERON** (1922), 1 L. R. 44 All. 735.—**IND.**

**y. ———.]—O'CONNOR v. GRAND INTERNATIONAL HOTEL CO.**, [1898] 2 L. R. 92.—**IR.**

**to thirty pounds.]—**(1) Pltf. while a guest at defts.' hotel had certain jewellery stolen. The jury found that the loss was caused by the negligence of defts.' servants in not having the premises searched upon the discovery of a poker & knife on the bed in pltf.'s dressing-room, from which the jewellery was stolen, & that there had also been negligence on the part of pltf., but that it was of a less degree than that of defts.:—*Held*: on the evidence, these findings were wrong, there was no negligence on the part of defts.' servants, nor on the part of pltf. & pltf. was entitled to judgment for £30 only.

(2) In pltf.'s room was a notice that "articles of value, if not kept under lock, should be deposited with the manager, who will give a responsible receipt for the same." The jewellery was kept in a locked jewel-box, which was in a basket-trunk that was locked in pltf.'s dressing-room. The jury found that this notice constituted a special bargain with pltf. that defts. would be responsible if jewels were kept under lock:—*Held*: there was no evidence to justify such finding.—**HUNTLY (MARCHIONESS) v. BEDFORD HOTEL CO., LTD.** (1891), 56 J. P. 53; 7 T. L. R. 641, C. A.

**204. Contributory negligence of guest—Effect.]—****MEDAWAR v. GRAND HOTEL CO.**, No. 201, *ante*.

#### *B. Notice Limiting Liability.*

*See Innkeepers' Liability Act, 1863 (c. 41).*

**205. Form—Material omission in exception.]—**

Deft., an innkeeper, caused a paper which purported to be a copy of Innkeepers' Liability Act, 1863 (c. 41), s. 1, to be exhibited in the hall or entrance to his inn, but the paper was unintentionally misprinted, & the sentence stood: "Where such property shall have been stolen, lost, or injured through the wilful default or neglect of such innkeeper or any servant in his employ." Pltf., while a guest at deft.'s inn, had stolen from his bedroom at night property amounting to the value of £119:—*Held*: the notice contained no statement which admitted the continuance of the common law liability for the goods or property stolen, lost, or injured through the wilful act of the innkeeper or his servant, & therefore did not protect deft.—**SPICE v. BACON** (1877), 2 Ex. D. 463; 46 L. J. Q. B. 713; 36 L. T. 896; 42 J. P. 261; 25 W. R. 840, C. A.

*Annotations:—Refd. Herbert v. Markwell* (1881), 45 L. T. 649; *Heane v. Norfolk Hotel Co.* (1888), 4 T. L. R.

**206. Exhibition in conspicuous part of entrance or hall—Necessity for.]—**Innkeepers' Liability Act, 1863 (c. 41), by sect. 1 limited the liability of innkeepers in respect of their goods of their guests to £30, except in certain cases. Sect. 3 makes the exhibition of a copy of the first sect. in a conspicuous place a condition precedent to the immunity granted by the Act (LINDLEY, L.J.).—**HODGSON v. FORD & SONS** (1892), 8 T. L. R. 722, C. A.

**207. ——— Notice in vestibule.]—****HEANE v. NORFOLK HOTEL CO., LTD.** (1888), 4 T. L. R. 635.

**208. ——— Notice on first floor.]—**Defts. had no copy of Innkeepers' Liability Act, 1863 (c. 41), s. 1, placed, as required by sect. 3 "in a conspicuous

#### **PART II. SECT. 3, SUB-SECT. 2.—B.**

**a. Effect of.]—***Held*: deft. could not limit his liability under the common law merely by posting up a notice to that effect in his hotel & without proof that pltf. agreed thereto.—**DAVIS v. LOCKSTONE**, [1921] App. D. S. AF.



part of the hall or entrance to his inn ; " but they had one on the first floor. They therefore could not avail themselves of the defence of limited liability of £30.—*CAREY v. LONG'S HOTEL CO., LTD.* (1891), 7 T. L. R. 213, C. A.

**209. Whether forming special contract—Between guest & innkeeper.]**—*HUNTLY (MARCHIONESS) v. BEDFORD HOTEL CO., LTD.*, No. 203, *ante*.

**210. ———.]**—*CRYAN v. HOTEL REMBRANDT, LTD.*, No. 40, *ante*.

### C. Deposit of Goods for Safe Custody.

See Innkeepers' Liability Act, 1863 (c. 41).

**211. Authority to receive for safe custody—Boots.]**—Pltf., who was staying at deft.'s hotel, instructed the porter to give his bag, containing jewelry, into the charge of the boots, which he did. The boots put the bag by the side of his desk. The bag & its contents were afterwards missed, & never recovered. Pltf. brought an action against the hotelkeeper for the value of the jewelry :—*Held* : the boots was not a person who had authority to receive the bag " expressly for safe custody," & pltf. could not recover.—*MOSS v. RUSSELL* (1884), 1 T. L. R. 13, C. A.

**212. Innkeeper must be expressly informed & receive goods with intention of accepting liability.]**—To constitute an express deposit for safe custody within Innkeeper's Liability Act, 1863 (c. 41), s. 1 (2), it must be proved that something was said or done by the guest whose property the goods were that would convey to the innkeeper the fact that the goods were being deposited with him for safe custody ; & that the innkeeper received them into his charge with the intention of making himself liable for their safety.—*WHITEHOUSE v. PICKETT*, [1908] A. C. 357 ; 77 L. J. P. C. 89 ; 99 L. T. 367 ; 24 T. L. R. 766 ; 52 Sol. Jo. 620, H. L.

*Annotations* :—*Consd.* *Behrens v. Grenville Hotel (Bude)* (1925), 69 Sol. Jo. 346. *Folld.* *Cryan v. Hotel Rembrandt* (1925), 133 L. T. 395.

**213. Cloak left by dining guest.]**—*CRYAN v. HOTEL REMBRANDT, LTD.*, No. 40, *ante*.

### 3.—ACTIONS AGAINST INNKEEPERS.

**214. General rule.]**—*SAUNDERS v. PLUMMER*, No. 194, *ante*.

**215. ———.]**—*GORDON v. SILBER*, No. 259, *post*.

**216. By whom action brought — Owner or carrier.]**—*ANON.* (1553), Ben. 8 ; 123 E. R. 231.

**217. ———.]**—*CLARK v. COLIBERE* (1583), Ch. Cas. in Ch. 172 ; 21 E. R. 100.

**218. ——— Master or servant.]**—*DROPE v. THAIRE* (1626), Benl. 173 ; 2 Dyer, 158 b, n. ; Lat. 126 ; Noy, 79 ; Poph. 178 ; 79 E. R. 1274.

*Annotations* :—*Refd.* *Strauss v. County Hotel Co.* (1883), 32 W. R. 170. *Mentd.* *York v. Grindstone* (1704), 1 Salk. 388.

**219. ——— Owner or friend.]**—*BEDLE v. MORRIS* (1609), Yelv. 162 ; 80 E. R. 108 ; *sub nom.* *BEDLE v. MORRIS*, Cro. Jac. 224.

**220. ——— Administrator of intestate.]**—*SAUNDERS v. PLUMMER*, No. 194, *ante*.

**221. Against whom action brought — Executor of innkeeper.]**—(1) Wherever a relation exists between two parties, which involves the performance of certain duties by one of them & the payment of reward to him by the other, the law will imply, or a jury may infer, a promise by each party to do what is to be done by him. Therefore an action may be maintained against the exors. of an innkeeper on his implied promise to keep safely & without diminution the goods of his guest. The exors. are also liable in " tort " the loss of the goods being a wrong committed within 3 & 4 Will. 4, c. 42, s. 2.

(2) An innkeeper, though guilty of no negligence but even diligent, is liable for the loss or injury of the goods of his guest not arising from the negligence of the guest, the act of God, or the Queen's enemies.

The omission of the guest to leave valuable articles with the innkeeper or to fasten his door on retiring to rest is not necessarily such negligence as disentitles him to recover.—*MORGAN v. RAVEY* (1861), 6 H. & N. 265 ; 2 F. & F. 283 ; 30 L. J. Ex. 131 ; 3 L. T. 784 ; 25 J. P. 376 ; 9 W. R. 376 ; 158 E. R. 109.

*Annotations* :—*As to* (1) *Refd.* *Batthyany v. Walford* (1887), 36 Ch. D. 269. *As to* (2) *Refd.* *Herbert v. Markwell* (1881), 45 L. T. 649 ; *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11. *Generally, Mentd.* *Baylis v. Lintott* (1873), L. R. 8 C. P. 345 ; *Robb v. Green*, [1895] 2 Q. B. 1 ; *Jackson v. Watson*, [1909] 2 K. B. 193.

**222. ——— Innkeeper — Not manager.]**—Pltf. having lost his goods at an hotel, of which a co. were proprietors, sought to recover their value in an action against the paid manager, in whose name the justices' licence had been granted :—*Held* : the co. were the real " innkeepers " ; & therefore, the action was not maintainable.—*DIXON v. BIRCH* (1873), L. R. 8 Exch. 135 ; 42 L. J. Ex. 135 ; 28 L. T. 360 ; 21 W. R. 443.

**223. What actions maintainable — Trover.]**—How far an action of trover will lie against an innkeeper.—*STAVERS v. PARKER* (1730), 1 Barn. K. B. 434 ; 94 E. R. 292.

**224. ——— Horse distrained from stable—Stable no part of inn.]**—*CROSER v. THOMLINSON* (1759), Barnes, 472 ; 2 Keny. 439 ; 94 E. R. 1009.

*Annotations* :—*Mentd.* *Williams v. Holmes* (1853), 8 Exch. 861 ; *Lyons v. Elliott* (1876), 1 Q. B. D. 210.

**225. Statement of claim—Description of goods lost.]**—*HERBERT v. LANE*, No. 136, *ante*.

**226. Gist of action.]**—In all actions in inferior cts., the gist of the action must be stated to have arisen within the jurisdiction. In an action against an innkeeper for keeping a horse so negligently, that he was ridden, the negligent keeping is the gist of the action. The riding matter of aggravation only.—*DAVIS v. STANNION* (1704), 2 Ld. Raym. 1040 ; 92 E. R. 191 ; *sub nom.*

### PART II. SECT. 3, SUB-SECT. 2.—C.

**b. Innkeeper must be expressly informed—& receive goods with intention of accepting liability.]**—Pltf. went as a guest to deft.'s inn. While there a parcel containing jewellery was sent to him on approval. On receiving the parcel, pltf. handed it to the manageress at the office or bar, saying, " Keep that for me," but not stating anything as to its value or contents. The parcel was stolen, but not through the wilful act, default or neglect of defts.

or any servant in their employ. The usual notices in compliance with the Act were hung up in the inn. Pltf., who had paid the jeweller the value of the parcel, £186, having brought this action for damages for its loss :—*Held* : the non-disclosure by pltf. of the value & contents of the parcel did not amount to contributory negligence on his part ; but the deposit was not a deposit " expressly for safe custody " within Innkeepers Act, 1863 (c. 41), & therefore, in the absence of evidence of any wilful act, default, or neglect on defts.'

part pltf. could not hold them responsible to a greater amount than £30. A guest who deposits an article with an innkeeper cannot in the absence of default or neglect, hold the innkeeper responsible to a greater amount than £30 for its loss, unless, when making the deposit, he informs the innkeeper, in a reasonable & intelligible manner, that the deposit is for the safe custody of the article.—*O'CONNOR v. GRAND INTERNATIONAL HOTEL CO.*, [1898] 2 I. R. 92.—*IR.*

**Sect. 3.—Protection of guest's property: Sub-sect. 3.**  
**Sects. 4 & 5. Part III. Sects. 1 & 2: Sub-**  
**1 & 2, A. (a).]**

STANYON v. DAVIS, Holt, K. B. 13; 6 Mod. Rep. 223; 1 Salk. 404.

**Annotations:—***Mentd.* R. v. Helling (1716), 1 Stra. 8; Emery v. Barlett (1729), 2 Stra. 827; Harvey v. Phillips (1743), 2 Atk. 541; Woodward v. Walton (1807), 2 Bos. & P. N. R. 476.

#### SECT. 4.—GUEST'S DEBTS.

**227. Innkeeper not liable—Unpaid laundry bill.]—**The master of an hotel is not liable to pay for the washing of the linen of the guests at his house.—CALLARD v. WHITE (1810), 1 Stark. 171.

#### SECT. 5.—INJURY TO CATTLE OR SHEEP.

*See* ANIMALS, Vol. II., p. 247, No. 309.

## Part III.—Remedies of Innkeepers.

### SECT. 1.—ACTION

**228. For what action may be brought—Keep of horse.]—**WARBROOKE v. GRIFFIN, No. 276, *post*.

**229. ——— Accommodation supplied.]—**SAUNDERS v. PLUMMER, No. 194, *ante*.

**230. Against whom action may be brought—Person requesting innkeeper to board stranger.]—**An *indebitatus assumpsit* lies for boarding a stranger at deft.'s request.—HART v. LONGFIELD (1703), 7 Mod. Rep. 148; 2 Ld. Raym. 841; 87 E. R. 1156.

**Annotation:—***Mentd.* Campbell v. R. (1846), 11 Q. B. 799.

**231. ——— Persons dining together—Regimental mess—Each liable for own share.]—**BROWN v. DOYLE (1788), 3 Camp. 51, n., N. P.

**232. ——— Each liable for whole amount.]—**Where a private Act of Parliament provided for the expense of maintaining the jury summoned to assess the value of property, taken under the Act, this does not extend to a dinner at a tavern given to the jury after delivering in their verdict.

Where a party of several persons dine together at a tavern, they are jointly liable for the whole expense, & not merely each for his own share.—FORSTER v. TAYLOR (1811), 3 Camp. 49, N. P.

**233. ——— Attorney taking witnesses to inn.]—**An attorney who takes witnesses to an inn, is *prima facie* liable to the innkeeper for the expenses incurred.—CARISS v. RICHARDSON (1822), 1 L. J. O. S. K. B. 11.

**234. ——— Parties not authorised agents of candidate—7 & 8 Will. 3, c. 4.]—**Provisions & entertainment given to voters at an election are not within above Act, s. 1, if not supplied by the direction of the candidate or his authorised agents. Consequently, an innkeeper may maintain an action against parties, not the authorised agents of a candidate, for entertainment & provisions furnished on their credit to voters in the interest of such candidate.—HUGHES v. MARSHALL (1831), 2 Cr. & J. 118; 5 C. & P. 150; 2 Tyr. 134; 1 L. J. Ex. 16; 149 E. R. 49.

**Annotation:—***Mentd.* Norwich Case (1869), 1 O'M. & H. 8.

**235. ——— Railway company—Implied authority of inspector to incur expenses.]—**A railway accident having happened, two men injured thereby were removed into the inn of L., where the inspector of the railway co. visited them, as it was part of his duty to do, & on being asked by one of the injured persons who would pay their expenses, told him not to trouble himself, for that the co.

would see that that was right. The innkeeper thereupon supplied all the wants of the men:—*Held*: there was evidence to go to the jury of an implied authority from the co. to the inspector to incur the expenses.—LANGAN v. GREAT WESTERN RY. CO. (1872), 26 L. T. 577; 36 J. P. 565; *affd.* (1873), 30 L. T. 173, Ex. Ch.

**236. What action may be brought—Refusal of guest to pay—Not trespass.]—**If one comes into a tavern to drink, & when he has drunk he goes away, & will not pay the taverner, it is no trespass, but the taverner shall have an action of debt.—SIX CARPENTERS' CASE (1610), 8 Co. Rep. 146 a; 77 E. R. 695.

**Consd.** Hickman v. Maisey (1900), 69 L. J. Q. B. 511; Canadian Pacific Wine Co. v. Tuley, [1921] 2 A. C. 417. **Reid.** Isaack v. Clark (1615), 2 Bulst. 308; Griffin v. Scott (1726), 2 Ld. Raym. 1424; Northampton Corpn. v. Ward (1745), 2 Stra. 1238; Austin v. Whittred (1746), Willes, 623; Winterbourne v. Morgan (1809), 11 East, 395; Ditcham v. Bond (1814), 3 Camp. 524; Thompson v. Lacy (1820), 3 B. & Ald. 283; Shorland v. Govett (1826), 5 B. & C. 485; Bristol Gdns. v. Wait (1834), 1 Ad. & El. 264; Kerby v. Denby (1836), 1 M. & W. 336; Smith v. Egginton (1837), 7 Ad. & El. 167; Jacobsohn v. Blake (1844), 6 Man. & G. 919; King v. Rochdale Canal Co. (1851), 15 Jur. 896; Ambergate, etc. Ry. v. Mid. Ry. (1853), 2 E. & B. 793; Westminster Corpn. v. L. & N. W. Ry., [1905] A. C. 426. **Mentd.** Horn v. Luines (1700), 12 Mod. Rep. 352; Moyse v. Cocksedge (1748), Willes, 636; Taylor v. Cole (1791), 1 Hy. Bl. 555; Phillips v. Bacon (1808), 9 East, 298; Lucas v. Nockells (1833), 10 Bing. 157; Reece v. Taylor (1835), 4 Nev. & M. K. B. 469; Evans v. Elliott (1836), 2 Har. & W. 231; Ellis v. Taylor (1841), 8 M. & W. 415; Harvey v. Pocock (1843), 11 M. & W. 740; Peters v. Clarkson (1844), 7 Man. & G. 548; Gulliver v. Cosens (1845), 1 C. B. 788; Webster v. Watts (1847), 17 L. J. Q. B. 73; West v. Nibbs (1847), 4 C. B. 172; Glynn v. Thomas (1856), 11 Exch. 870; O'Neill v. City & County Finance Co. (1886), 17 Q. B. D. 234; Long v. Clarke (1893), 42 W. R. 130; Durant v. Roberts Maxsted, [1900] 1 Q. B. 629.

**237. Pleading payment.]—***Semble*: if a guest at an inn pays his bill before leaving, no debt ever arises, & payment need not therefore be pleaded.—WOOD v. BLETCHER (1856), 27 L. T. O. S. 126; 4 W. R. 506.

### SECT. 2.—LIEN.

#### SUB-SECT. 1.—IN GENERAL.

*See* Innkeepers Act, 1878 (c. 38).

**238. Foundation of right—Obligation to receive guests & property.]—**SCARFE v. MORGAN, No. 67, *ante*.

**239. ———.]—**B. lent a pianoforte to a professional pianist, whilst staying as a guest at

#### PART III. SECT. 1.

**c. For what action may be brought—Damage to furniture.]—**Deft.'s wife went to stay at a hotel owned by plffs. While there, she was seized with cholera & died. In consequence of the infectious nature of the disease, plffs. were obliged to destroy the furniture

which was in the rooms of deft.'s wife & used by her during her illness. Plffs. subsequently sued to recover the value of such furniture from deft.:—*Held*: in the absence of evidence to show that deceased had not taken as much care of the furniture as a person of ordinary prudence would, under

similar circumstances, take of his own goods, deft. was not liable.—RAMPAL SINGH v. MURRAY & Co. (1899), 1 L. R. 22 All. 164.—IND.

#### PART III. SECT. 2, SUB-SECT. 1.

**d. General rule.]—**If a person goes to an inn & deposits his goods with



an inn, the innkeeper well knowing that the pianoforte was the property of B.:—*Held*: the innkeeper had no lien on the pianoforte for the bill due from his guest.

If a person brings the horse of another to an inn the innkeeper may detain it from the owner until its keep is paid. But if as the jury found in *Johnson v. Hill*, No. 265, *post*, the innkeeper knew that the person bringing the horse illegally got possession of it & therefore had no right to pledge it for his debt, then the lien does not attach (PLATT, B.).

The principle on which an innkeeper's lien depends is, that he is bound to receive travellers & the goods which they bring with them to the inn. Then inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which in the performance of his duty to the public he is bound to receive. The obligation to receive depends on his public profession (PARKE, B.).—*BROADWOOD v. GRANARA* (1854), 10 Exch. 417; 3 C. L. R. 177; 24 L. J. Ex. 1; 24 L. T. O. S. 97; 19 J. P. 39; 1 Jur. N. S. 19; 3 W. R. 25; 156 E. R. 499.

*Annotations*:—*Distd.* *Snead v. Watkins* (1856), 1 C. B. N. S. 267; *Threfall v. Borwick* (1872), L. R. 7 Q. B. 711; *Robins v. Gray*, [1895] 2 Q. B. 501.

**240. — Custom of the realm.**—A commercial traveller who travelled for pliffs. went in the course of their business to stay as a guest at deft.'s inn. While he was there pliffs. sent to him certain parcels of goods for sale in the district. Deft. at the time they were received into his inn had express notice that the goods were the property of pliffs., but he received them as the baggage of the traveller, who subsequently failed to pay for his board & lodging in the inn:—*Held*: deft. had a lien upon the goods in respect of the debt.

The duties, liabilities & rights of innkeepers with respect to goods brought to inns are founded not upon bailment or pledge or contract, but upon the custom of the realm with regard to innkeepers (LORD ESHER, M.R.).—*ROBINS & CO. v. GRAY*, [1895] 2 Q. B. 501; 65 L. J. Q. B. 44; 73 L. T. 252; 59 J. P. 741; 44 W. R. 1; 11 T. L. R. 569; 39 Sol. Jo. 734; 14 R. 671, C. A.

*Annotations*:—*Distd.* *Matsuda v. Waldorf Hotel Co.* (1910), 27 T. L. R. 153. *Refd.* *Cassils & Sassoon v. Holden Wood Bleaching Co.* (1914), 84 L. J. K. B. 834.

**241. Nature of right—Right of detainer only.**—*SUNBOLF v. ALFORD*, No. 244, *post*.

**242. Commencement — From when guest accepted.**—*WRIGHT v. ANDERTON*, No. 37, *ante*.

**243. Liability under lien—To take care.**—*ANGUS v. McLACHLAN*, No. 253, *post*.

## SUB-SECT. 2.—EXTENT OF LIEN.

### A. In respect of What Property.

#### (a) In General.

See Innkeepers Act, 1878 (c. 38).

**244. Goods in innkeeper's possession.**—An innkeeper's lien for the amount of his charges only extends to those goods of which he may have

the innkeeper & incurs a debt, the innkeeper has a lien on the goods.—*R. v. HOUGH & DREW* (1892), 15 N. S. W. L. R. 204; 10 N. S. W. W. N.

**243 i. Liability under lien—To take care.**—A person retaining goods under an innkeeper's lien for board must take reasonable care of them.—*FRANK v. BERRYMAN* (1894), 3 B. C. R. 506.

—CAN.

**e. Automobiles.**—Innkeepers Act did not confer any rights upon the keeper of a garage for automobiles.—*AUTOMOBILE & SUPPLY CO. v. HANDS, LTD.* (1913), 28 O. L. R. 585; 4 O. W. N. 1210.—CAN.

**f. Limitation as to amount secured by lien.**—Innkeepers Act is supplementary to the common law, & the

the possession at the time of exercising his right, which is simply one of detainer; neither authorising him to imprison his guest, nor to take forcible possession of his wearing apparel in present use, or of any goods then in the custody of the guest himself. Either of these acts constitutes a trespass, for which the innkeeper is liable.—*SUNBOLF v. ALFORD* (1838), 3 M. & W. 248; 1 Horn & H. 13; 2 J. P. 136; 2 Jur. 110; 150 E. R. 1135; *sub nom.* *TUNBOLF v. ALFORD*, 7 L. J. Ex. 60.

*Annotations*:—*Refd.* *Broadwood v. Granara* (1854), 19 J. P. 39. *Mentd.* *Spitzer v. Chaffers* (1863), 14 C. B. N. S. 686.

**245. Goods brought to inn by guest—Whether his own or another's.**—*THREFAILL v. BORWICK*, No. 258, *post*.

**246. —**—(1) The lien of an innkeeper is general, & extends to all goods & chattels belonging to his guest, & therefore a chattel although deposited with the innkeeper & placed by him apart from the personal goods of the guest, may be detained by him on account of money owing to him for the lodging, food, & entertainment of the guest.

(2) The lien of an innkeeper over a chattel belonging to a guest is waived if, in order to reimburse himself, he sells it; & this rule holds good even although the retention of the chattel is attended with expense.

(3) The innkeeper is bound to receive the horses, harness & carriage with the guest as much as he is bound to receive the guest himself (COTTON, L.J.).

(4) An innkeeper may demand the expenses before he receives the guest (BRAMWELL, L.J.).

(5) If an innkeeper sells goods upon which he has a lien, the lien is broken & he is guilty of a conversion, for which the owner of the goods can maintain an action against him & recover the whole of the proceeds of the same as damages.—*MULLINER v. FLORENCE* (1878), 3 Q. B. D. 484; 47 L. J. Q. B. 700; 38 L. T. 167; 42 J. P. 293; 26 W. R. 385, C. A.

*Annotations*:—*As to* (2) *Refd.* *Chesham Automobile Supply v. Beresford Hotel (Birchington)* (1913), 29 T. L. R. 584. *Generally, Mentd.* *Cox v. Liddell* (1895), 2 Mans. 212; *Johnson v. L. & Y. Ry.* (1878), 3 C. P. D. 499; *Whiteley v. Hill*, [1918] 2 K. B. 808.

**247. Goods of guest.**—*THOMPSON v. LACY*, No. 3, *ante*.

**248. —**—(1) The landlord of an inn has a lien on the goods of his guest for board, lodging, & wine supplied to such guest by the guest's order, whatever may be the amount, provided the guest be possessed of his reason, & not an infant. Therefore the sheriff, under a writ of *fi. fa.* against the guest, can only take the guest's goods, subject to the lien of the landlord for such his bill, & not merely subject to a lien for a reasonable quantity of wines, etc., only.

(2) The landlord of an inn has a lien for money lent to his guest, if it was agreed between them at the time of the loans that the guest's goods should be a security for the sums lent.

(3) Sale of Spirits Act, 1750 (c. 40), s. 12, which prevents a person from recovering for spirits supplied to a smaller amount than 20s. at a time, does not apply to spirits supplied by a hotel-

common law right of the innkeeper to a lien on the property of a stranger brought to the inn by a guest has not been taken away by the statute, but one of its purposes is to limit the liability of the innkeeper to \$40 in certain cases & in certain other cases to \$5.—*UNITED TYPEWRITER CO. v. KING EDWARD HOTEL CO.* (1914), 32 O. L. R. 126; 30 D. L. R. 519; 7 O. W. N. 173.—CAN.

**Sect. 2.—Lien: Sub-sect. 2, A. (a), (b), (c) & (d).**

keeper to a guest who is resident in his hotel.—

PROCTOR v. NICHOLSON (1835), 7 C. & P. 67, N. P. Annotation:—As to (3) *Reid*. Hughes v. Done (1841), 1 Q. B. 294.

249. Clothing worn by guest.]—SUNBOLF v. ALFORD, No. 244, ante.

250. Goods in custody of guest.]—SUNBOLF v. ALFORD, No. 244, ante.

251. Chattel deposited separately from personal goods.]—MULLINER v. FLORENCE, No. 246, ante.

**(b) Goods Left as Security.**

252. For hotel charges.]—ROSS v. BROMSTEAD (1624), Benl. 144; 73 E. R. 999.

253. —.]—An innkeeper who accepts security from his guest for the payment of hotel charges does not waive his lien at common law upon the goods of the guest for the amount of such charges unless there is something in the nature of the security, or in the circumstances under which it was taken, which is inconsistent with the existence or continuance of the lien & therefore destructive of it. An innkeeper retaining the goods of his guest by virtue of such lien is not bound to use greater care as to their custody than he uses as to his own goods of a similar description.—ANGUS v. McLACHLAN (1883), 23 Ch. D. 330; 52 L. J. Ch. 587; 48 L. T. 803; 31 W. R. 641.

Annotation:—Consd. *Re Morris*, [1908] 1 K. B. 473.

254. For money lent—By special agreement.]—PROCTOR v. NICHOLSON, No. 248, ante.

255. — Stolen railway tickets.]—Defts., who were innkeepers, lent money to a guest staying at their hotel on the security of three railway tickets which he had in his possession. The tickets had been stolen from pltf., who now claimed them from defts. Defts. set up that they were entitled to a lien upon the tickets as innkeepers:—*Held*: pltf. was entitled to recover, as the transaction between defts. & the guest was merely a moneylending transaction, & no question of innkeeper's lien arose.—MATSUDA v. WALDORF HOTEL CO., LTD. (1910), 27 T. L. R. 153.

Effect of accepting security for payment—No waiver of lien.]—See No. 253, ante.

**(c) Property of Third Party.**

256. Brought to inn by guest.]—TURRILL v. CRAWLEY, No. 68, ante.

257. —.]—Goods brought by a guest to an inn are subject to the innkeeper's lien, though they may turn out to be the property of a third person. H., who had formerly been clerk to pltf., an attorney, was subpoenaed as a witness in an action by his late employer to recover the cost of a bill of costs. H. put up at a public-entertainment at Westminster kept by

a bag containing, amongst other things, a letter-book belonging to pltf. Whilst at deft.'s house, H. became indebted to deft. for lodging & refreshments, & quitted without paying his bill, leaving behind him the bag with the letter-book, which deft. refused to deliver up to pltf. on demand, claiming a lien for his bill against H.:—*Held*: the claim of lien was valid.—SNEAD v. WATKINS (1856), 1 C. B. N. S. 267; 26 L. J. C. P. 57; 21 J. P. 263; 140 E. R. 111.

Annotation:—*Reid*. Gordon v. Silber (1890), 55 J. P. 134.

**PART III. SECT. 2, SUB-SECT. 2.—****A. (c).**

g. Relationship of boarding-house keeper to a guest who is resident in his hotel.—

(1886), 11 O. R.

—Innkeepers Act does not purport to give to the livery stable keeper as wide a lien as the common law lien of the innkeeper; it

words to upon the property of a third & BUTTLY CO. v. O.

O. W. N.

258. —.]—An innkeeper has a lien on all goods which a guest brings with him as his own, whether they are his own or another's, & this lien extends to goods which an innkeeper would not have been bound to receive.

A. went to deft.'s inn & stayed there with his family for some time; he took with him to the inn a piano as his own which he had hired of pltf. A. having left the inn in debt to deft., deft. claimed as against pltf. to detain the piano by virtue of his lien as innkeeper:—*Held*: whether deft. as innkeeper was bound to take in the piano or not, having done so, he had a lien upon it.

I may say that I should be inclined to agree, if a guest brought his piano with him for his own amusement, that, according to the advanced usages of society, the innkeeper might be well held to be bound to receive it, if he has room for it (LORD COLERIDGE, C.J.).—THREFAILL v. BORWICK (1875), L. R. 10 Q. B. 210; 44 L. J. Q. B. 87; 32 L. T. 95; 39 J. P. 409; 23 W. R. 312, Ex. Ch.

259. —.]—(1) Defts., husband & wife, stayed at pltf.'s hotel; the wife had with her a quantity of luggage, which was her separate property; credit was given to the husband, who made payments on account. The balance of pltf.'s bill not being paid, pltf. detained the wife's luggage in the alleged exercise of their right of lien:—*Held*: pltf. were entitled to a lien upon the goods notwithstanding that they were the separate property of the wife.

If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to title (LOPES, L.J.).

(2) The innkeeper is under an obligation to keep the goods of a guest received into the inn safely & securely, & can be sued & made liable in damages if he fails in this respect (LOPES, L.J.).—GORDON v. SILBER (1890), 25 Q. B. D. 491; 59 L. J. Q. B. 507; 63 L. T. 283; 55 J. P. 134; 39 W. R. 111; 6 T. L. R. 487.

Annotations:—As to (1) *Apprvd.* Robins v. Gray, [1895] 2 Q. B. 501. *Reid*. Lamond v. Richard, [1897] 1 Q. B. 541; Wright v. Anderton (1908), 78 L. J. K. B. 165. As to (2) *Apprvd.* Robins v. Gray, [1895] 2 Q. B. 501.

260. — Innkeeper's knowledge as to ownership.]—BROADWOOD v. GRANARA, No. 239, ante.

261. — —.]—ROBINS & CO. v. GRAY, No. 240, ante.

262. Brought to inn by stranger—Horse.]—ROBINSON v. WALTER, No. 64, ante.

263. — —.]—STIRT v. DRUNGOLD, No. 270.

264. — —.]—(1) An innkeeper may detain for his keep against the right owner a horse left with him to be kept though the persons who left him had no right with him, & though such persons did not stay in the inn, & the innkeeper received the horse at such person's request & omitted demanding anything for the keep upon application by the owner for his horse.

(2) Leaving his horse at an inn makes a man a guest there.—YORKE v. GRENAUGH (1703), 2 Ld. Raym. 806; 92 E. R. 79; *sub nom.* YORK v. GRINDSTONE, 1 Salk. 388.

As to (1) *Consd.* Turrill v. Crawley (1849), 13 Jur. 878. *Reid*. Bevan v. Waters (1828), 3 C. & P. 520; Judson v. Etheridge (1833), 1 Cr. & M. 743; *Consd.* v. Wood Bleaching Co. (1914), 84 L. J. K. B. 834. As to (2) *Reid*. Smith v. Dearlove (1884), 6 C. B. 132; Turrill v. Crawley (1849), 13 Jur. 878.



**265. — Innkeeper's knowledge as to ownership.]—**A. under colour of a legal proceeding, having wrongfully seized the horse of B., takes it to an inn where it is kept for several days. C., the landlord, refuses to deliver up the horse to B. upon a demand made soon after the delivery to him, but a few days afterwards offers to give up the horse to B. on being paid the sum of 10s. for the keep. C. has a lien upon the horse for the keep, unless he knew that A. was a wrongdoer in seizing the horse.—*JOHNSON v. HILL* (1822), 3 Stark. 172, N. P.

*Annotations:—***Appld.** *Broadwood v. Granara* (1854), 10 Exch. 417. **Refd.** *Turrill v. Crawley* (1849), 13 Q. B. 197.

**266. — Stolen horse brought in by police.]—**An innkeeper has no lien on a horse placed in his stable for the amount of its keep unless it be placed there by a guest. If a person is stopped with a horse under suspicious circumstances, & the horse be placed at an inn by the police, the innkeeper has no lien on the horse for its keep, & if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owner of the horse.—*BINNS v. PIGOT* (1840), 9 C. & P. 208, N. P.

**267. — ]—***BROADWOOD v. GRANARA*, No. 239, *ante*.

**268. Goods of wife of guest—Wife's luggage as separate property.]—***GORDON v. SILBER*, No. 259, *ante*.

#### (d) Horses.

**269. Right to detain horse for keep.]—**ANON. (1465), Y. B. 5 Edw. 4, fo. 2, pl. 20.

*Annotations:—***Refd.** *Anon.* (1623), Palm. 367; *Chase v. Westmore* (1816), 5 M. & S. 180.

**270. — ]—**Where a stranger brought pltf.'s horse, saddle, bridle, & saddle cloth to deft.'s inn & left them there for seven weeks:—*Held*: deft. could keep the horse till pltf. paid for its keep.

*Qu.*: whether he might retain his saddle, bridle & cloth.—*STIRT v. DRUNGOLD* (1617), 3 Bulst. 289; 81 E. R. 242.

*Annotation:—***Refd.** *Turrill v. Crawley* (1849), 13 Q. B. 197.

**271. — ]—***CHAPMAN v. ALLEN* (1632), Cro. Car. 271; 79 E. R. 836.

*Annotations:—***Expld.** *Chase v. Westmore* (1816), 5 M. & S. 180. **Consd.** *Jackson v. Cummins* (1839), 5 M. & W. 342. **Refd.** *Hutton v. Bragg* (1816), 2 Marsh. 339; *Judson v. Etheridge* (1833), 1 Cr. & M. 743.

**272. — ]—***SAUNDERS v. PLUMMER*, No. 194, *ante*.

**273. — ]—***NEWTON v. TRIGG*, No. 22, *ante*.

**274. — ]—**An innkeeper has a right to detain a horse for the expenses of his keep; but he cannot sell the horse & by that means pay himself; & if by suffering the horse to depart, or by any other means, he gives credit to the owner, he cannot afterwards detain him upon his coming again into his possession.—*JONES v. THURLOE* (1723), 8 Mod. Rep. 172; 88 E. R. 126; *sub nom.* *JONES v. PEARLE*, 1 Stra. 557.

*Annotations:—***Refd.** *Chase v. Westmore* (1816), 5 M. & S. 180. **Mentd.** *Snead v. Watkins* (1856), 1 C. B. N. S. 267.

#### PART III. SECT. 2, SUB-SECT. 2.— A. (d).

**269 i. Right to detain horse for keep.]—***Held*: an innkeeper has a lien, for the keep of horses, only on the property of a guest.—*CRABTREE v. GRIFFITH* (1862), 22 U. C. R. 573.—**CAN.**

**269 iii. — ]—**An innkeeper, claiming to act under R. S. O. 1887 (c. 154), sold by public auction a stallion be-

longing to pltf., a boarder at the inn, to enforce a lien thereon for the keep & accommodation thereof:—*Held*: the lien existed & the sale was authorised.—*HUFFMAN v. WALTERHOUSE* (1890), 19 O. R. 186.—**CAN.**

**275 i. — Unless special agreement.]—**Pltf., owning a line of stages, entered into a special agreement with deft., an innkeeper, for the stabling & feed of their horses. Some dispute arose as to deft.'s charges, & ascertaining that pltf. intended to remove their horses to another inn he refused to

**275. — Unless special agreement.]—**If a man brings his horse to an inn, & leaves him there in the stable without any special agreement what to pay, there the innholder is not bound to deliver the horse till the party & owner has defrayed his charge for the horse, but he may justify the detainer of the horse for his food & keeping: & after the horse has eaten as much as he is worth, the innholder, upon a reasonable praisement, may sell him, & it is a good sale in law.—*HOSTLER'S CASE* (1605), Yelv. 66; 80 E. R. 46.

*Annotations:—***Consd.** *Chase v. Westmore* (1816), 5 M. & S. 180. **Refd.** *Jones v. Pearle* (1723), 1 Stra. 557; *R. v. Cotton* (1751), Park. 112; *Hutton v. Bragg* (1816), 2 Marsh. 339. **Mentd.** *Incedon v. Crips* (1702), 2 Salk. 658.

**276. — Whether horse becomes innkeeper's property—Value of keep amounting to value of horse—No general custom.]—**An innkeeper with whom a horse is left, can detain it for its keep, & further has an action for the keep; but there is no general custom by which the horse becomes his property when the value of the keep amounts to the value of the horse or more. Such a custom prevailed only in London & Exeter.—*WARBROOKE v. GRIFFIN* (1609), 2 Brownl. 254; 123 E. R. 927; *sub nom.* *WATBROKE v. GRIFFITH*, Moore, K. B. 876.

*Annotations:—***Refd.** *Jones v. Pearle* (1723), 1 Stra. 557. **Mentd.** *Cashill v. Wright* (1856), 2 Jur. N. S. 1072.

**277. Right to feed horse — Directions by guest not to feed—Disclaimer of responsibility.]—***GILBERT v. BERKELEY* (1696), Holt, K. B. 366; Skin. 618; 90 E. R. 1102.

**Horses belonging to third party.]—**See Sub-sect. 2, A. (c), *ante*.

#### B. In respect of What Charges.

**278. Charges not incurred as guest.]—**An innkeeper received the carriage & horses of a person not residing at his inn. Whilst they were in his possession the owner took refreshments occasionally at the inn, & a friend of his resided there for some time at the owner's credit, & by his direction:—*Held*: the innkeeper had no lien upon the carriage, etc., for the amount of his bill, which included charges for the keep of the horses, the standing of the carriage, & refreshments for the owner & his friend.—*SMITH v. DEARLOVE* (1848), 6 C. B. 132; 17 L. J. C. P. 219; 11 L. T. O. S. 87; 12 Jur. 377; 136 E. R. 1202.

*Annotation:—***Refd.** *Gordon v. Silber* (1890), 25 Q. B. D. 491.

**279. Stabling, etc., of vehicle — Whether lien extends to board & lodging of guest.]—***TURRILL v. CRAWLEY*, No. 68, *ante*.

**280. Sums lent to or disbursed for guest.]—**In the absence of an express or an implied arrangement under which a visitor at an hotel resides at the hotel in some different capacity from that of other & ordinary visitors, an hotel-keeper cannot set up against such visitor that he has ceased to be responsible as an innkeeper for the loss of the guest's goods, & equally the guest or visitor cannot set up against the innkeeper that the latter has ceased to have a corresponding right of lien,

let them go:—*Held*: deft. had no right of lien, as pltf. were not guests, but employed deft. in the character of a livery stable keeper, & under a special agreement which gave him no continuing right of possession.—*DIXON DALBY* (1853), 11 U. C. R. 79.—**CAN.**

**k. Stolen horse—Stabled by thief.]—**A livery stable keeper has no lien on a horse for its stabling & keep as against the real owner, when the horse was stolen & placed with him by the thief.—*HARDING v. JOHNSTON* (1909), 18 Man. L. R. 625.—**CAN.**

*Sect. 2.—Lien: Sub-sect. 2, B.; sub-sects. 3 & 4. 3 & 4.]*

& this is so even though the visitor has been so long at the hotel that the hotel proprietor could refuse to keep him any longer. The mere fact that the guest is staying at the hotel on inclusive terms does not affect the liability or rights of the innkeeper. A guest who had been staying at defts.' hotel left there on Dec. 21, 1910, leaving an hotel bill unpaid, & leaving a motor car in the hotel garage. About three weeks thereafter, defts. took steps to have the car sold by auction, & for that purpose it was despatched in charge of their servants to London to a firm of auctioneers. On the way there it broke down & had to be towed back, when it was sent to a local repairer for the necessary repairs. After being repaired it was taken to the auctioneers, who advertised it in a London & a local newspaper on Jan. 10, 1913, & catalogued it for sale. The sale was to take place on Feb. 13, that is, more than six weeks from Dec. 21:—*Held*: (1) by sending the motor car off the premises in these circumstances before the expiration of the six weeks mentioned in the proviso to s. 1 of the Innkeepers Act, 1878 (c. 38), defts. had not lost their lien, as they still retained charge of the car, & could have enforced its delivery to the guest if necessary; (2) defts.' lien only extended to the expenses incurred by the guest in respect of food & accommodation & the cost of keeping his goods, & did not extend to sums lent to, or disbursed for, him; (3) defts. were entitled to add to their claim the cost of the repair of the car & the cost of advertising it & arranging with the auctioneers for its sale.—*CHESHAM AUTOMOBILE SUPPLY, LTD. v. BERESFORD HOTEL (BIRCHINGTON), LTD. (1913), 29 T. L. R. 584.*

#### SUB-SECT. 3.—DURATION OF LIEN.

**281. Acceptance of security for debt — Unless security inconsistent with lien.] —***ANGUS v. McLACHLAN, No. 253, ante.*

**282. Property in innkeeper's charge though not on premises—Car sent for sale before expiry of statutory period.] —***CHESHAM AUTOMOBILE SUPPLY, LTD. v. BERESFORD HOTEL (BIRCHINGTON), LTD., No. 280, ante.*

#### SUB-SECT. 4.—HOW

**283. Credit to owner.] —***JONES v. THURLOE, No. 274, ante.*

**284. Stay of guest interrupted — By occasional absences—Intention to return.] —**A. having two horses, went, with them to an inn, in the character of guest, & remained there a considerable time, occasionally taking the horses away for training & racing purposes:—*Held*: (1) the occasional absence of A. with the horses did not destroy the relation of innkeeper & guest, & the innkeeper's lien upon the horses, for his bill, was not, therefore, affected; (2) because the innkeeper had preferred an excessive claim, A. was not, therefore, dispensed from making a tender of the amount he owed for the keep of the horses during the time they were in the stables.—*ALLEN v. SMITH (1863), 1*

*New Rep. 404; 9 Jur. N. S. 1284; 11 W. R. 440, Ex. Ch.*

*Annotations:—Mentd. Rumsey v. N. E. Ry. (1863), 14 C. B. N. S. 641; Kinnaird v. Trollope (1889), 42 Ch. D. 610.*

**285. On sale.] —***MULLINER v. FLORENCE, No. 246, ante.*

#### SECT. 3.—SALE.

*See Innkeepers Act, 1878 (c. 38), s. 1.*

**286. Right to sell horse of guest — Horse having eaten its value—Unless special agreement.] —***HOSTLER'S CASE, No. 275, ante.*

**287. — — —.] —***WARBROOKE v. GRIFFIN (1609), 2 Brownl. 254; 123 E. R. 927; sub nom. WATBROKE v. GRIFFITH, Moore, K. B. 876.*

*Reid. Jones v. Pearle (1723), 1 Stra. 557; Cashill v. Wright (1856), 2 Jur. N. S. 1072.*

**288. — — —.] —***JONES v. THURLOE, No. 274, ante.*

**289. — — — Custom of London.] —**The custom of London as to the innkeepers is this. If one brings a horse to an inn, leaves him there, & goes his way; & the horse eats up more than his price; by the custom of London, the innkeeper may sell this horse to pay himself, but not if the debt was for other horses, as if one do bring many horses into an inn, & afterwards takes all of them away but one, the innkeeper cannot sell this one horse, for payment of that which was due to him for the other horses, by the custom of London, notwithstanding the debt does amount to more than the price of this horse; but every horse is to be sold by the custom to satisfy the debt due for his own meat only.—*MOSS v. TOWNSEND 1 Bulst. 207; 80 E. R. 893.*

*Annotations:—Reid. Mulliner v. Florence (1878), 47 L. J. Q. B. 700. Mentd. Hartop v. Hoare (1743), 2 Stra. 1187.*

**290. — — —.] —***ROBINSON v. WALTER, No. 64, ante.*

**291. — — —.] —***GILBERT v. BERKELEY (1696), Holt, K. B. 366; Skin. 648; 90 E. R. 1102.*

**292. — — —.] —**In an action of trover brought against an innkeeper for a horse, he pleaded not guilty, & upon evidence he showed, that the horse continued in the inn so long, that he had eaten more hay & corn than he was worth; & upon this debt, got the horse appraised, & took him himself at the price he was appraised at. The judge said in this action debt. could have pleaded nothing, but not guilty; but whether evidence would maintain such issue, he thought was a question that deserved consideration.

The custom of the City of London would undoubtedly warrant an innkeeper to appraise & sell a horse in the present circumstances, & he could follow no better rule than that. But yet in the present case debt. could not justify what he did; because he took the horse to himself (*per Cur.*).—*HAWKES v. KING (1729), 1 Barn. K. B. 301; 94 E. R. 204.*

**293. — — —.] —**The case referred to of a horse having eaten its full value is one instance of a right of sale being held to flow from a lien (*PAGE WOOD, V.-C.*).—*THAMES IRON WORKS CO. v. PATENT DERRICK CO. (1860), 1 John. & H. 93;*

#### PART III. SECT. 3.

*cannot sell to him.*  
The requirements as to notice of

1 Geo. 5, c. 49, s. 3, giving innkeepers a lien & a right of sale of goods entrusted to them for arrears of board must be strictly complied with, & further that

a vendor thereunder cannot sell to  
1.—*MARTIN v. HOWARD*  
W. R. 617; 4 O. W. N.  
10 D. L. R. 760.—*CAN.*



29 L. J. Ch. 714 ; 2 L. T. 208 ; 6 Jur. N. S. 1013 ;  
8 W. R. 408 ; 70 E. R. 676.

*Annotations* :—*Mentd.* Lievealey v. Gilmore (1866), L. R.  
1 C. P. 570 ; Aitken v. Bachelor (1893), 62 L. J. Q. B. 193.

294. *Effect of sale—Conversion.*] — MULLINER  
v. FLORENCE, No. 246, *ante*.

295. *Effect of sending for sale.*] — CHESHAM  
AUTOMOBILE SUPPLY, LTD. v. BERESFORD HOTEL  
(BIRCHINGTON), LTD., No. 280, *ante*.

SECT. 4.—DETENTION OF GUEST.

296. *No right of detainer.*] — SUNBOLF v.  
ALFORD, No. 244, *ante*.

297. *Former law.*] — WARD v. CLARK (1790), 9  
Wentworth's Pleading, 362.

*Annotation* :—*Refd.* Sunbolf v. Alford (1838), 3 M. & W. 248.

298. —.]—NEWTON v. TRIGG, No. 22, *ante*.

## INNS OF COURT.

*See* BARRISTERS.

## INNUENDO.

*See* LIBEL AND SLANDER.

## INQUEST.

*See* CONSTITUTIONAL LAW ; CORONERS.

## INQUISITION.

*See* CONSTITUTIONAL LAW ; CORONERS ; CROWN PRACTICE ; JURIES ; LUNATICS AND PERSONS  
OF UNSOUND MIND.

## INSANITY.

*See* LUNATICS AND PERSONS OF UNSOUND MIND.

## INSOLVENCY.

*See* BANKRUPTCY AND INSOLVENCY.

## INSPECTION.

*See* DISCOVERY, INSPECTION, AND INTERROGATORIES ; PRACTICE AND PROCEDURE.

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# INSURANCE.

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lating the authority of brokers is not bound by  
**ACME WOOD FLOORING Co., LTD.**  
 1), 90 L. T. 313; 20 T. L. R. 229;  
 48 Sol. Jo. 262; 9 Com. Cas. 157.

**Marine insurance.**—See Part II., Sect. 3, sub-  
 sect. 4, *post*.

**Fire insurance.**—See Part III., Sect. 7, *post*.

**Accident insurance.**—See Part V., Sect. 1, sub-  
 sect. 4, *post*.

**Guarantee policies.**—See Part VI., Sect. 3,  
*post*.

**Burglary & theft insurance.**—See Part VII.,  
 Sect. 2, *post*.

**Mutual assurance association.**—See Part IX.,  
 Sect. 4, *post*.

## SUB-SECT. 2.—CONSTRUCTION.

### A. Intention of Parties.

See, generally, DEEDS, Vol. XVII., pp. 249 *et*  
*seq.*

**12. General rule.**—Under a policy of in-  
 surance on goods from A. to B., C. & D., the risk  
 attached where the ship, which was captured  
 before the dividing point, sailed with intention to  
 proceed directly to D., without first visiting the  
 intermediate places: though if she mean to go  
 to more than one of the places so named, she  
 must visit them in the order in which they stand  
 in the policy. How far a representation made to  
 one underwriter shall be taken to extend to the  
 rest; and what shall be evidence of it.

It is wonderful, considering how much property  
 is at stake upon instruments of this description,  
 that they should be drawn up with so much laxity  
 as they are. . . . In construing these instruments  
 we must always look for what was the intention  
 of the parties, without confining ourselves to a  
 strict grammatical construction; for it is im-  
 possible in many instances so to construe them,  
 without departing widely from the object intended  
 (LAURENCE, J.).—MARDEN v. REID (1803), 3  
 East, 572; 102 E. R. 716.

*Annotations* :—**Mentd.** Ashley v. Pratt (1847), 16 M. & W.  
 471; Fisher v. Liverpool Marine Insee. (1873), L. R. 8 Q. B.  
 469.

**13. —.**—Policies of insurance are to be con-  
 strued according to the same rules as all other  
 written contracts, namely, by ascertaining the  
 intention of the parties, to be gathered in the first  
 instance from the words of the instrument, but  
 interpreted, if necessary, by the surrounding  
 circumstances.

A policy of insurance was effected on the ship  
*Dos Hermanos* & her cargo "at & from port or  
 ports in the river Plate to the United Kingdom,"  
 etc., "beginning the adventure upon the goods  
 & merchandises from the loading thereof aboard  
 the ship at as above"; the insurance being  
 effected to protect the interest of the owners  
 resident in the river Plate. The cargo had been

those agreed on, & for recovery of  
 loss. *Held*: competent to prove the  
 risk insured, contrary  
 to the terms of the policy, by parol &  
 circumstantial evidence.—MILLS v.  
 Co. & HAMILTON  
 5 (Ct. of Sess.) 930; 23  
 648; *subsequent proceedings*,  
 LIFE INSUR-  
 (1828),

it refused to  
 an order authorising the insur-  
 co. to issue a certified copy

thereof.—PULFORD v. STAR ASSURANCE  
 SOCIETY, LTD., [1918] O. P. D. 243.—  
 S. AF.

**d. Policy covering several distinct  
 properties—Divisibility.**—When a  
 policy covers two or more distinct  
 properties, each of which is insured  
 thereby for a specific sum & at a  
 fixed rate respectively, such policy must  
 be considered as divisible.—DATE v.  
 GORE DISTRICT MUTUAL FIRE INSUR-  
 ANCE Co. (1864), 14 C. P. 548.—CAN.

**e. Issue restrained in England—  
 Whether issuable in Scotland.**—ALBION  
 FIRE & LIFE INSURANCE Co. v. MILLS  
 (1828), 3 Wils. & S. 218; *affg.*, 6 Sh.

shipped in Patagonia on board the ship, then  
 bearing another name, destined for England.  
 She arrived at Monte Video in the river Plate in a  
 damaged state, & a portion of her cargo was taken  
 out for the purpose of repairing her, & then re-  
 loaded. On being repaired, she & her cargo were  
 purchased by parties at Monte Video, who changed  
 her name, & the above insurance was afterwards  
 effected. An average loss of the ship & cargo  
 having taken place:—*Held*: the underwriters  
 were liable. *Qu.*: if goods which are insured  
 are put on board a ship in a state likely to take  
 fire, & they are consumed by some other cause, the  
 policy is not vitiated by the fact of the state of  
 the goods not having been disclosed to the under-  
 writers.—CARR v. MONTEFIORE (1864), 5 B. & S.  
 408; 4 New Rep. 169; 33 L. J. Q. B. 256; 11  
 L. T. 157; 10 Jur. N. S. 1069; 12 W. R. 870;  
 2 Mar. L. C. 119; 122 E. R. 883, Ex. Ch.

**14. —.**—In a homeward policy the words  
 "at & from" a port named are to be construed  
 in their natural geographical sense, without  
 reference to the expiration of an outward policy  
 "to" the same place, & therefore the policy  
 attaches as soon as the vessel arrives within the  
 port named, & although not safely moored.

All the limitation imposed by the law, as to  
 the time of the commencement of the risk in such  
 a case is, that the ship should arrive at the port  
 "at" which she is insured in a state of sufficient  
 seaworthiness to be enabled to lie there in reason-  
 able security till properly repaired & equipped for  
 her voyage.

A policy of insurance is to be construed by the  
 same rules as other contracts, the duty of the ct.  
 being to collect the meaning of the parties by  
 taking the language employed in a plain &  
 ordinary sense, & not to speculate on some sup-  
 posed meaning which they have not expressed  
 (CHANNELL, B.).—HAUGHTON v. EMPIRE MARINE  
 INSURANCE Co. (1866), L. R. 1 Exch. 206; 35  
 L. J. Ex. 117; 15 L. T. 80; 14 W. R. 645; 2  
 Mar. L. C. 406; *sub nom.* HOUGHTON v. EMPIRE  
 MARINE INSURANCE Co., 4 H. & C. 44; 12  
 Jur. N. S. 376.

### B. Written and Printed Clauses.

See, generally, DEEDS, Vol. XVII., p. 357, Nos.  
 1673–1678.

**15. Written clause prevails—Where clauses  
 conflict.**—ROBERTSON v. FRENCH, No. 806, *post*.

**16. —.**—WESTERN ASSURANCE CO.  
 OF TORONTO v. POOLE, No. 731, *post*.

**17. —.**—ST. PAUL FIRE & MARINE  
 INSURANCE Co. v. MORICE, No. 1738, *post*.

**18. —. Intention of parties.**—Defts. under-  
 wrote a policy of insurance for £1,000, declared to  
 be upon cargo, being a re-insurance subject to all  
 clauses & conditions of the original policy, in the  
 ship *Daybreak*, at & from any port or ports in any  
 order on the West Coast of Africa to the vessel's  
 port of discharge in the United Kingdom; the

(Ct. of Sess.) 409; 24 Fac. Coll. 430.—  
 SCOT

**f. Assignment of policy—Necessity for  
 writing—Effect of verbal assignment.**—  
 MANNING v. BOWMAN (1872), 9  
 N. S. R. (3 G. & O.) 42.—CAN.

## PART I. SECT. 3, SUB-SECT. 2.—B.

**g. Type calculated to elude observa-  
 tion—Insurers refused benefit of clause.**—  
 In the application for insurance pre-  
 pared by the co. a notice was inserted  
 in very small type, & had escaped the  
 notice of appot.:—*Held*: although  
 this provision might not have been  
 framed in order to elude observation,

*Sect. 3.—The policy: Sub-sect. 2, B., C., D., E. & F.]*

insurance "to commence from the loading of the goods at as above." By the original policy the insurance was for £1,000 upon the cargo, valued at £3,350, of the vessel *Daybreak*, at & from Liverpool to any ports in any order backwards & forwards on the coast of Africa, & thence back to a port of discharge in the United Kingdom; with leave to increase the valuation of the cargo on the homeward voyage; outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge. Goods, shipped at Liverpool, were lost by perils insured against more than twenty-four hours after the vessel had arrived at her first port of discharge on the coast of Africa:—*Held*: the clause of the policy declared upon, that the insurance was to commence on the loading of the goods at as above, viz. a port on the coast of Africa, must be taken as qualified by the clause in the original policy, that outward cargo was to be considered homeward interest twenty-four hours after the ship's arrival at her first port of discharge; & the policy had therefore attached.

The ordinary & general rule in the case of a policy of insurance, of course, is that we must construe the policy as we find it; it is in a printed form, with written parts introduced into it, & we are to take the whole together, both the written & the printed parts. Although it has sometimes been endeavoured to be argued that we ought to bestow no more attention on the written parts than on the printed parts which are uniform in most policies of insurance, there is no doubt that we do, & ought to, make a difference between them. The part which is especially put into a particular instrument is naturally more in harmony with what the parties are intending than the other parts, although it must not be used so as to reject the residue, or to make it have no effect (*BLACKBURN, J.*).—*JOYCE v. REALM MARINE INSURANCE Co.* (1872), L. R. 7 Q. B. 580; 41 L. J. Q. B. 356; 27 L. T. 144; 1 Asp. M. L. C. 396.

*C. Construction contra proferentes.*

*See, generally, DEEDS, Vol. XVII., pp. 290–295, Nos. 1016–1087.*

**19. Where terms ambiguous.]**—Where there is ambiguity in the terms of a policy of insurance, "*verba chartarum fortius accipiuntur contra proferentem*" applies as a rule of construction.—*NOTMAN v. ANCHOR ASSURANCE Co.* (1858), 4 C. B. N. S. 476; 27 L. J. C. P. 275; 31 L. T. O. S. 202; 4 Jur. N. S. 712; 6 W. R. 688; 140 E. R. 1170.

*Annotation:—Mentd. Pennington v. Cardale* (1862), 10 W. R. 544.

**20. —.]**—The words of a policy are to be construed most strongly against the assurers, by whom the policy is prepared; & therefore, where it has been declared & agreed by applt., that the truth of the statements made by him in his proposal should be the basis of the policy, but the

ct., looking at the whole language of the declaration, & policy, were of opinion that the assured might reasonably have believed that it was intended that no misstatement, except a fraudulent one, should avoid the policy:—*Held*: the policy was not avoided by a statement in the proposal, which was, in fact, untrue, but which was made *bonâ fide*.—*FOWKES v. MANCHESTER & LONDON ASSURANCE ASSOCN.* (1863) 3 B. & S. 917; 2 New Rep. 112; 32 L. J. Q. B. 153; 8 L. T. 309; 11 W. R. 622; 122 E. R. 343.

*Annotation:—Refd. Hommings v. Sceptre Life Assn.,* [1905] 1 Ch. 365.

**21. —.]**—*THOMSON v. WEEMS, No. 1, ante.*

**22. —.]**—It is extremely important with reference to insurance, that there should be a tendency to hold for the assured than for the co., where any ambiguity arises upon the face of the policy (*WILLES, J.*).—*FITTON v. ACCIDENTAL DEATH INSURANCE Co.* (1864), 17 C. B. N. S. 122; 34 L. J. C. P. 28; 144 E. R. 50.

*Annotations:—Consd. Smith v. Accident Insee.* (1870), L. R. 5 Exch. 302. *Apld. Winspear v. Accident Insee.* (1880), 42 L. T. 900. *Consd. Cole v. Accident Insee.* (1889), 5 T. L. R. 736.

**23. Exceptions ambiguous.]**—(1) On the memorandum, "free from average under £3 per cent.," the underwriter is liable for the amount of the aggregate of several partial losses, each less than £3 per cent., but amounting together to more.

(2) The objection to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, & in plain opposition to the language it used. That, whereas the policy imputed to be upon the ship, furniture, & apparel generally, the usage is to say that it is not upon all the furniture & apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain (*LORD LYNTHURST, C.B.*).

(3) They [goods carried upon deck] are not in the part of the ship where goods are usually carried, they are in more than usual peril, & an usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried on, where that will imply the same information, of the nature of the goods, is not at variance with any part of the policy, is essential to that information which the underwriter ought to receive to enable him to estimate the risk & calculate the premiums (*LORD LYNTHURST, C.B.*).

(4) The rule of construction as to exceptions is that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words, & if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer (*LORD LYNTHURST, C.B.*).—*BLACKETT v. ROYAL EXCHANGE ASSUR-*

it was certainly calculated to elude observation, & the insurers were refused the benefit of it.—*GREET v. CITIZENS INSURANCE Co.* (1880), 27 Gr. 121; 5 A. R. 596.—*CAN.*

**PART I. SECT. 3, SUB-SECT. 2.—C.**

**191. Where terms ambiguous.]—Held:** the policy, certificates & memo. together constituted the contract & must be so construed as to avoid any repugnance

between their provisions & any ambiguity should be construed against the insurers, from whom all the instruments emanated.—*MOWAT v. BOSTON MARINE INSURANCE Co.* (1896), 26 S. C. R. 47.—*CAN.*

**191i. —.]—Held:** the questions in an application for insurance had been sufficiently & truthfully answered, according to the natural & ordinary meaning of the words used, & even

if the words used were capable of interpretation as having another or different meaning, then the language was ambiguous & the construction as to its meaning must be against the co. by which the questions were framed.—*METROPOLITAN LIFE INSURANCE Co. v. MONTREAL COAL & TOWING Co.* (1904), 25 C. L. T. 4; 35 S. C. R. 286.—*CAN.*

**191ii. —.]—BOYLE v. YORKSHIRE**

ANCE CO. (1832), 2 Cr. & J. 244; 2 Tyr. 266; 1 L. J. Ex. 101; 149 E. R. 106.

*Annotations*:—As to (1) **Consd.** *Stewart v. Merchants Marine Insee.* (1885), 16 Q. B. D. 619. **Refd.** *Stewart v. Steele* (1842), 5 Scott, N. R. 927. As to (2) **Consd.** *Hall v. Janson* (1855), 4 E. & B. 500. **Refd.** *Myers v. Sarl* (1860), 3 E. & B. 306; *Miller v. Titherington* (1863), 9 L. T. 231. As to (3) **Refd.** *British & Foreign Marine Insee. v. Gaunt*, [1921] 2 A. C. 41. **Generally, Mentd.** *Humfrey v. Dale* (1857), 7 E. & B. 266; *Lidgett v. Secretan* (1871), L. R. 6 C. P. 616.

24. —.]—Where there is ambiguity, it is important with reference to insurances that there should be a tendency rather to hold for the assured than for the co. (MARTIN, B.).—**SMITH v. ACCIDENT INSURANCE CO.** (1870), L. R. 5 Exch. 302; 39 L. J. Ex. 211; 22 L. T. 861; 18 W. R. 1107.

*Annotation*:—**Apld.** *Winspear v. Accident Insee.* (1880), 42 L. T. 900.

25. —.]—In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy & insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty (LINDLEY, L.J.).—**CORNISH v. ACCIDENT INSURANCE CO.** (1889), 23 Q. B. D. 453; 58 L. J. Q. B. 591; 54 J. P. 262; 38 W. R. 139; 5 T. L. R. 733, C. A.

26. —.]—By a policy of insurance against accidental injury an insurance co. undertook that, in case such injury should within three months from the occurrence of the accident causing such injury directly cause the death of the assured, they would pay a capital sum to the legal personal representative of the assured. The policy only insured against death where accident within the meaning of the policy was the direct or proximate cause thereof, but not where the direct or proximate cause thereof was disease or other intervening cause even although the disease or other intervening cause might itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby. The assured fell from his horse while hunting, & thereby suffered a severe shock to his nervous system. He rode home in wet clothes, & on the following day developed signs of pneumonia, from which he died six days later. In an arbn. in respect of a claim under the policy made by his administratrix, the arbitrators found that the cumulative effect of the shock & the subsequent ride home in wet clothes was to lower the general vitality of the assured to an extent which made the onset of pneumococcus possible, & that the onset took place one hour & a half after the fall, & that he was suffering from fully developed pneumonia twenty-nine hours & a half after the fall:—**Held**: the administratrix was entitle to recover; for on the fair construction of the policy, which being ambiguous ought to be construed against rather than in favour of the co., the liability of the co. was only to be excluded where death was due to disease or other intervening cause in the sense of a cause which was new & independent of the accident or which was not a natural *sequela* of the accident.—**Re ETHERINGTON & LANCASHIRE & YORKSHIRE ACCIDENT INSURANCE CO.**, [1909]

1 K. B. 591; 78 L. J. K. B. 684; 100 L. T. 568; 53 Sol. Jo. 266; *sub nom.* **ETHERINGTON v. LANCASHIRE & YORKSHIRE ACCIDENT INSURANCE CO.**, 25 T. L. R. 287, C. A.

*Annotations*:—**Refd.** *Re Bradley & Essex & Suffolk Accident Indemnity Soc.*, [1912] 1 K. B. 415; *Condoglianis v. Guardian Assce.*, [1921] 2 A. C. 125. **Mentd.** *Ystradowen Colliery Co. v. Griffiths*, [1909] 2 K. B. 533; *Leyland Shipping Co. v. Norwich Fire Insee. Soc.*, [1918] A. C. 350.

#### D. *Ejusdem generis* Rule.

27. When applicable.]—It is a well known canon of construction, that when a particular enumeration is followed by such words as “or other,” the latter expression ought, if not enlarged by the context, to be limited to matters *ejusdem generis* with those specially enumerated. The canon is attended with no difficulty, except in its application. Whether it applies at all, & if so, what effect should be given to it, must in every case depend upon the precise terms, subject matter, & context of the clause under construction (LORD WATSON).—**SUN FIRE OFFICE v. HART** (1889), 14 App. Cas. 98; 58 L. J. P. C. 69; 60 L. T. 337; 53 J. P. 548; 37 W. R. 561; 5 T. L. R. 289, P. C.

*See, also*, DEEDS, Vol. XVII., pp. 273–276, Nos. 882–903.

#### E. Technical Terms.

*See, generally*, DEEDS, Vol. XVII., p. 271, Nos. 863–873.

28. Admissibility of evidence to interpret.]—Commercial men may be called as witnesses to prove the meaning of any particular expression used in a letter on a commercial subject.—**CHAURAND v. ANGERSTEIN** (1791), Peake, 61, N. P.

29. —.]—In order to construe a term in a written instrument where it is used in a peculiar sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word, but it is not admissible to contradict or vary what is plain.—**BEACON LIFE & FIRE ASSURANCE CO. v. GIBB** (1862), 1 Moo. P. C. C. N. S. 73; 1 New Rep. 110; 7 L. T. 574; 9 Jur. N. S. 185; 11 W. R. 194; 1 Mar. L. C. 269; 15 E. R. 630, P. C.

*Annotation*:—**Mentd.** *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

30. Interpreted in popular sense—Modified by circumstances.]—**ROBERTSON v. FRENCH**, No. 806, *post*.

31. —.]—**CARR v. MONTEFIORE**, No. 13, *ante*.

32. —.]—**HAUGHTON v. EMPIRE MARINE INSURANCE CO.**, No. 14, *ante*.

—.]—**Incorporation of usage**.]—*See* Subsect. 2, G., *post*.

33. —.]—**THOMSON v. WEEMS**, No. 1, *ante*.

**Marine insurance**.]—*See* Part II., Sect. 3, subsect. 4, C., *post*.

**Fire insurance**.]—*See* Part III., Sect. 7, subsect. 2, *post*.

#### F. Admissibility of Extrinsic Evidence.

*See, generally*, DEEDS, Vol. XVII., pp. 302 *et seq.*; EVIDENCE, Vol. XXII., pp. 250, 251.

34. Parol evidence—Restraining effect of policy.]—Parol evidence of what passed at the

**INSURANCE CO., LTD.**, [1925] 2 D. L. R. 596; 56 O. L. R. 564 D. L. R. 344.—**CAN.**

19 iv. —.]—A warranty will be strictly construed, & in case of doubt or ambiguity the rule *contra proferentem* will apply.—**PAPAS v. GENERAL ACCI-**

**DENT, FIRE & LIFE ASSURANCE CORPN.**, —**CAN.** LTD. (1916), C. P. D. 619.—**S. AF.**

#### PART I. SECT. 3, SUB-SECT. 2.—E.

28 i. Admissibility of evidence to interpret.]—**CHAPLIN v. PROVINCIAL INSURANCE CO.** (1873), 23 C. P. 278.

#### PART I. SECT. 3, SUB-SECT. 2.—F.

h. Parol evidence—To qualify condition.]—It was provided that if gunpowder was kept on the premises without written consent, the policy



**Sect. 3.—The policy: Sub-sect. 2, F. & G.; sub-3. Sect. 4: Sub-sects.**

time of effecting a policy is not admissible to restrain the effect of the policy.—**WESTON v. EMES** (1808), 1 Taunt. 115; 127 E. R. 775.

**35. Where no ambiguity.]—BEACON LIFE & ASSURANCE CO. v. GIBB**, No. 29, *ante*.

**36. To explain nature of risk.]—HUNTING & SON v. BOULTON**, No. 786, *post*.

**Technical terms.]—See Sub-sect. 2, E., ante.**

**Usage.]—See Sub-sect. 2, G., post.**

#### G. Usage.

*See, generally, CUSTOM & USAGES, Vol. XVII., pp. 25 et seq.*

**Effect of usage upon contract generally.]—See CUSTOM & USAGES, Vol. XVII., pp. 39 et seq.**

**37. Policy construed according to usage.]—PRESTON v. GREENWOOD**, No. 47, *post*.

**38. —.]—LONG v. ALLAN**, No. 2506, *post*.

**39. —.]—BOWRING v. ELMSLIE** (1790), 7 Term Rep. 216, n.; 101 E. R. 939.

**40. —.]—STEWART v. MERCHANTS MARINE INSURANCE CO.**, No. 1977, *post*.

**41. Insurer presumed to know usage.]—(1) An underwriter is bound to know the nature & peculiar circumstances of the branch of trade to which the policy relates.**

**(2) To prove the manner of conducting a particular branch of trade at one place, evidence may be given to show the manner in which the same branch is carried on at another place.**

The trade of fishing on the coast of Newfoundland . . . has been known & practised for many years. . . . Every underwriter is presumed to be acquainted with the practice of the trade he insures & that whether it is established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year (**LORD MANSFIELD, C.J.**).—**NOBLE v. KENNOWAY** (1780), 2 Doug. K. B. 510; 99 E. R. 326.

*Annotations:—As to (1) Apled. Ougier v. Jennings* (1800), 1 Camp. 505, n. *Refd. Zwinger v. Samuda* (1817), 7 Taunt. 265; *Pearson v. Commercial Union Assce.* (1876), 45 L. J. Q. B. 761. *As to (2) Refd. Fleet v. Murton* (1871), L. R. 7 Q. B. 126.

**42. —.]—VALLANCE v. DEWAR**, No. 1246, *post*.

**43. Who bound by usage—Assured not acquainted therewith—Usage of Lloyd's.]—ACME WOOD FLOORING CO., LTD. v. MARTEN**, No. 11, *ante*.

**44. Usage must be general & notorious.]—HARRISON v. UNIVERSAL MARINE INSURANCE CO.**, No. 1608, *post*.

**45. — Not necessarily uniform.]—VALLANCE v. DEWAR**, No. 1246, *post*.

should be void. To a plea setting up a breach of this condition, *pltf.* replied that it was well understood by the parties that the subject-matter of insurance included a small quantity of gunpowder:—*Held*: the condition which wholly excluded gunpowder, could not be thus qualified by *parol* evidence.—**MASON v. HARTFORD FIRE INSURANCE CO.** (1870), 29 U. C. R. 585.—**CAN.**

**36 i. To explain nature of risk.]—CHAMBERS v. PHOENIX ASSURANCE CO.** (1915), 34 N. Z. L. R. 435; *revsq.* (1914), 33 N. Z. L. R. 1475.—**N.Z.**

**k. Variation of terms—Evidence of previous parol agreement.]—A parol agreement entered into before the execution of the policy cannot vary or control the terms of the policy.—BELL v. MILLER** (1877), Knox, 331.—**AUS.**

**1. Proof of contents of lost policy—Form based on application.]—The policy had been destroyed, & no copy**

kept, but a form was produced proved to be the form then in use, & filled up from the application:—*Held*: good secondary evidence of the policy, as regarded the conditions, etc., but not as regarded the description of the property, which differed from that in the application.—**JOHNSTON v. CANADA FARMERS' MUTUAL FIRE INSURANCE CO.** (1877), 28 C. P. 211.—**CAN.**

#### PART I. SECT. 3, SUB-SECT. 2.—G.

**44 i. Usage must be general & notorious.]—Custom of small schooners in the coasting trade to keep close to the coast so that they can make harbour in bad weather:—Held: to be well known & established, & to have formed an element in the contract of insurance.—**EISENHAUR v. NOVA SCOTIA MARINE INSURANCE CO.** (1892), 24 N. S. R. (12 R. & G.) 205.—**CAN.****

**49 i. Admissibility of evidence—As to usage—To contradict terms.]—Where an insurance policy contains a condi-**

**tion making the policy void if gunpowder is kept on premises without permission, evidence of a usage to keep powder cannot affect the condition of the policy.—FOLEY v. NORWICH UNION FIRE INSURANCE SOCIETY** (1888), 40 N. S. R. 624.—**CAN.**

**46. Admissibility of evidence—To prove usage.]—CAMDEN v. COWLEY**, No. 922, *post*.

**47. —.]—See, also, CUSTOM & USAGES, Vol. XVII., pp. 37, 38, Nos. 418–426.**

**47. — As to usage—In construction of policy.]—Usage is admissible in evidence to explain the construction of a policy of insurance, in the parts written by the parties, as well as in the common printed form. If the question be, whether the addition of a place, by name, in a policy would have varied the risk, or whether, on the other hand, such place was implied in the words actually used, it is material evidence, in favour of the latter construction, that the premium in either case would have been the same.**

Usage is always considered in construing policies of insurance, even when no difficulty on the words themselves (**LORD MANSFIELD, C.J.**).—**PRESTON v. GREENWOOD** (1784), 4 Doug. K. B. 28; 99 E. R. 750.

*Annotation:—Refd. Kynance Sailing Ship Co. v. Young* (1911), 104 L. T. 397.

**48. —.]—LONG v. ALLAN**, No. 2506, *post*.

**49. — To contradict terms.]—BLACKETT v. ROYAL EXCHANGE ASSURANCE CO.**, No. 23, *ante*.

**.]—See, generally, CUSTOM & USAGES, Vol. XVII., pp. 47–50, Nos. 523–556.**

**.]—See, generally, CUSTOM & USAGES, Vol. XVII., pp. 40–50, Nos. 444–556.**

**Marine usage.]—See Part II., Sect. 3, sub-sect. 5, post.**

#### SUB-SECT. 3.—STAMP.

*See Part XII., post.*

#### SECT. 4.—INSURABLE INTEREST.

##### SUB-SECT. 1.—IN GENERAL.

**50. Effect of want of—Cancellation of policy.]—A ct. of equity will not entertain a bill for the delivery up of a policy of insurance, on the ground of want of insurable interest.—DESBOROUGH v. CURLEWIS** (1838), 3 Y. & C. Ex. 175; 2 Jur. 740; 160 E. R. 662.

**51. Party with limited interest—May insure part or whole interest.]—CASTELLAIN v. PRESTON**, No. 156, *post*.

**52. Presumption in favour of interest.]—In my opinion it is the duty of a ct. always to lean**

tion making the policy void if gunpowder is kept on premises without permission, evidence of a usage to keep powder cannot affect the condition of the policy.—**FOLEY v. NORWICH UNION FIRE INSURANCE SOCIETY** (1888), 40 N. S. R. 624.—**CAN.**

##### PART I. SECT. 4, SUB-SECT. 1.

**m. Party with limited interest.]—If a person who has a limited interest in a chattel insure it for the full value, intending to protect the vested or contingent interests of others in the property insured, such insurance will be valid to the full amount.—JOHNSON v. UNION FIRE INSURANCE CO. OF NEW ZEALAND** (1884), 10 V. L. R. 154.—**AUS.**

**n. —.]—An unpaid vendor who, by agreement with his vendee, has insured the property sold, may recover its full value in case of loss, though his interest may be limited, if, when he effected the insurance, he intended to**



## PART I.—GENERAL PRINCIPLES.

in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, & one which has no real merit, certainly not as between the assured & the insurer (BRETT, M.R.).—*STOCK v. INGLIS* (1884), 12 Q. B. D. 564; 53 L. J. Q. B. 350; 51 L. T. 449; 5 Asp. M. L. C. 294, C. A.; *on appeal sub nom. INGLIS v. STOCK* (1885), 10 App. Cas. 263, H. L.

*Annotations*:—*Consd. Re London County Commercial Re-insurance Office*, [1922] 2 Ch. 67. *Mentd. Wimble v. Rosenberg*, [1913] 3 K. B. 743; *Healy v. Howlett*, [1917] 1 K. B. 337; *Colley v. Overseas Exporters*, [1921] 3 K. B. 302; *Sterns v. Vickers*, [1923] 1 K. B. 78.

**Marine insurance.**—See Part II., Sect. 8, *post*.

**Fire insurance.**—See Part III., Sect. 3, *post*.

**Life insurance.**—See Part IV., Sect. 4, *post*.

**Gaming & wagering policies.**—See Part IX., *post*.

### SUB-SECT. 2.—WHAT AMOUNTS TO.

53. **Interest liable to loss or detriment.**—*LUCENA v. CRAUFURD*, No. 555, *post*.

54. — **By proximate effect of peril.**—*SEAGRAVE v. UNION MARINE INSURANCE CO.*, No. 654, *post*.

55. **Interest legal or equitable—Equitable interest.**—*Ex p. HOUGHTON*, *Ex p. GRIBBLE*, No. 685, *post*.

56. — — — — — *EBSWORTH v. ALLIANCE MARINE INSURANCE CO.*, No. 676, *ante*.

57. — **Necessity for interest—At time of insurance.**—(1) Where agents for a foreign ship have advanced money for necessities within Admiralty Court Act, 1840 (c. 65), s. 6, & have a right to arrest the ship merely *ad fundandam jurisdictionem* & not in respect of any maritime lien, they have in respect of that right an insurable interest in the ship for the balance of advances unsatisfied by exercising their lien on freight.

(2) An interest which is not in the nature of a property legal or equitable in the things exposed to maritime perils may still be insurable. Although

protect the interest of the vendee as well as his own.—*KEEFER v. PHOENIX INSURANCE CO.* (1901), 21 C. L. T. 221; 31 S. C. R. 144.—CAN.

o. — — — — — The owner of property covered by insurance policy & subject to an agreement for sale has an insurable & beneficial interest in the property.—*HOFFMAN v. CALGARY FIRE INSURANCE CO.* (1909), 2 Alta. L. R. 1.—CAN.

p. **Interest of vendor—Pending completion of sale.**—A vendor, who has agreed to sell for full value, has nevertheless, pending the contract of sale, a perfect right to insure the premises sold.—*GILL v. CANADA FIRE & MARINE INSURANCE CO.* (1882), 1 O. R. 341.—CAN.

q. **Interest of mortgagee.**—A mtgee. legal or equitable has an insurable interest in the mortgaged property.—*WESTERN AUSTRALIAN BANK v. ROYAL INSURANCE CO.* (1908), 5 L. R. 1.—CAN.

r. — — — — — A policy effected by a mtgor. in the name of a mtgee. covers the interest of both, & the mtgee. can recover for the full amount of the loss even beyond the amount of his mtge.—*SOMERVILLE v. AUSTRALIAN MERCANTILE UNION INSURANCE CO.* (1887), 6 N. Z. L. R. 108.—N.Z.

### PART I. SECT. 4, SUB-SECT. 2.

an interest to be insurable is not necessarily a right, legal or equitable, in, or charge upon the property or arising out of the ownership of the subject matter exposed to the risk insured against, & any interest may be insured which is dependent on the safety of the thing exposed to such risks, still it must in all cases at the time of the loss be an interest legal or equitable, & not merely an expectation, however probable.

(3) The creditor of a shipowner has no insurable interest in all the shipowner's property which is exposed to maritime risks.

(4) The foundation of the rules as to insurable interest is that the contract of marine insurance is essentially a contract of indemnity. Unless the assured is exposed to a real loss by the perils insured against, the contract is not a contract of indemnity, but is a mere wagering contract, & cannot be enforced.—*MORAN, GALLOWAY & CO. v. UZIELLI*, [1905] 2 K. B. 555; 74 L. J. K. B. 494; 54 W. R. 250; 21 T. L. R. 378; 10 Com. Cas. 203.

*Annotation*:—As to (3) *Apprvd. Macaura v. Northern Assce.*, [1925] A. C. 619.

58. — — — — — **At time of loss.**—*MORAN, GALLOWAY & CO. v. UZIELLI*, No. 57, *ante*.

59. **Probable expectation.**—*MORAN, GALLOWAY & CO. v. UZIELLI*, No. 57, *ante*.

60. **Debt—Giving rise to lien.**—*WOLFF v. HORNCASTLE*, No. 678, *post*.

61. — **Voluntarily incurred.**—*BARNES v. LONDON, EDINBURGH & GLASGOW LIFE INSURANCE CO.*, No. 190, *post*.

62. **Interest of agent—Without possession or lien.**—*SEAGRAVE v. UNION MARINE INSURANCE CO.*, No. 654, *post*.

63. **Assets of company—Shareholder of company.**—Neither a shareholder nor a simple creditor of a co. has any insurable interest in any particular asset of the co.—*MACAURA v. NORTHERN ASSURANCE CO.*, [1925] A. C. 619; 94 L. J. P. C. 154; 133 L. T. 152; 41 T. L. R. 447; 69 Sol. Jo. 777, H. L.

64. — **Simple creditor of company.**—*MACAURA v. NORTHERN ASSURANCE CO.*, No. 63, *ante*.

**Marine insurance.**—See Part II., Sect. 8, *post*.

*DON & GLOBE INSURANCE CO.* (1870), 20 C. P. 523.—CAN.

b. **Tenancy of glebe lands—Covenant for renewal—Where not binding on lessor's successor.**—A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor, & after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant.—*SHAW v. PHOENIX INSURANCE CO.* (1870), 20 C. P. 170.—CAN.

c. **Interest in goods bought—Payment & delivery postponed—Ascertained & unascertained goods.**—If the parties to a contract for the sale of ascertained goods agree that the payment for & delivery of the goods are to be postponed, the property in the goods passes to the buyer as soon as the proposal for sale is accepted & such passing of property cannot be put off by any agreement between the parties. The buyer has therefore an insurable interest in the goods. But where the sale is of unascertained goods & there has been no subsequent ascertainment or appropriation, then there has been no effective sale so as to pass the property in the goods to the buyer & he has no insurable interest.—*BRIJ COOMAREE v. SALAMANDER FIRE INSURANCE CO.* (1905), 1 L. R. 32 Calc. 111.

d. **Interest of agent.**—An agent who has authority from his principals, express, implied or ratified, can effect

time of the loss in possession of the premises under an agreement to pay for the same by instalments. He had paid a portion of the purchase-money & had improved the property by various outlays upon it, yet under the agreement he could not have demanded possession until a few days after the policy was signed:—*Held*: plff. had an insurable interest.—*HUMPHREY v. LONDON & LANCASHIRE INSURANCE CO.* (1870), 8 N. S. R. 39.—CAN.

t. **Assignment of policy—Security for loan of purchase-money—Interest in purchased property.**—The owner of a stock of goods effected an insurance thereon, & assigned the property insured, & transferred the policy of insurance, to C. C. subsequently sold the property to M., who in payment delivered his promissory notes indorsed by L. The policy was assigned to L. in trust to secure himself against the notes, with the assent of the co., who had full knowledge of all the facts:—*Held*: L. had an insurable interest in the goods.—*DAVIES v. HOME INSURANCE CO.* (1866), 3 E. & A. 269.—CAN.

u. **To bank—As warehouseman's security—Interest of bank.**—A warehouseman, insured certain wheat with deft. co., & assigned the policy to a bank, to which he gave a warehouse receipt, signed by B. his clerk, & indorsed by himself. In an action on the policy, on behalf of the bank:—*Held*: the bank had no insurable interest.—*TODD v. LIVERPOOL & LON-*

**Sect. 4.—Insurable interest: Sub-sect. 2. Sects. 5 & 6:** different policies.]—*GODIN v. LONDON ASSURANCE Co., No. 427, post.*

**Sub-sects. 1 & 2, A.]**

**Fire insurance.]—See Part III., Sect. 3, post.**

**Life insurance.]—See Part IV., Sect. 4,**

**Gaming & wagering policies.]—See Part IX., post.**

## SECT. 5.—DOUBLE INSURANCE.

**65. What amounts to—Same risk covered by Marine insurance.]—See Part II., Sect. 11, post.**

insurances on the goods of his principals.  
—*KANJI DWARKADAS v. HARIDAS PURSHOTTAM* (1911), 1 L. R. 36 Bom. 484.  
—**IND.**

### PART I. SECT. 5.

**e. What amounts to.]—MORROW v. LANCASHIRE INSURANCE Co. (1898), 29 O. R. 377.—CAN.**

**f. —.]—BRITISH COLUMBIA HOP Co. v. FIDELITY-PHENIX FIRE INSURANCE Co. (1914), 20 B. C. R. 165.—CAN.**

**g. — Insurance by same person — Or in same interest.]—It was a condition of a policy that a further insurance by pltf. or any other person, should render the policy void:—Held: the further insurance must be by the same person who has before insured, or in the same interest.—*GILCHRIST v. GORE DISTRICT MUTUAL FIRE INSURANCE Co. (1873), 34 U. C. R. 15.—CAN.***

**67 i. Recovery of loss—Double satisfaction not recoverable.]—KENNY v. UNION MARINE INSURANCE Co. (1880), 13 N. S. R. (1 R. & G.) 313.—CAN.**

**67 ii. —.]—TAYLOR v. EQUITABLE, ETC. INSURANCE Co., [1918] 1 W. W. R. 676; 13 Alta. L. R. 58.—CAN.**

**68 i. Contribution between insurers.]—EVANS v. STADACONA FIRE & LIFE INSURANCE Co. (1884), 17 N. S. R. (5 R. & G.) 88.—CAN.**

**68 ii. —.]—Held: the proper method of ascertaining the relative amounts payable by the different cos. was to add the amount of all policies together without reference to the division of the risks, & each co. was liable for its relative proportion to the whole amount insured.—*MCCAUSLAND v. QUEBEC FIRE INSURANCE Co. (1894), 25 O. R. 330.—CAN.***

**68 iii. —.]—SMITH v. EQUITABLE INSURANCE Co. (1885), 4 N. Z. L. R. 181 (S. C.).—N.Z.**

**68 iv. —.]—An insurance co. after paying to a tramway co. a sum due under a policy insuring against loss by accident, raised an action in its own name against another insurance co. for contribution on the ground that it had insured the same risk:—Held: the pursuers had a title to sue.—*SICKNESS & ACCIDENT ASSURANCE ASSOCN. v. GENERAL ACCIDENT ASSURANCE CORPN. (1892), 19 R. (Ct. of Sess.) 977; 29 Sc. L. R. 836.—SCOT.***

**68 v. —.]—NATHANSON v. COMMERCIAL INSURANCE Co. (1886), 4 S. C. 461.—S. AF.**

**h. Assent of insurers—Necessity for.]—RAMSAY WOOLLEN CLOTH MANUFACTURING Co. v. MUTUAL FIRE Co. OF DISTRICT OF JOHNSTOWN (1854), 11 U. C. R. 516.—CAN.**

tions was, that the insured should at once give notice in writing to the head office of any additional insurance, & should have the consent of the directors thereto, if given, indorsed on the policy, otherwise the policy to be void; & this notwithstanding anything contained in another condition as to giving notice with reasonable diligence:—Held: the assured ran the risk, in effecting a second insurance, of getting debts' assent, which he had not done, & the question of reasonable time or diligence

in giving notice & getting such assent, which was urged as a defence, could not arise.—*WEINAUGH v. PROVINCIAL INSURANCE Co. (1870), 20 C. P. 405.—CAN.*

**i. —.]—MECHANICS BUILDING & SAVINGS SOCIETY v. GORE DISTRICT MUTUAL FIRE INSURANCE Co. (1876), 40 U. C. R. 220; 3 A. R. 157.—CAN.**

**m. —.]—MANITOBA ASSURANCE Co. v. WHITLA, WHITLA v. ROYAL INSURANCE Co. (1903), 34 S. C. R. 191.—CAN.**

**n. — Additional insurance voidable.]—Pltf., who was insured in debt. co. under a policy containing a condition that the "co. is not liable if any subsequent insurance is effected in any other co., unless & until the co. assent thereto" effected an insurance with the M. Co., which was void at their option:—Held: pltf. could not recover, for the insurance in the M. Co., being only voidable, was a subsequent insurance within the condition.—*GAUTHIER v. WATERLOO MUTUAL INSURANCE Co. (1881), 6 A. R. 231.—CAN.***

**o. — Additional insurance void.]—Pltf. co. had issued a policy to debt. containing the usual condition as to subsequent insurance being effected without the assent of the insurer. Such additional insurance was effected without assent, in foreign cos. which were fictitious because they had obtained their charters through fraud:—Held: the policies effected with the foreign cos. were illegal & void, & did not constitute a breach of the condition relied upon in pltf.'s policy.—*PACIFIC COAST INSURANCE Co. v. HICKS* (1913), 13 E. L. R. 194.—CAN.**

**p. — New policy substituted — For one assented to.]—PARSONS v. STANDARD FIRE INSURANCE Co. (1880), 5 S. C. R. 233.—CAN.**

**q. —.]—MOORE v. CITIZENS' FIRE INSURANCE Co. (1888), 14 A. R. 582.—CAN.**

**r. — Presumption of assent.]—Pltf. had mailed the co. a notice properly addressed of a further insurance, which they had received:—Held: the co. must be deemed to have assented to it, no dissent having been signified by them within two weeks after the time when the notice would have been received in regular course.—*SHANNON v. HASTINGS MUTUAL INSURANCE Co. (1877), 26 C. P. 380; 2 A. R. 81.—CAN.***

**t. —.]—COCKBURN v. BRITISH AMERICA ASSURANCE Co. (1890), 19 O. R. 245.—CAN.**

**a. — May be expressed or implied after loss.]—Assent, express or implied, to subsequent insurance is sufficient even if given after the loss has occurred. In this case such assent was sufficiently shown by debts. joining in the adjustment of the loss & allowing the insured to accept from the subsequent insurers their proportion of the loss as so adjusted.—*MUTCHMOR v. WATERLOO MUTUAL FIRE INSURANCE Co. (1902), 22 C. L. T. 406; 4 O. L. R. 606; 1 O. W. R. 667.—CAN.***

**b. Notice of additional insurance — Necessity for.]—Pltf. having effected an insurance with another co., which**

from all that appeared was binding upon them, & having failed to notify debts. thereof:—Held: debts. were not liable under their policy.—*BRUCE v. GORE DISTRICT MUTUAL INSURANCE Co. (1870), 20 C. P. 207.—CAN.*

**c. —.]—MASON v. ANDES INSURANCE Co. (1873), 23 C. P. 37.—CAN.**

**d. —.]—HAYDEN v. STADACONA INSURANCE Co. (1877), 2 P. E. I. 242.—CAN.**

**aa. —.]—WHITE v. SOUTH BRITISH INSURANCE Co., O. B. & F. 20.—N.Z.**

**bb. — When sent.]—BUTLER v. WATERLOO COUNTY MUTUAL FIRE INSURANCE Co. (1870), 29 U. C. R. 553.—CAN.**

**cc. — Within reasonable time.]—GRAHAM v. LONDON MUTUAL FIRE INSURANCE Co. (1886), 13 O. R. 132.—CAN.**

**dd. — Before loss.]—FAIR v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE Co. (1876), 26 C. P. 398.—CAN.**

**ee. — Receipt by insurers — Onus of proof.]—Under 36 Vict. c. 44, s. 38, the insured must prove not only the sending of the notice, but its actual receipt by the co.—*LYONS v. MANUFACTURERS & MERCHANTS' MUTUAL INSURANCE Co. (1877), 28 C. P. 13.—CAN.***

**ff. — Whether receipt by agent sufficient.]—MCCREA v. WATERLOO COUNTY MUTUAL FIRE INSURANCE Co. (1876), 26 C. P. 431; *affd.* (1877), 1 A. R. 218.—CAN.**

**gg. — Notice sent by second company.]—Pltf. was insured in another co., whose agents sent a notice in writing to the debt. co.'s agent. Debt. co. did not dissent:—Held: as this notice was given under instructions from pltf. it fulfilled pltf.'s obligation.—*WORTH v. YORKSHIRE INSURANCE Co. (1913), 13 E. L. R. 145.—CAN.***

**hh. — Irregularities — Mistake.]—The notice of further insurance stated the amount to be larger than it really was, & gave the name of the co. in which it was effected wrongly:—Held: as debts. were neither prejudiced nor misled by the mistake, & no fraud appeared or was alleged in so giving the notice, the policy was not thereby vitiated.—*OSSEY v. PROVINCIAL INSURANCE Co. (1862), 12 C. P. 133.—CAN.***

**kk. — Waiver of notice.]—One of the conditions of an insurance policy provided, that if the insured had at the time of the policy, or should have afterwards, any other insurance without the consent of debts. written on the policy, the policy should be void:—Held: the condition could not be waived by debt.'s inspector, or in any way except in writing.—*MASON v. HARTFORD FIRE INSURANCE Co. (1875), 37 U. C. R. 437.—CAN.***

**ll. — Verbal notice — Illiterate person.]—PASCOE v. NORWICH UNION INSURANCE SOCIETY (1884), 3 N. Z. L. R. 271 (S. C.).—N.Z.**

**mm. Additional insurance by mortgagee.]—A subsequent insurance effected by a mtgee., under a mtge. containing a covenant to insure without**



## SECT. 6.—THE PREMIUM.

## SUB-SECT. 1.—RECOVERY FROM INSURED.

**69. Premiums paid by agent—Proof of existence of policy—By production.]**—In an action for effecting policies of insurance, it is necessary to prove their existence by producing them.—*WILLIAMS v. YOUNGHUSBAND* (1815), 1 Stark. 139.

**70. Action by underwriters — Representative action—R. S. C., Ord. 16, r. 9.]**—Defts. entered into an agreement of motor reinsurance with pltf. & eighteen other underwriters at Lloyd's. The agreement, which provided that defts. should pay to the underwriters a premium of 25s. on each car *per annum*, was signed by the underwriters in the manner usual in the case of Lloyd's policies. Pltf. brought an action, on behalf of & for the benefit of all persons interested in & named as underwriters in the agreement, to recover certain premiums due under the agreement. Defts. said that pltf. was not entitled to maintain the action as the agreement was made with pltf. & other underwriters as joint contractors:—*Held*: pltf. was entitled under above rule to maintain the action as the underwriters who were parties to the agreement were numerous & had a common interest in the action.—*JANSON v. PROPERTY INSURANCE CO., LTD.* (1913), 30 T. L. R. 49; 58 Sol. Jo. 84; 19 Com. Cas. 36.

**Marine insurance.]**—See Part II., Sect. 4, sub-sect. 1; Sect. 5, sub-sect. 1, F., *post*.

## SUB-SECT. 2.—RETURN TO INSURED.

## A. In General.

**71. Risk never run—Returnable.]**—If risk not run, the insurer to retain only a part of the premium.

If the risk is not run . . . the insurer shall not retain the premium. It has been objected that the voyage being begun & part of the risk being already run, the premium cannot be apportioned.

ptf.'s knowledge or consent:—*Held*: not to avoid the policy.—*SAUVEY v. ISOLATED RISK & FARMERS' FIRE INSURANCE CO.* (1879), 44 U. C. R. 523.—CAN.

**r. Effect of change in second company.]**—A change in the co. in which another insurance has been effected, not increasing the amount insured, does not avoid the policy.—*LOWSON v. CANADA FARMERS' MUTUAL FIRE INSURANCE CO.* (1881), 6 A. R. 512.—CAN.

## PART I. SECT. 6, SUB-SECT. 1.

**t. From whom recoverable.]**—The person ordering an insurance is liable for the premium, & the insurers can sustain an action against him.—*ATTWOOD, HUNT & WILSON v. KOUGH & CO. TRUSTEES* (1818), 1 Nfld. L. R. 110.—NFLD.

**a. Payment in cash—Condition precedent to liability.]**—*NEWIS v. GENERAL ACCIDENT, ETC. ASSURANCE CORPN.* (1910), 11 C. L. R. 620.—AUS.

**b. — — —.]**—*WALKER v. PROVINCIAL INSURANCE CO.* (1860), 8 217.—CAN.

**c. — — —.]**—*CORSTINE v. ACCIDENT GUARANTEE CO. OF CANADA* (1907), 3 E. L. R. 497.—CAN.

**d. — — —.]**—*Cash tendered & refused.]*—Where the clerk of an insurance co. a receipt for a renewal p.

signed at the time the policy to renew the declining to from the person in hand money belonging to the

insured; that the receipt was never demanded back, & that the insured rolled on the renewal as having been effected:—*Held*: the effect of all that had passed between the parties was to establish the payment of the amount of the renewal premium.—*STAUNTON v. WESTERN ASSURANCE CO.* (1874), 21 Gr. 578; *affd.* (1875), 23 Gr. 81.—CAN.

**e. Where terms of application for policy departed from.]**—*D. E. BROWN'S TRAVEL BUREAU v. TAYLOR*, [1918] 3 W. W. R. 468.—CAN.

**f. Assured unable to pay—Payment by another.]**—*PEOPLE'S LIFE INSURANCE CO. v. TATTERSALL* (1906), 37 S. C. R. 690.—CAN.

**g. Payment to agent—Where negotiations indirect.]**—A., the agent in J. of the C. Co., whose head office was in Y., forwarded applications to B., a broker in B. The latter would send the application to the co., when, if it was accepted, a policy would be delivered to him, & the premium charged against him at the time. The policy was then forwarded by B. to A., who would deliver it to the assured, taking the premium note direct to himself, & sending to B. his own note for the amount:—*Held*: this was an indirect carrying on of insurance in the province by the co., & a premium note given to A. could not be collected.—*Re OULTON, JONES v. TAYLOR* (1874), 15 N. B. R. (2 Pug.) 391.—CAN.

**h. — — —.]**—*Whether payment to company.]*—Deft., through B., ptfs.' agent, effected a policy with ptfs. B., who had authority to receive the premium,

But I can see no force in the objection. This is not a contract so entire that there can be no apportionment (*LORD MANSFIELD, C.J.*).—*STEVENSON v. SNOW* (1761), 3 Burr. 1237; 1 Wm. Bl. 318; 97 E. R. 808.

*Annotations*:—*Distd.* *Bermon v. Woodbridge* (1781), 2 Doug. K. B. 781. *Consd.* *Rothwell v. Cooke* (1797), 1 Bos. & P. 172. *Refd.* *Tyrie v. Fletcher* (1777), 2 Cowp. 666; *Lorraine v. Thomlinson* (1781), 2 Doug. K. B. 585; *Meyer v. Gregson* (1784), 3 Doug. K. B. 402.

**72. — — —.]**—(1) An insurance on a ship & goods, at & from A. to B., during her stay & trade there, at & from thence to her port or ports of discharge in C. & at & from thence back to A., is an entire contract, & if the loss happen at any time after the commencement of the risk, there shall be no return of premium.

The principles are clear. Where the risk has never begun there must be a return of premium. . . . On the other hand, if the risk has once begun, you cannot sever it, & apportion the premium (*LORD MANSFIELD, C.J.*).

(2) By an implied warranty every ship must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was seaworthy when she left Honfleur the underwriters would have been liable though she had not been so at Angola, etc. (*LORD MANSFIELD, C.J.*).—*BERMON v. WOODBRIDGE* (1781), 2 Doug. K. B. 781; 99 E. R. 497.

*Annotations*:—*As to* (1) *Refd.* *Rothwell v. Cooke* (1797), 1 Bos. & P. 172. *As to* (2) *Folld.* *Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471. *Generally, Mentd.* *Furtado v. Rogers* (1802), 3 Bos. & P. 191; *Percival v. Caney* (1852), 4 De G. & Sm. 610; *Stanton v. Percival* (1855), 5 H. L. Cas. 257; *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Assocn.* (1920), 89 L. J. K. B. 881.

**73. — — —.]**—In an action on a policy of insurance, with a count for money had & received, if deft. pay no money into ct., but establish as a defence that the risk never commenced, pltf. is entitled to a verdict for the premium, though no

brought the policy with the receipt for the first premium, issued from ptfs.' head office, to deft., who was in charge of a branch of the bank at which B. kept his account. Deft. drew a cheque on another branch of the bank, & B. requested him to place the amount to the credit of his bank account, which was done in the usual way, & the cheque charged to deft.; but B.'s account was at the time overdrawn, & he afterwards became insolvent:—*Held*: the payment thus made to B. was a payment to ptfs.—*AETNA LIFE INSURANCE CO. v. GREEN* (1876), 38 U. C. R. 459.—CAN.

**k. Payment in arrear—Notice to assured.]**—*BOSOMWORTH v. WESTERN FARMERS' WEATHER MUTUAL INSURANCE CO.* (1924), 55 O. L. R. 300.—CAN.

**l. Increase of rates.]**—*ANGERS v. MUTUAL RESERVE FUND LIFE ASSOCN.* (1904), 35 S. C. R. 330.—CAN.

## PART I. SECT. 6, SUB-SECT. 2.—A.

**m. Premiums paid by mistake.]**—*PERRY v. NEWCASTLE FIRE INSURANCE CO.* (1852), 8 U. C. R. 363.—CAN.

**n. Premiums paid on ultra vires policy.]**—While an insurance co. incorporated by special Act of a provincial legislature cannot do business outside of the province, premiums paid to it may be recovered in an action for money had & received.—*HOOPER GRAIN CO. v. COLONIAL ASSURANCE CO.*, [1917] 1 W. W. R. 1226.—CAN.

**o. Additional risk—Extra premium—Recovery where risk never run.]**—*PROVIDENT SAVINGS LIFE SOCIETY*

*Sect. 6.—The premium: Sub-sect. 2, A., B. & C. |*  
*Sect. 7: Sub-sects. 1 & 2. Sect. 8.]*

demand of premium was made by his counsel in opening the case.—*PENSON v. LEE* (1800), 2 Bos. 1200.

74. Attachment of premium—entire—No part of premium returnable.]—*TYRIE v. FLETCHER*, No 2501, post.

75. ———.] — *BERMON v. WOOD BRIDGE*, No. 72, ante.

76. ———.] *v. GREGSON* No. 2503, post.

77. ———.]—*HOGG v. HORNER* (1797), 2 Park's Marine Insurances, 8th ed. p. 782, n., N. P. Annotations:—*Reid. Lambert v. Liddard* (1814), 1 Marsh. 149. *Mentd. Gairdner v. Senhouse* (1810), 3 Taunt. 16; *Leathly v. Hunter* (1831), 7 Bing. 517; *Margetson v. Glynn* (1892), 66 L. T. 142.

78. ——— Risk divisible—Part of premium returnable.]—*STEVENSON v. SNOW*, No. 71, ante. Marine insurance.]—See Part II., Sect. 28, post. Life insurance.]—See Part IV., Sect. 12, post.

#### B. Where Policy Avoided.

79. Misrepresentation.]—If A., in consideration of a premium, undertakes to insure B. against being drawn for the militia under a particular statute, until a certain day, & represents that on that day all balloting under the statute will cease, & that B. will be completely secured by the insurance against the operation of the statute, A. is not thereby bound to indemnify B. in consequence of his being drawn for the militia under the statute, after the above-mentioned day. But, on account of the misrepresentation, the contract is void, & B. may recover back the premium, as money had & received.—*DUFFELL v. WILSON* (1808), 1 Camp. 401, N. P. Annotation:—*Consd. Kettlewell v. Refuge Assee.*, [1908] 1 K. B. 545.

80. ———.]—To entitle the assured to recover premiums paid by him under a policy of insurance for funeral expenses on the ground of misrepresentation made to him by the agent of the insurer, the misrepresentation must be fraudulent, or there must be some breach of duty by the agent acting in a fiduciary capacity towards the assured.—*GOLDSTEIN v. SALVATION ARMY ASSURANCE*

*v. BELLEW* (1904), 24 C. L. T. 301; 35 S. C. R. 35.—CAN.

p. Promissory note given for premium—Default in payment—Insurance not effective until payment made—Right to recover.]—*CRAWFORD v. SIPPRELL* (1901), 35 N. B. R. 344.—CAN.

q. Withdrawal of application Before acceptance by insurers.]—*HENDERSON v. STATE LIFE INSURANCE CO.* (1905), 5 O. W. R. 585; 9 O. L. R. 540.—CAN.

r. Where discontinuance of payments permitted—Payments after stipulated period.]—*TANJORE LIFE ASSURANCE CO. v. KUPPANNA RAU* (1919), 1 L. R. 43 Mad. 333.—IND.

t. Policy kept up by wife on bankruptcy of husband.]—A husband having insured his life settled the policy moneys upon his wife for life or until remarriage with remainders over. Upon his bkpcy. the policy was kept up by the wife:—*Held*: upon his death she was entitled to be repaid the premiums so paid by her, with interest, up to the amount of the difference between the then present value of the policy had she not paid the premiums & the amount actually received.—*MORGAN v. MORGAN'S JUDICIAL FAC-*

*TOR*, [1922] S. L. T. 247.—SCOT.

#### PART I. SECT. 6, SUB-SECT. 2.—B.

a. Policy void ab initio.]—*NEW-FOUNDLAND MARINE ASSURANCE CO. v. BARRON* (1856), 4 Nfld. L. R. 103.—NFLD.

b. ———.]—In his application pltf. untruly represented the building as furnished with a brick chimney:—*Held*: on this ground the policy never attached, & pltf. might recover back his premium.—*MULVEY v. GORE DISTRICT MUTUAL FIRE ASSURANCE CO.* (1866), 25 U. C. R. 424.—CAN.

c. ———.]—A contract to procure fire insurance in some office valid in Canada, means, in some co. licensed to do business, in Canada, & a premium paid under such a contract may be recovered back, as upon a failure of consideration, if the insurance is effected without the knowledge of the insured in a co. not so licensed.—*BARRETT v. ELLIOTT* (1904), 24 C. L. T. 344; 10 B. C. R. 461.—CAN.

d. Termination of insurance—At discretion of company—Tender of unearned premium.]—*LONDON & LANCASHIRE FIRE INSURANCE CO. v. VELTRE* (1918), 56 S. C. R. 588; 42

*SOCIETY*, [1917] 2 K. B. 291; 86 L. J. K. B. 793; 117 L. T. 63, D. C.

81. ——— Without fraud.]—If a policy be avoided by a misrepresentation made without fraud, the assured is entitled to a return of the premium.

Where there is a fraud, there is no return of premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium (*GIBBS, J.*).—*FEISE v. PARKINSON* (1812), 4 Taunt. 640; 128

*Thurtell v. Beaumont* (1824), 8 Moore,

O. P. 612.

82. ———.] — *ANDERSON v. THORNTON*, No. 151, post.

83. Fraud.]—*FEISE v. PARKINSON*, No. 81, ante.

84. Alteration—Without consent of underwriter.]—*LANGHORN v. COLOGAN*, No. 113, post.

85. Concealment.] — *ANDERSON v. THORNTON*, No. 151, post.

Marine insurance.]—See Part II., Sect. 28, post.

Life insurance.]—See Part IV., Sect. 12, post.

Wagering policies.]—See Part IX., Sect. 6, post.

#### C. Illegal Contracts.

Marine insurance.]—See Part II., Sect. 28, sub-sect. 4, post.

Life insurance.]—See Part IV., Sect. 12, post.

Wagering policies.]—See Part IX., Sect. 6, post.

#### SECT. 7.—WARRANTIES.

##### SUB-SECT. 1.—IN GENERAL.

86. Definition of warranty.]—Whatever is written in the margin of a policy of insurance is a warranty, & must be literally complied with.

There is a material distinction between a warranty & a representation. A representation may be equitably & substantially answered: but a warranty must be strictly complied with. . . . A warranty in a policy of insurance is a condition or a contingency, & unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist unless it be literally complied with (*LORD MANSFIELD, C.J.*).—*DE HAHN v. HARTLEY* (1786), 1 Term Rep. 343; 99 E. R. 1130.

Annotation:—*Consd. Rich v. Parker* (1798), 7 Term Rep. 705.

87. ———.]—*THOMSON v. WEEMS*, No. 1, ante.

D. L. R. 79.—CAN.

e. Wager policy—Action for cancellation.]—In an action by the co. for cancellation of a policy under 14 Geo. III., c. 48, s. 1, a return of the premiums paid will not be made a condition of obtaining cancellation.—*NORTH AMERICAN LIFE ASSURANCE CO. v. BROPHY* (1902), 22 C. L. T. 250; 32 S. C. R. 261.—CAN.

f. Premium paid after avoidance.]—An action upon the policy being dismissed, the co. were ordered to refund the last payment of premium, which was received in ignorance that the policy was no longer in force.—*IMPERIAL BANK OF CANADA v. ROYAL INSURANCE CO.* (1906), 12 O. L. R. 519; 8 O. W. R. 148.—CAN.

g. Policy voidable.]—*ANGERS v. MUTUAL RESERVE FUND LIFE ASSOCN.* (1904), 35 S. C. R. 330.—CAN.

##### PART I. SECT. 7, SUB-SECT. 1.

86 i. Definition of warranty.] — *PACIFIC FIRE & MARINE INSURANCE CO. v. ANDERSON* (1868), 5 W. W. & A'B. 61.—AUS.

86 ii. ———.]—*BAILEY v. OCEAN MUTUAL MARINE INSURANCE CO.*, 19 S. C. R. 163.—CAN.



88. Distinguished from representation.] — DE HAHN v. HARTLEY, No. 86, *ante*.

89. — How distinguished.] — The ordinary rule for ascertaining whether a statement is a condition or a representation is to ascertain whether or not the statement is material to the contract about to be entered into (VAUGHAN WILLIAMS, L.J.). — BANCROFT v. HEATH (1901), 17 T. L. R. 425; 6 Com. Cas. 137, C. A.

90. — —.] — YORKSHIRE INSURANCE CO., *TD. v. CAMPBELL*, No. 1327, *post*.

91. Mode of incorporation in policy—Marginal incorporation.] — (1) A warranty on the margin of a policy must be strictly followed, as much as if written in the body of the instrument.

(2) "Thirty seamen besides passengers," means thirty persons belonging to the ship's company, including cook, surgeon, boys, etc. — BEAN v. STUPART (1778), 1 Doug. K. B. 11; 99 E. R. 9. *Annotation*: — *As to* (1) *Consd.* Anderson v. Fitzgerald (1853), 4 H. L. Cas. 484.

92. — —.] — DE HAHN v. HARTLEY, No. 86, *ante*.

93. — —.] — A time policy of insurance on freight was warranted "free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." During a voyage the steamer's main shaft broke through a peril of the sea & the vessel returned to her port of loading. It was there found that the necessary delay for repairs would frustrate the objects of the adventure, & the charterers, as they were entitled to do by the foreign law applicable, put an end to the charter & the freight was lost. In an action on the policy for total loss of freight: — *Held*: the claim was consequent on loss of time within the meaning of the exception, & the underwriters were not liable.

There is a sort of insinuation to the effect that this warranty is only upon a piece of paper pasted on the margin of the policy. What is the relevancy of that? It either is or is not part of the contract. If it is part of the contract it is perfectly immaterial what part of the contract it appears in. Why am I to reject the clause? Is it because it is pasted on? Is it because it is aside of the rest of the contract? No one can gravely suggest that (LORD HALSBURY, C.). — BENS AUDE v. THAMES & MERSEY MARINE INSURANCE CO., [1897] A. C. 609; 66 L. J. Q. B. 666; 77 L. T. 282; 46 W. R. 78; 13 T. L. R. 501; 8 Asp. M. L. C. 315; 2 Com. Cas. 238, H. L.

*Annotations*: — *Folld.* Turnbull, Martin v. Hull Underwriters Assoc., [1900] 2 Q. B. 402 *Apld.* Russian Bank for Foreign Trade v. Excess Insce. (1918), 87 L. J. K. B. 872. *Mentd.* Embiricos v. Reid, [1914] 3 K. B. 45; Metropolitan Water Board v. Dick, Kerr, [1917] 2 K. B. 1; Bank Line v. Capel, [1919] A. C. 435.

94. — Folded up in policy.] — PAWSON v. BARNVELT (1778), cited 1 Doug. K. B. 12, n.; 99 E. R. 10.

Marine insurance.] — See Part II., Sect. 18, *post*.

Fire insurance.] — See Part III., Sect. 9, sub-sect. 2, *post*.

Life insurance.] — See Part IV., Sect. 9, sub-sect. 2, *post*.

Mutual insurance.] — See Part XI., Sect. 4, sub-sect. 2, *post*.

#### SUB-SECT. 2.—COMPLIANCE WITH WARRANTIES.

95. Strict compliance essential.] — BEAN v. STUPART, No. 91, *ante*.

representa-  
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sential.]—

A warranty is a condition precedent to the policy, & whether material to the risk or not, must, unless waived, be fulfilled with the most scrupulous exactness.—SOUTH BRITISH FIRE & MARINE INSURANCE CO. v. BROJO

96. — PAWSON v. WATSON, No. 1179, *post*.

97. — DE HAHN v. HARTLEY, No. 86, *ante*.

98. — It is a first principle of the law of insurance that, when a thing is warranted to be of a particular nature or description, it must be exactly such as it is represented to be, otherwise the policy is void, & there is no contract.—NEW-CASTLE FIRE INSURANCE CO. v. MACMORRAN & CO. (1815), 3 Dow. 255; 3 E. R. 1057, H. L.

*Annotations*: — *Consd.* Re Universal Non-Tariff Fire Insce., Forbes' Claim (1875), L. R. 19 Eq. 485. *Apld.* Hambrough v. Mutual Life Insce. of New York (1895), 72 L. T. 140; Condoglianis v. Guardian Assce., [1921] 2 A. C. 125. *Refd.* Thomson v. Weems (1884), 9 App. Cas. 671; Ellinger v. Mutual Life Insce. of New York, [1905] 1 K. B. 31.

99. — —.] — NELSON v. SALVADOR, No. 1344, *post*.

100. — Condition precedent to recovery.] — HARVEY v. UZIELLI (*circa* 1892), cited 68 L. T. 181.

*Annotation*: — *Consd.* Barnard v. Faber (1892), 68 L. T. 179.

101. — —.] — THOMSON v. WEEMS, No. 1, *ante*.

102. — —.] — Deft. & other underwriters subscribed a fire policy, which contained the following clause: "Warranted to be on same rate, terms & identical interest as U. Insurance Co. £800, & G. Insurance Co. £700." In the policy of one of the two cos. the premiums & also the interest insured differed from those in deft.'s policy: — *Held*: the warranty must be taken to be a condition precedent; the facts showed that there had been a breach of such warranty & the policy was consequently void & deft. not liable. — BARNARD v. FABER, [1893] 1 Q. B. 340; 62 L. J. Q. B. 159; 68 L. T. 179; 41 W. R. 193; 9 T. L. R. 160; 4 R. 201, C. A.

*Annotations*: — *Apld.* Hambrough v. New York Mutual Life Insce. (1895), 72 L. T. 140; Ellinger v. Mutual Life Insce. of New York, [1905] 1 K. B. 31.

103. — — Untrue statements by agent of insurer—Without knowledge of assured.] — Where in a proposal of insurance the proposer warrants that the statements in the proposal are true & agrees that the warranty is to form the basis of the contract of insurance, & where statements in the proposal inserted by the agent of the insurance co. on information supplied to him by the proposer, are in fact untrue, the policy issued on that basis is void, whether the statements were material or not & notwithstanding the *bona fides* of the proposer & the insurance co. are not liable to the assured under the policy.

The agent had no knowledge but that given to him by the assured, & the award in favour of the insurers must be upheld (MCCARDIE, J.). — PAXMAN v. UNION ASSURANCE SOCIETY, LTD. (1923), 39 T. L. R. 424.

Marine insurance.] — See Part II., Sect. 18, *post*.

Fire insurance.] — See Part III., Sect. 9, sub-sect. 2, *post*.

Life insurance.] — See Part IV., Sect. 9, sub-sect. 2, *post*.

Mutual insurance associations.] — See Part XI., Sect. 4, sub-sect. 2, *post*.

#### SECT. 8.—REINSURANCE.

104. The contract of re-insurance—Description of subject matter.] — MACKENZIE v. WHITWORTH, No. 506, *post*.

NATH SHAHA (1909), I. L. R. 36 Cal. 510.—IND.

#### PART I. SECT. 8.

h. Reduction of insurer's liability.] — CANADA FIRE MARINE INSURANCE

*Sect. 8.—Reinsurance. Sect. 9: Sub-sects. 1, 2, 3, A.]*

**105. — Independent of original contract.]**

Where in an action on a policy of marine insurance defts. sought under R. S. C., Ord. 16, r. 48, to bring in as a third party the underwriter of a policy of reinsurance on the same subject-matter:—*Held*: the third party procedure was not applicable to such a case, inasmuch as a contract of reinsurance was not one of "indemnity" within the rule.

The decisions establish that the contract of insurance & that of re-insurance are independent of each other, the underwriter of the original policy of insurance being entitled to insure on his own account the interest which he has acquired in the safety of the subject-matter of insurance by reason of the fact of his having contracted to insure it. The condition that the underwriter of the policy of reinsurance is to pay as may be paid on the original policy does not in my opinion import, as suggested, that the contract is one of indemnity. The assured under a policy of re-insurance must, like any other assured, show that there has been a loss of the subject-matter of insurance by a peril insured against by the policy of reinsurance (*MATHEW, L.J.*).—*NELSON v. EMPRESS ASSURANCE CORPN., LTD.*, [1905] 2 K. B. 281; 74 L. J. K. B. 699; 93 L. T. 62; 53 W. R. 648; 21 T. L. R. 555; 10 Asp. M. L. C. 68; 10 Com. Cas. 237, C. A.

*Annotations*:—*Consd.* *St. Paul Fire & Marine Insce. v. Morice* (1906), 11 Com. Cas. 153. *Distd.* *British Dominions General Insce. v. Duder*, [1915] 2 K. B. 394. *Folld.* *Clover, Clayton v. Hessler*, [1925] 1 K. B. 1. *Refd.* *Liverpool Mortgage Insce. Case*, [1913] 2 Ch. 604; *Norwich Union Fire Insce. Soc. v. Colonial Mutual Fire Insce.*, [1922] 2 K. B. 461; *A.-G. v. Forsikringsakt. National (of Copenhagen)* (1924), 93 L. J. K. B. 679.

**106. — Insurable interest.]—NELSON v. EMPRESS ASSURANCE CORPN., LTD.**, No. 105, *ante*.

**107. — Whether one of indemnity—R. S. C., Ord. 16, r. 48.]—NELSON v. EMPRESS ASSURANCE CORPN., LTD.**, No. 105, *ante*.

**108. — —.]—BRITISH DOMINIONS GENERAL INSURANCE CO., LTD. v. DUDER**, No. 734, *post*.

**109. — Necessity for registration as mortgage—Companies Consolidation Act, 1908 (c. 69), s. 93 (1).]—Re LAW CAR & GENERAL INSURANCE CORPN., LTD.** (1911), 55 Sol. Jo. 407; *affd.*, [1911] W. N. 101, C. A.

**110. Validity of original policy preserved by treaty—Reinsurance policy inferentially included.]**

*Co. v. NORTHERN INSURANCE CO. OF ABERDEEN & LONDON* (1878), 2 A. R. 373.—*CAN.*

**k. Renewal of reinsurance—Necessity for notice of renewal.]—GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CO., LTD. v. NATIONAL BRITISH & IRISH MILLERS' INSURANCE CO., LTD.**, [1914] C. P. D. 586.—*S. AF.*

**l. Transfer of insurance business—Whether reinsurance.]—Pltf.'s premises were insured in L. Co., from Oct. 2, 1865, to Oct. 2, 1866. Before the term expired he received notice from W., the agent at N., that L. Co. would renew the policy on the same terms, & accordingly he paid W. the premium money & got his receipt. A., the general agent at J., declined to renew the policy, & paid the premium to defts., who issued a policy, taking the description of the premises from the L. Co.'s books, dated Oct. 16, 1866, but insuring from Oct. 2, 1866, to Oct. 2, 1867. The premises were destroyed by fire on Oct. 13, before the policy issued; but pltf. did not know that he was insured by defts.**

until he received the policy from W. who also acted for them:—*Held*: this amounted to a reinsurance, & there being no fraud pltf. was entitled to recover.—*GIFFARD v. QUEENS INSURANCE CO.* (1869), 12 N. B. R. (1 Han.) 432.—*CAN.*

**m. — —.]—FIRE INSURANCE ASSOCN., LTD. v. CANADA FIRE & MARINE INSURANCE CO.** (1883), 2 O. R. 481.—*CAN.*

**n. — —.]—FIRE INSURANCE ASSOCN., LTD. v. CANADA FIRE & MARINE INSURANCE CO.** (1883), 2 O. R. 495.—*CAN.*

**o. Extent of reinsurers' liability.]—Upon the construction of a contract of reinsurance whereby an insurance co. undertook to relieve another insurance co. of claims under its employers' liability insurance policies:—*Held*: the reinsuring co. was bound to indemnify the other co. for the legal & medical expenses which the latter was bound, under its policies, to pay to the insured employers.—*GLASGOW ASSURANCE CORPN., LTD. (LIQUIDATORS) v. WELSH INSURANCE CORPN.***

—*Pltfs.*, a British Insurance co., in Feb. 1914, issued a policy insuring the profits of a mill in Hungary against loss by fire, & at the same time reinsured their risk with a number of Lloyd's underwriters, of whom deft. was one. In Aug. 1914, war broke out between Britain & Hungary, & in Sept. 1914, the insured mill was burnt down. By the ordinary law of England the original contract of insurance would have been annulled by the outbreak of war, but by a treaty made between Britain & Hungary after the end of the war the validity of the contract was preserved. *Pltfs.* settled the claim of their assured by paying an agreed amount, & they sued in this action to recover from deft. the proportionate amount due from him as one of their reinsurers:—*Held*: (1) the reinsurance policy as well as the original policy was preserved by the treaty, & *pltfs.* had acted properly in settling the claim of their assured; & therefore their claim against deft. succeeded; (2) *obiter*, a provision in the reinsurance policy that the reinsurers should follow *pltfs.*' settlements bound the reinsurers to pay in cases where the original insurers had compromised a claim honestly, & in a proper business-like manner.—*EXCESS INSURANCE CO., LTD. v. MATHEWS* (1925), 31 Com. Cas. 43.

**111. Proviso that reinsurers follow settlements by insurers—Bonâ fide compromise by insurers.]—EXCESS INSURANCE CO., LTD. v. MATHEWS**, No. 110, *ante*.

**Marine reinsurance.]—See Part II., Sect. 9, *post*.**

**Fire reinsurance.]—See Part III., Sect. 2, *post*.**

**Life reinsurance.]—See Part IV., Sect. 16, *post*.**

## SECT. 9.—ADVOIDANCE OF POLICIES.

### SUB-SECT. 1.—ALTERATION.

*See Stamp Act, 1891 (c. 39), s. 96.*

**112. Alteration with consent of insurer—In writing.]—Policy altered by consent after it was written, well.—BATES v. GRABHAM** (1703), 2 Salk. 444; *Holt*, K. B. 469; 91 E. R. 386, N. P.

**113. Alteration without consent of insurer—Liability avoided.]—If a policy is executed in the printed form, without any specific subject of insurance being inserted in writing, & the subject matter is afterwards added in writing, & the addition signed by some of the underwriters only, the assured cannot recover against those under-**

*LTD.*, [1914] S. C. 320; 51 Sc. L. R. 271; [1914] 1 S. L. T. 139.—*SCOT.*

**p. Rights of reinsuring company.]—Where an insurance co. reinsures part of an amount insured by another co. "subject to the terms & conditions of the primary co.'s policy & to settlement thereunder in case of loss," the reinsuring co. has legally no voice in the settlement of the claim by the primary co. with the insured, though a settlement without consulting them is improper, & may disentitle the primary co. to the costs of an action for recovering the reinsurance.—*NATIONAL FIRE & MARINE INSURANCE CO. OF NEW ZEALAND v. AUSTRALIAN MERCANTILE UNION INSURANCE CO.* (1887), 6 N. Z. L. R. 144.—*N.Z.***

**q. — To raise all defences open to original insurer.]—In an action on a policy of reinsurance it is competent for deft. to raise all the same matters of defence that pltf. could have raised in an action against him by the primitive insurers on the original policy.—*UNIVERSAL MARINE INSURANCE CO., LTD. v. MILLER* (1866), 3 W. W. & A.B. 139.—*AUS.***



writers who do not so sign, on the contract, as it stands altered by the insertion.—**LANGHORN v. COLOGAN** (1812), 4 Taunt. 330; 128 E. R. 357. *Annotations*:—**Distd.** Sanderson v. McCulloch (1819), 4 Moore, C. P. 5. **Consd.** Forshaw v. Chabert (1821), 3 Brod. & Bing. 158. **Refd.** Sanderson v. Symonds (1819), 1 Brod. & Bing. 426. **Mentd.** Mollett v. Wackerbarth (1847), 5 C. B. 181; Aldous v. Cornwell (1868), L. R. 3 Q. B. 573.

**Marine Insurance.**—See Part II., Sect. 16, sub-sect. 1, *post*.

#### SUB-SECT. 2.—FRAUD.

**114. Cancellation of policy ordered.**—A policy of insurance being made an ill use of, the ct. decreed it to be delivered up.—**WITTINGHAM v. THORNBOROUGH** (1890), Prec. Ch. 20; 2 Eq. Cas. Abr. 335; 24 E. R. 11; *sub nom.* **WHITTINGHAM v. THORNBURGH**, 2 Vern. 206.

**115.** —.]—Bill for discovery of fraud in a policy of insurance, to defend an action at law, & that the policy might be declared void, & be delivered up to be cancelled. Demurrer thereto overruled.—**FRENCH v. CONNELLY** (1794), 2 Anst. 454; 145 E. R. 933.

**116.** — **Limits of equitable jurisdiction.**—If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a ct. of equity has jurisdiction to direct its delivery up & cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence, or to declare that there is no liability upon it. If there is danger of the evidence for the defence being lost, the remedy is, not an action for cancellation, but an action to perpetuate testimony.—**BROOKING v. MAUDSLAY, SON & FIELD** (1888), 38 Ch. D. 636; 57 L. J. Ch. 1001; 58 L. T. 852; 36 W. R. 664; 4 T. L. R. 421; 6 Asp. M. L. C. 296.

*Annotations*:—**Refd.** London Assn. of Shipowners & Brokers v. London & India Docks Joint Committee, [1892] 3 Ch. 242; Gauranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536. **Mentd.** The Manar, [1903] P. 95; West v. Sackville, [1903] 2 Ch. 378.

**Concealment or non-disclosure.**—See Sub-sect. 4, *post*.

**Misrepresentation.**—See Sub-sect. 4, *post*.

**By agent.**—See Sect. 14, sub-sect. 7, *post*.

**Return of premium.**—See Sect. 6, sub-sect. 2, B., *ante*.

#### SUB-SECT. 3.—CONCEALMENT OR NON-DISCLOSURE.

##### A. In General.

**Contracts of insurance uberrimæ fidei.**—See Sect. 2, *ante*.

**117. Duty to disclose.**—In all contracts of insurance.—It was argued that though this might be a policy of insurance, yet it was not a marine, fire or life policy, & that it is only in actions upon such policies that the defence of concealment of a material fact avails the underwriter. I do not understand the validity of this argument (SMITH, L.J.).—**SEATON v. HEATH, SEATON v. BURNAND**, [1899] 1 Q. B. 782; 68 L. J. Q. B. 631; 80 L. T. 579; 47 W. R. 487; 15 T. L. R. 297; 4 Com. Cas. 193, C. A.; *on appeal, sub nom.* **SEATON v. BURNAND, BURNAND v. SEATON**, [1900] A. C. 135, H. L.

*Annotations*:—**Refd.** Cantiero Meccanico Brindisino v. Janson, [1912] 3 K. B. 452; London General Omnibus Co.

v. Holloway, [1912] 2 K. B. 72; Yorke v. Yorkshire Insce., [1918] 1 K. B. 662. **Mentd.** Parr's Bank v. Albert Mines Syndicate (1900), 5 Com. Cas. 116; Re Denton's Estate, Licenses Insce. Corpn. & Guarantee Fund v. Denton, [1904] 2 Ch. 178; Floyd v. Gibson (1909), 100 L. T. 761; Banbury v. Bank of Montreal, [1918] A. C. 626; Wilson v. United Counties Bank, [1920] A. C. 102; Yorkshire Insce. v. Craine, [1922] 2 A. C. 541.

**118.** — **On insurer & assured.**—**CARTER v. BOEHM**, No. 3, *ante*.

**119.** — **On assured.**—An insurer is bound to communicate to the underwriters any intelligence he has, which may affect his choice whether he will insure at all, & at what premium he will insure, whether in fact true or false. If a ship is advertised to be in danger, & the insurer effects a policy on ship or ships, knowing that the ship in danger is one of them, without stating the ships names, this is a concealment which avoids the policy, although the rumour was false. *Semble*: if an insurer effects a policy on ship or ships, knowing their names, but not communicating them, the policy is void; such an insurance being tantamount to a representation that he does not know by what ships the goods will come.—**LYNCH v. HAMILTON** (1810), 3 Taunt. 37; 128 E. R. 15; *affd. sub nom.* **LYNCH v. DUNSFORD** (1811), 14 East, 494, Ex. Ch.

*Annotations*:—**Appld.** Leigh v. Adams (1871), 25 L. T. 566. **Refd.** Rickards v. Murdock (1830), L. & Welsb. 132; Blackburn, Low v. Vigors (1887), 12 App. Cas. 531.

**120.** — —.]—(1) It is the duty of the assured, not only to communicate to the underwriter articles of intelligence which may affect his choice, whether he will insure at all, & at what premium he will insure; but, likewise, all rumours & reports which may tend to enhance the magnitude of the risk.

(2) The opinion of underwriters, whether, upon certain facts being communicated to them, they would have insured or not the particular voyage, cannot be received as evidence.

(3) The materiality of the intelligence or rumours, which the assured is charged with having suppressed, is a question for the jury, under the circumstances of the case, & ought not to rest upon the opinion of mercantile men.—**DURRELL v. BDERLEY** (1816), Holt, N. P. 283, N. P.

*Annotations*:—*As to* (2) **Consd.** Campbell v. Rickards (1833), 5 B. & Ad. 840. **Refd.** Chapman v. Walton (1833), 10 Bing. 57.

**121.** — —.]—(1) Whether a proposed assurance be upon shipping, or lives, or against fire, it is the duty of the assured to communicate every material fact necessary to be known to the assurer. & if any such fact be known & not communicated, the policy will be void, although the assured did not, at the time, believe it to be material.

(2) It is a question for the jury whether any particular fact was or was not material.—**LINDENAU v. DESBOROUGH** (1828), 8 B. & C. 586; 108 E. R. 1160; *sub nom.* **VON LINDENAU v. DESBOROUGH**, 3 C. & P. 353; 3 Man. & Ry. K. B. 45; 7 L. J. O. S. K. B. 42.

*Annotations*:—*As to* (1) **Appld.** Wainwright v. Bland (1836), 1 M. & W. 32. **Consd.** Wheelton v. Hardisty (1857), 8 E. & B. 232; London Assn. v. Mansel (1879), 11 Ch. D. 363; Joel v. Law Union & Crown Insce., [1908] 2 K. B. 431. **Refd.** Jones v. Provincial Insce. (1857), 3 C. B. N. S. 65; Yorke v. Yorkshire Insce., [1918] 1 K. B. 662. *As to* (2) **Refd.** Jones v. Provincial Insce. (1857), 3 C. B. N. S. 65. *Generally, Mentd.* Everett v. Desborough (1829), 5 Bing. 503.

#### PART I. SECT. 9, SUB-SECT. 2.

**114 i. Cancellation of policy ordered.**—**VENNER v. SUN LIFE INSURANCE CO.** (1890), 17 S. C. R. 394.—**CAN.**

**114 ii.** —.]—**MUTUAL LIFE ASSURANCE CO. v. VOL. XXIX.**

**ANCE CO. OF NEW YORK v. ANDERSON** (1897), 1 N. B. Eq. Rep. 466.—**CAN.**

**114 iii.** —.]—**ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO. v. NARASIMHA CHARU** (1901), 1 L. R. 25 Mad. 183.—**IND.**

#### PART I. SECT. 9, SUB-SECT. 3.—A.

**119 i. Duty to disclose—On assured.**—**LEPAGE v. CANADA FIRE & MARINE INSURANCE CO.** (1880), 2 P. E. I. 322.—**CAN.**





change of the circumstances as might materially affect B.'s conduct, of which change B. is not aware & omits to inform B., thereof, but leaves him to act under his former impression, this ct. will not hold B., bound by his acts whilst under that former impression.

The P. C. Assurance Society having granted a policy for £3,000 on the life of L. T., proposed to pltfs., who were another assurance society, that they should take £1,000 part of the risk, & stated that they had reassured the life for £1,000 with a third office, but that they intended to retain the remaining £1,000 themselves. Pltfs., accepted, but before the reassurance with them was affected, defts. changed their intention & disposed of the whole risk, but omitted to inform pltfs. thereof. The reassurance with pltfs. was then completed:—*Held*: the policy of reassurance with pltfs., was rendered void by this misrepresentation, & it must be delivered up to pltfs., & this although no fraud of any kind was otherwise established against defts.—*TRAILL v. BARING* (1864), 4 De G. J. & Sm. 318; 3 New Rep. 681; 33 L. J. Ch. 521; 10 L. T. 215; 10 Jur. N. S. 377; 12 W. R. 678; 46 E. R. 941, L. J.J.

*Annotations*:—*Apld.* British Equitable Insce. v. G. W. Ry. (1868), 38 L. J. Ch. 132. *Reid.* Hoare v. Bremridge (1872), 27 L. T. 368; *Re* Scottish Petroleum Co. (1883), 23 Ch. D. 413; *Canning v. Hoare* (1885), 1 T. L. R. 526. *Mentd.* *Re* Metropolitan Coal Consumers' Assocn., Karberg's Case (1892), 66 L. T. 700.

**142. Materiality of matters not disclosed—Question for jury.]—DURRELL v. BEDERLEY**, No. 120, *ante*.

**143. ———.]—LINDENAU v. DESBOROUGH**, No. 121, *ante*.

**Marine insurance.]—See Part II., Sect. 16, sub-sect. 3, B., post.**

**Fire insurance.]—See Part III., Sect. 9, sub-sect. 1, post.**

**Life insurance.]—See Part IV., Sect. 9, sub-sect. 1, post.**

**142 i. Materiality of matters not disclosed—Question for jury.]—PARSONS v. CITIZENS' INSURANCE CO.** (1879), 43 U. C. R. 281.—CAN.

**142 ii. ———.]—SMITH v. DOMINION OF CANADA ACCIDENT INSURANCE CO.** (1903), 36 N. B. R. 300.—CAN.

#### PART I. SECT. 9, SUB-SECT. 4.

**144 i. Whether policy vitiated.]—FARMERS & SETTLERS' CO-OPERATIVE INSURANCE CO. OF AUSTRALIA, LTD. v. LUTZ**, [1924] S. A. S. R. 84.—AUS.

**144 ii. ———.]—Misrepresentation made with intent to deceive vitiates a policy however trivial or immaterial to the risk it may be; if honestly made it only vitiates when material & substantially incorrect.—NOVA SCOTIA MARINE INSURANCE CO. v. STEVENSON** (1894), 23 S. C. R. 137.—CAN.

**144 iii. ———.]—On the facts:—Held**: pltf. had made a material false representation which vitiated the policy, & he was not entitled to recover upon his claim for indemnity.—*BURNETT v. BRITISH COLUMBIA ACCIDENT & EMPLOYERS' LIABILITY CO.* (1914), 28 W. L. R. 425.—CAN.

**144 iv. ———.]—NOVA SCOTIA TRUST CO. v. MUTUAL LIFE INSURANCE CO. OF N. Y.**, [1925] 3 D. L. R. 832.—CAN.

**144 v. ———.]—DORSET v. NEW ZEALAND INSURANCE CO., MATTHEWS v. NEW ZEALAND INSURANCE CO.** (1890), 8 N. Z. L. R. 308.—N.Z.

**144 vi. ———.]—Where a man capable of reading & writing chooses to sign a proposal for insurance the answers in which are expressed to be the basis of the contract, without reading it, &**

**one of the answers which he thus causes to be represented to the co. as his answers is untrue in fact, there is no valid contract, & the policy issued in pursuance of that proposal is void.—ROKKYER v. AUSTRALIAN ALLIANCE ASSURANCE CO.** (1908), 28 N. Z. L. R. 305.—N.Z.

**144 vii. ———.]—Re SAMSON & ATLAS INSURANCE CO., LTD.** (1909), 28 N. Z. L. R. 1035.—N.Z.

**144 viii. ———.]—NEWCASTLE FIRE INSURANCE CO. v. MACMORRAN & CO.** (1815), 3 Dow, 255; 3 E. R. 1057, H. L.—SCOT.

**147 i. ———.]—Materiality of misrepresentation.]—ASHFORD v. VICTORIA MUTUAL ASSURANCE CO.** (1870), 20 C. P. 434.—CAN.

**147 ii. ———.]—STICKNEY v. NIAGARA DISTRICT MUTUAL INSURANCE CO.** (1873), 23 C. P. 372.—CAN.

**147 iii. ———.]—A false statement, to avoid the policy, must be material.—STEVES v. SOVEREIGN FIRE INSURANCE CO.** (1880), 20 N. B. R. 394.—CAN.

**147 iv. ———.]—The statements made were misleading statements & involved the suppression of information which pltfs. were bound to give & in both respects they had reference to a matter which was material to the risk. Defts. acted upon these misstatements & were misled by them:—Held**: pltfs.' action upon the policy should be dismissed.—*DWORKIN v. GLOBE INDemnITY CO. OF CANADA* (1921), 67 D. L. R. 404; 51 O. L. R. 159.—CAN.

**147 v. ———.]—HARDING v. VICTORIA INSURANCE CO., LTD.**, [1924] N. Z. L. R. 267.—N.Z.

#### SUB-SECT. 4.—MISREPRESENTATION.

*See, generally, MISREPRESENTATION & FRAUD.*

**144. Whether policy vitiated.]—FITZHERBERT v. MATHER**, No. 124, *ante*.

**145. ———.]—DUFFELL v. WILSON**, No. 79, *ante*.

**146. ———.]—HUNTING & SON v. BOULTON**, No. 786, *post*.

**147. ———.]—Materiality of misrepresentation.]—PAWSON v. WATSON**, No. 1179, *post*.

**148. ———.]—Undue confidence induced.]—A London merchant, insuring at Leith, represented contrary to the fact, that he had done some insurance at Lloyd's, upon the same voyage, at the same premium given to the Leith underwriters, who, not being well acquainted with the nature of the risk themselves, subscribed the policy, from their confidence in the skill & judgment of the London underwriters:—Held**: this was a fraud which vitiated the policy, though the misrepresentation was not such as affected the nature of the risk.—*SIBBALD v. HILL* (1814), 2 Dow, 263; 3 E. R. 859, H. L.

*Annotations*:—*Consd.* Ionides v. Pender (1874), L. R. 9 Q. B. 531. *Apld.* Rivaz v. Gerussi (1880), 6 Q. B. D. 222.

**149. ———.]—Representation in answer to insurers' inquiry.]—THE BEDOUIN**, No. 1687, *post*.

**150. Proof of misrepresentation—Burden on insurer.]—Where payment of a risk is resisted by insurers on the ground of misrepresentation, the onus is on them to prove very clearly that such misrepresentation has been made.—DAVIES v. NATIONAL FIRE & MARINE INSURANCE CO. OF NEW ZEALAND, NATIONAL FIRE & MARINE INSURANCE CO. OF NEW ZEALAND v. DAVIES**, [1891] A. C. 485; 60 L. J. P. C. 73; 65 L. T. 560, P. C.

*Annotations*:—*Reid.* Glicksman v. Lancashire & General Assco., [1925] 2 K. B. 593. *Mentd.* Union Insce. Soc. of Canton v. Wills, [1916] 1 A. C. 281.

**151. ———.]—Concealment—Non-fraudulent misrepresentation.]—(1) To an action on a policy of insurance, a plea, that the insurer was induced to**

**147 vi. ———.]—On the facts:—Held**: the policy was void, the misstatement materially affecting the co.'s estimate of the risk.—*REID & CO. v. EMPLOYERS' ACCIDENT & LIVE STOCK INSURANCE CO.* (1899), 1 F. (Ct. of Sess.) 1031; 36 Sc. L. R. 825.—SCOT.

**149 i. ———.]—Representation in answer to insurer's inquiry.]—On the application the assured stated that there was no incumbrance on the property. Subsequently the premium was reduced & a new policy issued on the same property for the same amount, no new application being made or questions asked or answered. It turned out that there was in fact an incumbrance on the property:—Held**: in the absence of direct evidence to the contrary, this latter policy must be assumed to have been based on the original application, & the assured could not recover.—*MARTIN v. HOME INSURANCE CO.* (1870), 20 C. P. 447.—CAN.

**149 ii. ———.]—In effecting insurances applt. is bound to make true answers to the questions put by the co.; if he does not, & misrepresents the risk in any way, it will invalidate the policy.—GREET v. CITIZENS INSURANCE CO.** (1880), 27 Gr. 121.—CAN.

**149 iii. ———.]—BASTEDO v. BRITISH EMPIRE INSURANCE CO., LTD.** (1913), 18 B. C. R. 377.—CAN.

**t. Question for jury.]—HOPKINS v. PROVINCIAL INSURANCE CO.** (1868), 18 C. P. 74.—CAN.

**a. ———.]—KEER v. HASTINGS MUTUAL FIRE INSURANCE CO.** (1877), 41 U. C. R. 217.—CAN.

**Sect. 9.—Avoidance of policies: Sub-sect. 4. Sects. & 11.]**

enter into the policy by a false misrepresentation of a material fact, made by the assured & their agent, such misrepresentation being, at the time it was made false to the knowledge of the insured & their agent, is supported by proof, either of concealment or of misrepresentation not fraudulent.

(2) Where a policy is avoided by concealment or by misrepresentation not fraudulent the assured is entitled to a return of the premium, & the policy is conclusive evidence of the receipt of the premium by the insurer.—**ANDERSON v. THORNTON** (1853), 8 Exch. 425; 20 L. T. O. S. 250; 155 E. R. 1415.

*Annotation:—As to (1) Refd. Thom v. Bigland (1853), 8 Exch. 725.*

**Return of premium—On misrepresentation.]—**See Sect. 6, sub-sect. 2, B., *ante*.

**By agent to insured.]—**See Sect. 14, sub-sect. 6, *post*.

**Marine insurance.]—**See Part II., Sect. 16, sub-sect. 2, *post*.

**Fire insurance.]—**See Part III., Sect. 9, sub-sect. 1, *post*.

**Life insurance.]—**See Part IV., Sect. 9, sub-sect. 1, *post*.

**SECT. 10.—RECTIFICATION OF POLICIES—MISTAKE.**

**152. Policy differing from prior agreement—Rectification in accordance with agreement.]—**

(1) If a policy of insurance differs from the label, which is the memorandum or minutes of the agreement, it shall be made agreeable to the label.

(2) Where there are the words at & from a place to England, first arrival is implied & always understood in policies.

The general principles laid down by pliffs.' counsel are right, as stress of weather, & the danger of proceeding on a voyage when a ship is in a decayed condition, & in such a case, if she went to the nearest place, I should consider it equally the same, as if she had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, & no deviation (**LORD HARDWICKE, C.**).—**MORTEUX v. LONDON ASSURANCE (GOVERNOR & CO.)** (1739), 1 Atk. 545; 26 E. R. 343, L. C.

*Annotations:—As to (1) Apld. Collett v. Morrison (1851), 9 Hare, 162. Refd. Griffiths v. Fleming, [1909] 1 K. B. 805. As to (2) Apld. Haughton v. Empire Marine Insce. (1866), L. R. 1 Exch. 206. Generally, Mentd. Phelps v. Hill, [1891] 1 Q. B. 605.*

**153. ———.]—**If the policy varies from the agreement to effect an insurance, a ct. of equity will interfere & deal with the case of the

insured on the footing of the agreement, & not of the policy.—**COLLETT v. MORRISON** (1851), 9 Hare, 162; 21 L. J. Ch. 878; 68 E. R. 458.

*Annotations:—Consd. Wood v. Dwaris, (1850) 11 Exch. 493; Griffiths v. Fleming, [1909] 1 K. B. 805. Refd. Martin v. West of England Insce. (1858), 6 W. R. 377; Re Bradley & Essex & Suffolk Accident Indemnity Soc., [1912] 1 K. B. 415. Mentd. Childers v. Childers (1857), 30 L. T. O. S. 3.*

**154. ———.]—****EMANUEL & CO. v. ANDREW WEIR & CO., No. 788, post.**

**155. Evidence of mistake—Effect of absence of evidence.]—**Policy of insurance. Bill to rectify it according to the intent dismissed, there not being evidence to vary the contract.

If the ship was never brought within the terms of the insurance, so that the insurer never runs any risk, the premium must be entered in an action by the assuree (**LORD HARDWICKE, C.**).—**HENKLE v. ROYAL EXCHANGE ASSURANCE CO.** (1749), 1 Ves. Sen. 317; 27 E. R. 1055, L. C.

*Annotations:—Refd. Townshend v. Stangroom (1801), 6 Ves. 328; Wharram v. Wharram (1864), 3 Sw. & Tr. 301. Mentd. Furtado v. Rodgers (1802), 3 Bos. & P. 191.*

**Marine insurance.]—**See Part II., Sect. 17, *post*.

**Fire insurance.]—**See Part III., Sect. 8, *post*.

**SECT. 11.—SUBROGATION.**

**156. General rule.]—**(1) According to the doctrine of subrogation, as between the insurer & the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised or has accrued, & whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished.

A vendor contracted with a purchaser for the sale, at a specified sum, of a house, which had been insured by the vendor with an insurance co. against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, & the vendor received the insurance money from the co. The purchase was afterwards completed, & the purchase money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor:—**Held:** in an action by the co. against the vendor, the co. were entitled to recover a sum equal to the insurance money from the vendor for their own benefit.

(2) A person with a limited interest may insure either for himself & to cover his own interest only,

**PART I. SECT. 10.**

**152 i. Policy differing from prior agreement—Rectification in accordance with agreement.]—**An insurance had been effected for \$1,000 only, & the policy had by mistake been issued for \$2,000. The premium paid was in accordance with the co.'s rates for a \$1,000 policy:—**Held:** the insurance effected was for \$1,000 only.—**ÆTNA LIFE INSURANCE CO. v. BRODIE** (1880), 5 S. C. R. 1.—**CAN.**

**152 ii. ———.]—**The building marked "feed house" on the plan was not attached to assured's dwelling, & did not in any way correspond with the description in the policy, but another building marked "wood shed" answered the description & contained the goods intended to be insured:—

**Held:** the maxim *falsa demonstratio non nocet* applied, & the false part of the description should be rejected, & the policy held to attach.—**CONNELY v. GUARDIAN ASSURANCE CO.** (1891), 30 N. B. R. 316; *affd.*, 20 S. C. R. 208.—**CAN.**

**152 iii. ———.]—****NORTH BRITISH INSURANCE CO. v. TUNNOCK & FRASER** (1864), 3 Macph. (Ct. of Sess.) 1; 37 Sc. Jur. 1.—**SCOT.**

**b. Incorrect description representing contract actually concluded.]—**Where an insured's land is incorrectly described in an application for insurance & in the policy issued in pursuance thereof, but the policy with such incorrect description represents the contract which was actually concluded with the insurance co., the insured

cannot recover for a loss upon the land in respect to which the insurance should have been placed.—**DOHERTY v. CANADA NATIONAL INSURANCE CO., LTD.**, [1918] 1 W. W. R. 366; 38 D. L. R. 494; 11 Sask. L. R. 32.—**CAN.**

**c. Conditions misunderstood by insured—No misrepresentation by agent.]—**The agent of a life insurance co. explained the conditions upon which it would issue a policy, but plff. misunderstood the conditions, which were somewhat complicated:—**Held:** the agent had made no misrepresentation, plff. was not entitled to a rectification of the policy.—**POTGIETER v. NEW YORK MUTUAL LIFE INSURANCE SOCIETY** (1900), 17 S. C. 67.—**S. AF.**



or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. . . . It is well known in marine as in fire insurances that a person who has a limited interest may insure nevertheless in the total value of the subject matter of the insurance (BOWEN, L.J.).

(3) The contract of insurance contained in a marine or fire policy is a contract of indemnity (BRETT, L.J.).—CASTELLAIN v. PRESTON (1883), 11 Q. B. D. 380; 52 L. J. Q. B. 366; 49 L. T. 29; 31 W. R. 557, C. A.

*Annotations*:—As to (1) *Appld.* Assicurazioni Generali de Trieste v. Empress Assce., [1907] 2 K. B. 814. *Consd.* British Dominions General Insee. v. Duder, [1915] 2 K. B. 394. *Refd.* Sea Insee. v. Hadden (1884), 13 Q. B. D. 706; Law Fire Assce. v. Oakley (1888), 4 T. L. R. 309; West of England Fire Insee. v. Isaacs, [1896] 2 Q. B. 377; Thames & Mersey Marine Insee. v. British & Chilian S.S. Co., [1915] 2 K. B. 214; Matthey v. Curling, [1922] 2 A. C. 180. As to (2) *Distd.* Gaussen v. Whatman (1905), 93 L. T. 101. *Refd.* Reliance Marine Insee. v. Duder, [1913] 1 K. B. 265. As to (3) *Consd.* British Dominions General Insee. v. Duder, [1915] 2 K. B. 394. *Refd.* Gaussen v. Whatman (1905), 93 L. T. 101; Grover & Grover v. Mathews, [1910] 2 K. B. 401; Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Case, [1914] 2 Ch. 617; Wilson Shipping Co. v. British & Foreign Insee., [1920] 2 K. B. 25; Edwards v. Motor Union Insee., [1922] 2 K. B. 249. *Generally, Mentd.* Re Denton's Estate, Licenses Insee. Corp'n. & Guarantee Fund v. Denton (1904), 52 W. R. 484.

157. Rights of insurer—After payment made—All remedies open to assured.]—SIMPSON v. THOMSON, No. 2355, *post*.

158. ————.]—A policy of fire insurance is a contract of indemnity, & upon payment of the amount of loss the insurer is entitled to be put into the place of the assured; & if at a subsequent time the assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss sustained by him.—DARRELL v. TIBBITTS (1880), 5 Q. B. D. 560; 50 L. J. Q. B. 33; 42 L. T. 797; 44 J. P. 695; 29 W. R. 66, C. A.

*Annotations*:—*Appld.* Castellain v. Preston (1883), 11 Q. B. D. 380. *Consd.* West of England Fire Insee. v. Isaacs, [1896] 2 Q. B. 377.

159. ————.]—Payment not within terms of policy.]—Payment honestly made by insurers in satisfaction of a claim by the insured entitles the insurers to the remedies available to the insured; & such remedies cannot be resisted on the ground that the payment was not within the terms of the policy:—*Held*: although the insurers could not by mere force of subrogation sue in their own name yet that in this case the right to do so was conferred by assignment from the insured.—KING v. VICTORIA INSURANCE CO., [1896] A. C. 250; 65 L. J. P. C. 38; 74 L. T. 206; 44 W. R. 592; 12 T. L. R. 285, P. C.

*Annotations*:—*Refd.* Edwards v. Motor Union Insee., [1922] 2 K. B. 249. *Mentd.* Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608; Torkington v. Magee, [1902] 2 K. B. 427; Chelsham & Woldingham Assoon. v. Hayward (1911), 76 J. P. 52; Re Pain, Gustavson v. Haviland, [1919] 1 Ch. 38.

#### PART I. SECT. 11.

157 i. Rights of insurer—After payment made—All remedies open to assured.]—ANCHOR MARINE INSURANCE CO. v. PHOENIX INSURANCE CO. (1881), 6 A. R. 567.—CAN.

157 ii. ————.]—IMPERIAL RE INSURANCE CO. v. BULL (1889), S. C. R. 697.—CAN.

157 iii. ————.]—Pltf.'s automobile was injured by the negligence of defts.' employees. Pltf. was insured against injury by such an accident as

that which occurred, & the insurance co. adjusted & paid his loss:—*Held*: the insurance co., being called upon by pltf. to indemnify him, was by law subrogated to his rights against the wrongdoer.—GOUGH v. TORONTO & YORK RADIAL RY. CO. (1918), 42 O. L. R. 415; 14 O. W. N. 15.—CAN.

d. ————.]—BROWN v. BRITISH COLUMBIA ELECTRIC RY. CO., [1925] 3 D. L. R. 734; 2 W. W. R. 635.—CAN.

164 i. Compensation paid to assured

160. ————.]—Anything diminishing or reducing loss.]—BURNAND v. RODOCANACHI, No. 2375, *post*.

161. ————.]—Enforcement of rights — Insurer cannot sue in own name.]—An insurance office having paid the assured the amount of the loss sustained by him in consequence of a demolishing by rioters, sued the hundredors under 1 Geo. 1, statute 2, c. 5, s. 6, in their own names:—*Held*: the office was not entitled to recover.—LONDON ASSURANCE CO. v. SAINSBURY (1783), 3 Doug. K. B. 245; 99 E. R. 636.

*Annotations*:—*Refd.* Yates v. Whyte (1838), 1 Arn. 85; Edwards v. Motor Union Insee., [1922] 2 K. B. 249.

162. ————.]—Except by assignment.]—KING v. VICTORIA INSURANCE CO., No. 159, *ante*.

163. ————.]—Insurer must sue in name of assured.]—SIMPSON v. THOMSON, No. 2355, *post*.

164. Compensation paid to assured by third party—After payment by insurer—Liability of assured to account.]—BURNAND v. RODOCANACHI, No. 2375, *post*.

165. ————.]—Gold of defts., mine-owners, which had been insured by pltf's., underwriters, was commandeered by the South African Govt. shortly before the declaration of war. Defts. having asked for a return of part of the gold, the South African Govt. paid them a sum of money in respect of it, on the understanding that defts.' mine would be kept open, & that 50 per cent. of the gold won would be handed to the South African Govt. Pltf's. having paid as for a total loss claimed the sum received by defts. from the South African Govt.:—*Held*: the sum received by defts. from the South African Govt. was a payment in diminution of the loss which pltf's. were entitled to recover, but defts. were not trustees for pltf's., nor liable to pay interest on the amount while it had remained in their hands.—STEARNS v. VILLAGE MAIN REEF GOLD MINING CO., LTD. (1905), 21 T. L. R. 236; 10 Com. Cas. 89, C. A.

166. ————.]—Pltf's. had insured the life of deft.'s brother for £1,000 & his motor car against damage to the extent of £90, the policy providing that pltf's. should be entitled to all the rights of the assured & to use his name in enforcing them. Defts.' brother was killed in a collision between the motor car & a railway train, & pltf's. paid to defts., as his brother's exor., £1,081 15s. 0d., of which £81 15s. 0d. was for damage to the car. Deft. brought an action against the railway co. under Fatal Accidents Act, 1846 (c. 93), on behalf of the relatives & irregularly included a claim for damage to the car, & he accepted from the railway co. £1,250 in full settlement of the action. In an action by pltf's. to recover from defts. £81 15s. 0d. of this sum as money received to their use:—*Held*: as the compromise prevented pltf's. from suing the railway co. & defts. had so dealt with the claim for damage to the car that it was impossible to ascertain what part of the £1,250 was paid in respect thereof, pltf's. were entitled to recover the

by third party—After payment by insurer—Liability of assured to account.]—When the assured is put in as good a position by the recovery from the wrongdoer as if the damage insured against had not happened, then for any surplus of money or other advantage recovered over & above that, the insurer is entitled to be subrogated into the right to receive that money or advantage to the extent of the amount paid under the insurance policies.—NATIONAL FIRE INSURANCE CO. v. McLAREN (1886), 12 O. R. 682.—CAN.

**Sect. 11.—Subrogation.** *Sects. 12, 13 & 14: Sub-sects. 1, 2 & 3.]*

full amount of £81 15s. 0d.—*HORSE, CARRIAGE & GENERAL INSURANCE CO., LTD. v. PETCH* (1916), 33 T. L. R. 131.

*Marine insurance.]—See Part II., Sect. 25, post.*  
*Fire insurance.]—See Part III., Sect. 2, post.*

## SECT. 12.—DISCOVERY AND INTERROGATORIES.

**Discovery & production of documents—Report of insurance agent to company.]—See DISCOVERY, Vol. XVIII., p. 135, Nos. 858–860.**

**—Ship's papers.]—See DISCOVERY, Vol. XVIII., pp. 93–95, Nos. 442–468.**

**Interrogatories.]—See DISCOVERY, Vol. XVIII., p. 222, No. 1704.**

## SECT. 13.—ARBITRATION CLAUSES.

**NOTE.—The references in this section are to the pages & numbers in Volume II. dealing with the title Arbitration.**

**Necessity for signature of submission by assured.]—See p. 315, No. 24.**

**Whether arbitration clause in force & applicable.]—See pp. 332, 333, Nos. 145–147.**

**Law governing construction of clause.]—See p. 335, No. 156.**

**Condition precedent to arbitration.]—See p. 336, Nos. 162, 163.**

**Effect on jurisdiction of court.]—See p. 350, Nos. 263, 264.**

**Submission condition precedent to right to sue.]—See pp. 355–358, 360, Nos. 290–302, 308.**

**Stay of proceedings—Agreement impugned.]—See p. 363, No. 325.**

**Reference to foreign court.]—See p. 364, No. 329.**

**—Power of court.]—See pp. 365, 366, Nos. 339–341.**

**—Grounds for granting or refusing.]—See pp. 369, 371, Nos. 359, 370, 373.**

## SECT. 14.—INSURANCE AGENTS.

### SUB-SECT. 1.—IN GENERAL.

**167. Contract made without authority—Whether capable of ratification—After knowledge of loss.]—**

(1) Where a contract of fire insurance is made by one person on behalf of another without authority, it cannot be ratified by the party on whose behalf it is made after & with knowledge of the loss of the thing insured.

### PART I. SECT. 14, SUB-SECT. 1.

**e. Liability for negligence.]—JOHNSTON v. GRAHAM** (1863), 14 C. P. 9.—CAN.

**f. —.]—A. applied to an agent of an insurance co. to effect an insurance, & paid the premium. The agent gave the usual receipt, following a form supplied by the co. which declared that a policy would be issued by the co. in sixty days if approved of by the manager. The agent did not report the transaction to the co., & after the expiration of sixty days a fire occurred:—Held: the co., & not the insured, should sustain any damage occasioned by the agent's neglect, & the co. was liable for the loss by fire.—PATTERSON v. ROYAL INSURANCE CO.** (1867), 14 Gr. 169.—CAN.

**—.]—HAWKE v. NIAGARA**

**DISTRICT MUTUAL FIRE INSURANCE CO.** (1876), 23 Gr. 130.—CAN.

**h. —.]—BUCK v. KNOWLTON** (1892), 21 S. C. R. 371.—CAN.

**k. —.]—HENRY v. BEATTIE** (1903), 23 C. L. T. 30, 250.—CAN.

**l. —.]—STONESS v. ANGLO-AMERICAN INSURANCE CO.** (1912), 21 O. W. R. 405; 3 O. W. N. 886; 3 D. L. R. 63.—CAN.

**m. —.]—ANTISEPTIC BEDDING CO. v. GUROFSKI** (1914), 26 O. W. R. 852; 7 O. W. N. 95; 8 O. W. N. 92; 33 O. L. R. 319.—CAN.

**n. Liability for breach of definite instructions.]—An agent of an insurance co., who has effected an insurance in breach of his express instructions, is liable to indemnify the co. any loss unavoidably sustained by reason**

(2) There is no case in which it is said that that rule [of gratification] ought to be extended to cases other than to policies of marine insurance (*HAMILTON, J.*).—*GROVER & GROVER, LTD. v. MATHEWS*, [1910] 2 K. B. 401; 79 L. J. K. B. 1025; 102 L. T. 650; 26 T. L. R. 411; 15 Com. Cas. 249.

**168. Mistake of insured as to identity of principal.]—A man entered into a contract with the agent of an insurance co., to insure him, under the impression that he was dealing with the agent of another co.:—Held: there was a contract, & the co. whose agent he dealt with was liable.—MACKIE v. EUROPEAN ASSURANCE SOCIETY** (1869), 21 L. T. 102; 17 W. R. 987.

**Annotation:—Reid. Murfitt v. Royal Insce.** (1922), 38 T. L. R. 334.

**Marine insurance brokers.]—See Part II., Sect. 5, post.**

### SUB-SECT. 2.—WHETHER AGENT OF INSURER OR INSURED.

**169. Fraudulent representation as to validity of policy.]—Pltfs. alleged that they had allowed an existing policy on the life of another to lapse & had taken out a fresh policy on the same life with defts. on the representation of defts.' agent that the policy was good & valid. On the death of the life insured defts. repudiated liability on the ground of absence of insurable interest:—Held: the question whether defts. could avail themselves of the alleged fraud of their agent & retain the premiums must be determined by a jury.—PARR v. LONDON, EDINBURGH & GLASGOW ASSURANCE CO.** (1891), 8 T. L. R. 88, D. C.

**170. Agent filling up proposal form—Answers untrue—Insured ignorant of untruth.]—A policy of insurance against accidental injury was effected with an insurance co. through their local agent. The proposal form was filled up by the agent, many of the answers filled in by him being false in material respects; the false answers were inserted without the knowledge or authority of appct., who signed the proposal form without reading it. The proposal contained a declaration in which appct. agreed that the statements in the proposal should form the basis of the policy, & the policy contained a proviso that it was granted on the express condition of the truthfulness of the statements in the proposal. Shortly after payment of the premium the insured was accidentally injured:—Held: (1) it was the duty of appct. to read the answers in the proposal before signing it, & he must be taken to have read & adopted them; & (2) in filling in the false answers in the proposal the agent was acting, not as the agent of the insurance co., but as the agent of appct.; & there-**

**thereof.—INDEPENDENT CASH MUTUAL FIRE INSURANCE CO. v. WINTERBORN** (1913), 24 O. W. R. 6; 4 O. W. N. 674; 10 D. L. R. 113.—CAN.

**o. Reasonable care necessary.]—A person who undertakes to procure insurance for another must use due diligence & reasonable care in the performance of his duties.—SHARPE v.** (1905), 9 Nfld. L. R. 77.—NFLD.

### PART I. SECT. 14, SUB-SECT. 2.

**170 i. Agent filling up proposal form—Answers untrue—Insured ignorant of untruth.]—DOWDY v. GENERAL ANIMALS INSURANCE CO.** (1916), 8 O. W. N. 61; 33 O. L. R. 258.—CAN.

**170 ii. —.]—M'MILLAN v. ACCIDENT INSURANCE CO., LTD.** [1907] S. C. 484.—SCOT.



fore the policy was void.—**BIGGAR v. ROCK LIFE ASSURANCE CO.**, [1902] 1 K. B. 516; 71 L. J. K. B. 79; 18 T. L. R. 119; 46 Sol. Jo. 105; *sub nom.* & **ROCK LIFE ASSURANCE CO.**, 85

*Insurance — to (2) Distd. Golding v. Royal London Auxillary Insee.* (1914), 30 T. L. R. 350; *Keeling v. Pearl Assco.* (1923), 129 L. T. 573. *Consd. Paxman v. Union Assco. Soc.* (1923), 39 T. L. R. 424. *Reid. Tofts v. Pearl Life Assco.* (1913), 110 L. T. 190.

—]—**KEELING v. PEARL ASSURANCE CO., LTD.**, No. 192, *post*.

172. ——— **Property inspected & misdescribed by agent.**—*Re UNIVERSAL NON-TARIFF FIRE INSURANCE CO., FORBES & CO.'S CLAIM*, No. 189, *post*.

**Effect of warranty by insured that answers true.**—*See No. 103, ante*.

**Authority of agent to waive breach of conditions.**—*See No. 177, post*.

173. **As to payment of premiums—Premiums paid by note—Note not met.**—**LONDON & LANCA-SHIRE LIFE ASSURANCE CO. v. FLEMING**, No. 183, *post*.

174. **To collect insurance money after loss—Policy sent to agent by insured.**—It was a well-known practice recognised by law that, if an agent was employed to effect an insurance & did so, & then a loss occurred & then the policy was sent to him by the assured, he was the assured's agent to collect (**WALTERS, J.**).—**LEGG v. BYAS, MOSLEY & CO.** (1901), 18 T. L. R. 137; 7 Com. Cas. 16.

*Annotation:—Mentd. Bradford v. Price* (1923), 92 L. J. K. B. 871.

172 i. ——— **Property inspected & misdescribed by agent.**—Pltf. upon an application for insurance being read over to him, objected to the distance, stated in the diagram, which was indorsed on the application, of the contiguous buildings. Defts. agent who had prepared the diagram after a personal survey of the premises, promised to measure the distance & make the necessary alterations before sending it to the head office. Pltf. thereupon signed the application, but the agent forwarded it without having made the corrections. By one of the conditions of the policy it was provided that if an agent should fill up an application, he should be deemed to be the agent for that purpose of the insured & not of the co., "but the co. will be responsible for all surveys made by their agent personally":—*Held*: the diagram was a survey within the proviso, & the co. were responsible for its inaccuracy.—**SHANNON v. HASTINGS MUTUAL INSURANCE CO.** (1877), 2 A. R. 81; 2 S. C. R. 394; 25 C. P. 470.—CAN.

172 ii. ———]—**SOWDEN v. STANDARD FIRE INSURANCE CO.** (1880), 5 A. R. 290.—CAN.

172 iii. ———]—**GUARDIAN INSURANCE CO. v. CONNELLY** (1892), 20 S. C. R. 208.—CAN.

p. ———]—**PHOENIX ASSURANCE CO., LTD. v. BERECREE** (1906), 3 C. L. R. 946.—AUS.

q. ———]—**JOHNSTONE v. NIAGARA DISTRICT MUTUAL INSURANCE CO.** (1863), 13 C. P. 331.—CAN.

r. ———]—**GRAHAM v. ONTARIO MUTUAL INSURANCE CO.** (1887), 14 O. R. 358.—CAN.

t. ———]—An appet. for a policy of fire insurance, by signing an application form that has been filled in by an agent of the co. adopts all the statements contained in it as his own & is bound by them, & if such statements are untrue & material, the co. will be relieved of all liability under the policy. The agent has no authority to invent statements, & must, in doing so, be regarded not as agent of the

Marine insurance brokers.]—*See Part II., Sect. 5, ante.*

#### SUB-SECT. 3.—AUTHORITY OF AGENT.

*See, generally, AGENCY, Vol. I., pp. 295 et seq.*

175. **Receipt of renewal premium—After policy avoided—By lapse.**—Upon a policy of assurance on the life of A., the premium became due on Mar. 15, but was not paid until Apr. 12, when the country agent of the insurance co., through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the co. to the agent were, that the premium on every life policy must be received within fifteen days from the time of its becoming due; if not paid within that time, that he was to give immediate notice to the office of that fact, & in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the co. of the non-payment of the premium within the fifteen days; it was therefore entered in their books as paid on Mar. 15, & the agent was debited for the amount:—*Held*: (1) the mere debiting the agent with the premium could not be considered as a payment to the co. by the assured; (2) as the agent had no authority to contract for the co., the fact of his receiving the money after the expiration of the fifteen days, & the entry in the co.'s books debiting him with the amount, were no evidence of a new agreement between the co. & the assured.—**ACEY v. FERNIE**

insurer but of the assured.—**CANADIAN CREDIT MEN'S TRUST ASSOCN. v. ROYAL SCOTTISH INSURANCE CO.**, *Re MARTIN*, [1923] 2 D. L. R. 245; 50 N. B. R. 191.—CAN.

a. ———]—**HOLDAWAY v. BRITISH CROWN ASSURANCE CORPN., LTD.**, [1925] 1 D. L. R. 386.—CAN.

b. ———]—**CONNORS v. LONDON & PROVINCIAL ASSURANCE CO.** (1913), 47 I. L. T. 148.—IR.

c. ——— **Proposal signed by insured without reading.**—Where an appet. for insurance allows an agent to fill in the answers in the application form & signs the same without taking the trouble to read it to see if the answers are correct the agent should be treated as the agent of appet. in so doing.—**WHITNEY v. GREAT NORTHERN INSURANCE CO.**, [1918] 2 W. W. R. 167.—CAN.

d. ———]—**LIFE & HEALTH ASSURANCE ASSOCN., LTD. v. YULE** (1904), 6 F. (Ct. of Sess.) 437; 41 Sc. L. R. 316; 12 S. L. T. 690.—SCOT.

e. **As to payment of premiums.**—When an insured is aware that the agents are paying his premiums to the insurers, with his assent & upon his request, express or implied, & that the agents are looking to him to reimburse them, the relation of principal & agent is created between the agents & the insured & the agents may maintain an action to recover premiums so paid.—**MOWATT v. GOODALL** (1915), 31 W. L. R. 537; 24 D. L. R. 781; 21 B. C. R. 394; 9 W. W. R. 171.—CAN.

f. **Cancellation of policy.**—The insurance broker through whom the assured effects insurance is his agent for all purposes in connection therewith, & he is also the agent of the co. for the purpose of giving notice of the cancellation of the policy.—**NAKATA v. DOMINION FIRE INSURANCE CO.** (1915), 52 S. C. R. 294.—CAN.

PART I. SECT. 14, SUB-SECT. 3.  
175 i. **Receipt of renewal premium—After policy avoided—By lapse.**—An agent of a fire insurance co. has an

implied authority in the absence of notice to the contrary to receive renewal premiums, such a power being indispensable to the carrying on of the business.—**GARDNER v. HOME & COLONIAL ASSURANCE CO.** (1871), 8 N. S. R. 204.—CAN.

175 ii. ———]—**MANUFACTURERS' ACCIDENT INSURANCE CO. v. PUDSEY** (1897), 27 S. C. R. 374.—CAN.

175 iii. ———]—**MARSHALL v. WESTERN CANADA FIRE INSURANCE CO.** (1911), 18 W. L. R. 68; 4 Sask. L. R. 181.—CAN.

175 iv. ———]—**SCOTT v. ACCIDENT ASSOCN. OF NEW ZEALAND** (1888), 6 N. Z. L. R. 263.—N.Z.

g. **Waiver of breach of condition—Time for claim.**—A condition in a policy was, that no suit should be sustained against the co., unless brought six months after the loss. Within this time pltf. presented his claim for loss, when it was agreed by parol between him & D., acting for defts., that if pltf. would not prosecute his claim until S. returned from England, defts. would pay the same & take no advantage of this limitation clause:—*Held*: D. had power to bind the co. as their agent, & what had taken place amounted to a waiver of the condition.—**BRADY v. WESTERN INSURANCE CO.** (1867), 17 C. P. 597.—CAN.

h. ——— **Payment of premium.**—A policy of life insurance contained a condition that it should not be binding until the advance premium was paid & the policy delivered to appet. for insurance: & that no agent of the co., except the president or secretary, should have any authority to waive or alter any of the conditions. The premium never was in fact paid, nor was the policy delivered: & although the assured did tender the premium to the agent, who declined to receive it & agreed to give time for the payment of it till it was demanded, & to hold the policy in the meantime for the assured:—*Held*: as the agent was neither the president nor secretary of the co., he had no authority to waive the condition requiring payment of

**Sect. 14.—Insurance agents: Sub-sect. 3.]**

(1840), 7 M. & W. 151; 10 L. J. Ex. 9; 151 E. R. 717.

*Annotations:—As to (1) Apld. London & Lancashire Life Assce. v. Fleming, [1897] A. C. 499. As to (2) Distd. Re Economic Fire Office (1896), 12 T. L. R. 142. Refd. Wing v. Harvey (1854), 5 De G. M. & G. 265; Splents v. Lefevre (1863), 11 L. T. 114.*

**176.** ————.]—An agent for an assurance co. has no implied authority to waive a forfeiture of a policy. A. insured his wife's life; the premiums were to be paid weekly, & the policy forfeited if the premiums should be in arrear for more than four weeks. The premiums were not paid for eleven weeks. The agent of the co. then received payment of the arrears:—*Held*: in an action on the policy, the co. were not liable, & the agent had no implied authority to waive the forfeiture by accepting payment of the arrears.—**BRITISH INDUSTRY LIFE ASSURANCE CO. v. WARD** (1856), 17 C. B. 644; 27 L. T. O. S. 81; 20 J. P. 391; 139 E. R. 1229.

*Annotation:—Refd. Card v. Carr (1856), 1 C. B. N. S. 197.*

**177.** ———— **By breach of condition.]**—Indorsed upon a life policy was a condition that the policy should be void, & the money secured thereby forfeited to the use of the insurance co., if the insured should go beyond the limits of Europe without the licence of the directors. The condition was infringed by the insured going to reside in Canada, where he died; but after the breach, the local agent of the co. at the place where the policy had been effected continued to receive the usual premiums upon the policy, with notice of the breach of the condition, which he represented as not invalidating the policy, provided the premiums were regularly paid:—*Held*: (1) the notice of the breach of condition given to the agent of the insurance co. was constructive notice thereof to the co.; (2) the latter, whether they had express notice of the breach or not, were precluded by the conduct of their agent from insisting upon the forfeiture upon the death of the insured.—**WING v. HARVEY** (1854), 5 De G. M. & G. 265; 2 Eq. Rep. 533; 23 L. J. Ch. 511; 23 L. T. O. S. 120; 18 Jur. 394; 2 W. R. 370; 43 E. R. 872, L. JJ.

*Annotations:—As to (2) Consd. Splents v. Lefevre (1863), 11 L. T. 114; Mackie v. European Assce. Soc. (1869), 21 L. T. 102. Follid. Holdsworth v. Lancashire & Yorkshire Insce. (1907), 23 T. L. R. 521. Refd. Card v. Carr (1856), 1 C. B. N. S. 197; Yorkshire Insce. v. Craine, [1922] 2 A. C. 541.*

**178. Waiver of breach of condition—Departure beyond seas.]**—**WING v. HARVEY**, No. 177, *ante*.

**179. Contract to grant policy.]**—An ordinary local agent of an insurance co. is not, without

the premium.—**CALHOUN v. UNION MUTUAL LIFE INSURANCE CO.** (1879), 19 N. B. R. 13.—CAN.

**k. — Taking hazardous employment.]**—A life policy was subject to a condition making it void if the insured took a hazardous employment, without the written permission of the president of the co. The assured did take such employment without such written permission, but with the assent of the co.'s provincial agent, & after the change of occupation paid a premium, which was retained by the co. with knowledge of the change of occupation:—*Held*: the co. was estopped from taking advantage of the forfeiture clause.—**ELSON v. NORTH AMERICAN LIFE ASSURANCE CO.** (1902), 9 B. C. R. 474; *affd., sub nom.* **NORTH AMERICAN LIFE ASSURANCE CO. v. ELSON** (1903), 33 S. C. R. 383.—CAN.

**l. — Indorsement of insurer on transfer.]**—**Re LORDS, LTD., LORD v. SCOTTISH UNION & NATIONAL INSURANCE CO.**, [1924] 4 D. L. R. 259.—CAN.

**179 i. Contract to grant policy.]**—An insurance agent, though he may have authority to receive proposals & premiums, has no necessarily authority to bind his principals to the issue of a policy.—**FRAZER v. PHOENIX ASSURANCE CO.** (1889), 10 N. S. W. L. R. 246.—AUS.

**179 ii. —.]**—**HENRY v. AGRICULTURAL MUTUAL ASSURANCE CO.** (1865), 11 Gr. 125.—CAN.

**179 iii. —.]**—**PARSONS v. QUEEN INSURANCE CO.** (1878), 29 C. P. 188.—CAN.

**179 iv. —.]**—**COCKBURN v. BRITISH AMERICA ASSURANCE CO.** (1890), 19 O. R. 245.—CAN.

**m. Delegation.]**—**WALKERVILLE MATCH CO. v. SCOTTISH UNION CO.** (1903), 24 C. L. T. 8; 6 O. L. R. 674; 1 O. W. R. 647; 2 O. W. R. 1616.—CAN.

**n. Acknowledgment of receipt of premium.]**—**MOORE v. HALFEY** (1883), 9 V. L. R. 400.—AUS.

special authority, authorised to bind the co. by a contract to grant a policy. The London agent of a county insurance co. received pltf.'s proposal for an insurance. Pltf. paid the annual premium to the agent who promised that he should have the policy. The agent retained & misapplied the money & never forwarded the proposal to the co.:—*Held*: in the absence of proof of special authority to the agent that the co. were not bound to grant the policy.—**LINFORD v. PROVINCIAL HORSE & CATTLE INSURANCE CO.** (1864), 34 Beav. 291; 5 New Rep. 29; 11 L. T. 330; 28 J. P. 803; 10 Jur. N. S. 1066; 55 E. R. 647.

*Annotation:—Refd. Murfitt v. Royal Insco. (1922), 38 T. L. R. 334.*

— **Authority question of fact.]**—Pltf., who owned an orchard & a garden alongside a railway, submitted to a subordinate local agent of defts., who were an insurance co., a proposal for insuring his trees & fruit against fire. The agent said that the pltf. would be held covered, pending defts.' decision whether they would accept the proposal. Then a fire occurred, & after the fire but before defts. knew of it they refused to accept the risk. The agent had no express authority from defts. to make the bargain with pltf. In an action on the oral contract made by defts.' agent:—*Held*: on the facts defts.' agent had implied authority to make the contract, & pltf. was in the circumstances entitled to recover.—**MURFITT v. ROYAL INSURANCE CO., LTD.** (1922), 38 T. L. R. 334.

*See, also, No. 184, post.*

**181. Delegation—Appointment of sub-agent.]**—Though an agent cannot delegate his authority, yet there are many acts which he must necessarily do through the agency of other persons, & which are valid when so done.

A proposal for a life policy was accepted, on behalf of a London assurance co., by their agent in Australia, who acted in the transaction through the medium of a sub-agent, & the premium was paid. It was held binding on the co., although the agent had no authority to appoint a sub-agent, & although there were some informalities, but of form only.—**ROSSITER v. TRAFALGAR LIFE ASSURANCE ASSOCN.** (1859), 27 Beav. 377; 54 E. R. 148.

*See, generally, AGENCY, Vol. I., pp. 388 et seq.*

**182. Acknowledgment of receipt of premium—Premium not in fact paid.]**—**Re ECONOMIC FIRE OFFICE, LTD.** (1896), 12 T. L. R. 142.

**183. Variation of conditions—In policy—Payment by promissory note.]**—(1) Where a life policy contains provisions to the effect that it shall not

**o. —.]**—**PENLEY v. BEACON ASSURANCE CO.** (1859), 7 Gr. 130.—CAN.

**p. —.]**—**PATTERSON v. ROYAL INSURANCE CO.** (1867), 14 Gr. 169.—CAN.

**q. — Payment for services rendered.]**—An agent of an insurance co. has no power to bind the co. by giving a policy-holder a receipt for the amount of a premium as payment for services alleged to have been rendered by the policy-holder to the co., the policy on its face providing that payment of the premium in cash to the co. was necessary.—**TIERNAN v. PEOPLE'S LIFE INSURANCE CO.** (1896), 23 A. R. 342.—CAN.

**183 i. Variation of conditions—In policy—Payment by promissory note.]**—**MOFFATT v. RELIANCE MUTUAL LIFE ASSURANCE SOCIETY** (1881), 45 U. C. R. 561.—CAN.

**183 ii. —.]**—Even if an agent who receives an application for



be in force till the first premium is paid, & that if a note be taken for the first or renewal premium & not paid the policy is void at & from default, the onus is on the policy holder to prove cash payment of the premium.

(2) Where the insurers' agent accepts in payment of a premium a note which is not paid when due, there is no presumption that he was to raise money thereon as an agent for the insured, & pay the premium out of the proceeds.

(3) Where the insurers accept their agent's note in discharge of an account current between them in which the agent was debited with the amount of the premium, that affords no presumption of an intention to treat their own agent as agent for the insured, or the insurance as subsisting contrary to the terms of their contract with the policy holder.—*LONDON & LANCASHIRE LIFE ASSURANCE CO. v. FLEMING*, [1897] A. C. 499; 66 L. J. P. C. 116; 13 T. L. R. 572, P. C.

**184. — In proposal form.]**—The agent of an insurance co. obtained from pltf. a proposal for insurance against accident. In the proposal pltf. overstated his height & understated his weight. The proposal form stated that the statements therein were to form the basis of the policy, & that the proposed insurance was not to be binding on the co. until a policy should be issued in respect thereof. Pltf. paid the first year's premium to the agent & received a receipt upon which was printed "Held covered for fourteen days from date hereof, subject to the conditions of the policy, unless the proposal be previously declined." There was evidence that the agent told pltf. that he would be insured right away, & if he did not hear within fourteen days he might treat himself as insured. After the expiration of the fourteen days pltf. was injured by an accident. The proposal was, in fact, declined by the co., but no notice of the refusal was sent to pltf. :—*Held* : (1) the agent had no authority to make the statements to pltf., & pltf. was not insured at the time of the accident; (2) the misstatement avoided the policy.—*LEVY v. SCOTTISH EMPLOYERS' INSURANCE CO.* (1901), 17 T. L. R. 229, D. C.

**185. Variation of amount secured by policy.]**—Pltf. effected a semi-tontine life policy for £5,000 with defts. through their agent, who had previously represented to him in writing that the cash value at the end of fifteen years would be £7,390. Clause 11 of the policy stated that the contract

between the parties was completely set forth in the policy & the application therefor, & that none of its terms could be modified except by an agreement signed by one of certain officers, of which the agent was not one. At the end of the fifteen years pltf. claimed £7,390, which defts. refused to pay, upon the ground that under the policy only £8,106 5s. was due :—*Held* : assuming that the agent had authority to make the representation, it was not a separate & collateral agreement, as it was inconsistent with the terms of the policy & expressly excluded by Clause 11, & therefore it was not admissible in evidence against defts.—*HORNCastle v. EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES* (1906), 22 T. L. R. 735, C. A.

*Annotation* :—*Reid. Comerford v. Britannic Assce.* (1908), 24 T. L. R. 593.

**186. —.]**—Pltf. effected a policy of insurance with deft. co. on the life of her husband for £150, there being an endorsement on the policy that the sum assured was £37 10s. for the first year after which it was to increase at the rate of £37 10s. per year until it reached the full sum of £150. In the negotiations for the policy & before the first premium was paid the superintendent of the branch office where the insurance was effected without having actual authority from defts. to do so, promised pltf. that she would be paid the full sum of £150 if her husband died from accident as distinguished from disease even before the expiration of the third year of the insurance. The husband was accidentally drowned during the second year of the insurance :—*Held* : the superintendent had no ostensible authority to make the promise & defts. were not liable for more than £75.—*COMERFORD v. BRITANNIC ASSURANCE CO., LTD.* (1908), 24 T. L. R. 593.

**187. Expression of opinion as to effect of policy.]**—Manufacturers of explosives insured their buildings & the contents thereof by policies of insurance whereby the insurers agreed to pay the sums named if the property or any part thereof should be destroyed or damaged by fire. Each policy contained a condition to the effect that the insurance did not cover loss or damage by explosion, except explosion by illuminating gas, & a memorandum indorsed in these words : "This policy does not cover loss or damage by fire following any explosion unless it be proved that such a fire was not caused directly or indirectly

a policy of life & accident insurance has no authority to receive payment for the premium by way of a promissory note, yet if the agent actually receives cash for the premium through discount of a note & accounts for it to the co. during the lifetime of appet. & before an accident occurs, the co. cannot sustain the objection that the premium was not paid at the time of the accident.—*DUBUC v. NEW YORK LIFE INSURANCE CO.*, [1925] 4 D. L. R. 364; 3 W. W. R. 386.—CAN.

**r. —.]**—There is a distinction between the powers to be implied in the case of insurance agents when taking new risks, & their powers when assuming to deal with risks already in existence. In the former case, a person dealing with the agent is entitled to assume that he has the general powers of an insurance agent, & within the scope of his ostensible authority, has power to bind the co. of the risk accepted by even though, as a matter of fact, the agent has not been accepted, & the contract are embodied in the policy, the agent is applied to

for permission to change the location of the goods insured or any of the conditions of that policy, appet. deals with that agent at his peril, & if in fact the agent has no authority, the assent given by him is of no avail, even although the person obtaining the assent has no knowledge of the lack of authority.—*JOURNAY v. RAILWAY PASSENGERS ASSURANCE CO.*, [1924] 1 D. L. R. 308; 50 N. B. R. 501.—CAN.

**184 i. — In proposal form.]**—Where an agent of a fire insurance co. takes several written proposals for insurance from a person the co. is not liable if the agent subsequently accepts a permanent risk upon a verbal proposal, varying the former risk which had been, to the knowledge of the insured, accepted by the co.—*JONES v. LONDON & LANCASHIRE FIRE INSURANCE CO.* (1886), 5 N. Z. L. R. C. A. 38.—N.Z.

**t. Pledging company's credit — For travelling expenses.]**—A travelling agent, employed by a life assurance society to solicit applications for policies of assurance on their behalf, has no implied authority to pledge the credit of the society for travelling expenses.—*NATIONAL MUTUAL LIFE*

*ASSOCN. OF AUSTRALIA v. ANGELO* (1912), 14 W. A. L. R. 52.—AUS.

**a. Granting insurance in own favour.]**—The agent of an insurance co. cannot, without the express sanction of his principals, grant an insurance in his own favour binding on the co.—*WHITE v. LANCASHIRE INSURANCE CO.* (1879), 27 Gr. 61.—CAN.

**b. Cancellation of policies.]**—Evidence that the agent of a foreign insurance co. received applications for insurance & forwarded them to the co., collected the premiums, received & delivered the policies, & settled & paid the losses, does not authorise him to cancel policies issued by the co.—*PALMER v. OCEAN MARINE INSURANCE CO.* (1890), 29 N. B. R. 501.—CAN.

**c. —.]**—*CONFEDERATION LIFE ASSURANCE CO. v. MCINNES* (1895), 4 B. C. R. 126.—CAN.

**d. Adoption of compromised adjustment of loss.]**—*KIRK v. NORTHERN ASSURANCE CO.* (1898), 31 N. S. R. (19 R. & G.) 325.—CAN.

**e. Alteration of policy.]**—An agent of an insurance co., without authority from any one, upon the request of the assured, altered an employer's liability

**Sect. 14.—Insurance agents: Sub-sects. 3 & 4.]**

thereby or was not the result thereof." During negotiations between the manufacturers & an agent of an insurance co. for the issue of a fire policy the manufacturers asked the agent whether the co.'s ordinary fire policy covered damage done by an explosion following a fire. The agent in reply quoted the terms of the condition mentioned above & informed the manufacturers that damage caused by an explosion resulting from a fire would be covered by the co.'s ordinary fire policy save that loss or damage as specified in the condition would be excepted. The manufacturers understood the qualification to refer only to an explosion due to hostile action, "loss or damage occasioned by foreign enemy" being one of the exception risks in the condition:—*Held*: the representation by the agent was a representation, not of fact, but of law, namely, as to the meaning & effect of the condition.—*Re HOOLEY HILL RUBBER & CHEMICAL CO., LTD., & ROYAL INSURANCE CO., LTD.*, [1920] 1 K. B. 257; *sub nom. HOOLEY HILL RUBBER & CHEMICAL CO., LTD. v. ROYAL INSURANCE CO., LTD.*, 88 L. J. K. B. 1120; 121 L. T. 270; 35 T. L. R. 483; *affd.* without affecting this point, [1920] 1 K. B. 264, C. A.

*Annotation*:—*Mentd. Curtis's & Harvey (Canada) v. North British & Mercantile Insce.*, [1921] 1 A. C. 303.

**188. Acts of agent ultra vires insurers—Knowledge of insured.]**—The Montreal Assurance co., was incorporated by the Canadian Ordinance, 4 Vict. c. 37, & 6 Vict. c. 22. By sect. 4 of the latter statute, it was provided, that all policies of insurance should be subscribed by three directors, countersigned by the secretary & manager, & under the seal of the corp'n. By a bye-law of the co., made in conformity with the powers conferred by the ordinance & statute, a resolution to the same effect was passed. H. mortgaged a house in Lower Canada to R. Some time afterwards R.'s representative being dissatisfied with the security, applied for repayment of the mtge. money, when H. agreed to insure the mortgaged premises in a certain sum for the benefit of the mtgee.'s representative. In pursuance of this arrangement, H. applied to the Montreal Assurance co., through M., their manager & agent, to insure the premises against fire. H. was unable to pay the premium, & proposed to M. that the co. should take his promissory note, payable in twelve days. This was agreed to by M., & a promissory note given, M. at the same time promising to send the policy. The particulars of the policy were entered in the books of the co., but the note being dishonoured when due, the entry was erased. The policy was never issued. Shortly afterwards the premises were burnt down:—*Held*: (1) the powers of M. as manager, being public, must be taken to have been known to H., the insured, & the acts of M. in the transaction were *ultra vires* & void, not being within the scope of his general authority as manager, & therefore, not binding upon the Montreal Assurance co.; (2) as such a contract was not binding on M.'s principals, it did not become binding upon them by reason of its having

policy which had been sent to him for delivery to the assured by making it comprehend the workmen at a place other than those named in the policy:—*Held*: the co. could not be held to have authorised the alteration & were not bound by the contract as altered.—*PIGOTT v. EMPLOYERS' LIABILITY CORPN.* (1900), 31 O. R.

1. Issuing "binder" after termina-

tion of agency.]—*KLINE BROTHERS & CO. v. DOMINION FIRE INSURANCE CO.* (1912), 47 S. C. R. 252.—CAN.

5. Acceptance of wrong premium.]—In the absence of proof of special authority to the agent, acceptance by him of a wrong premium does not bind insurers.—*KIVA HAI v. NORTHERN ASSURANCE CO., LTD.* (1924), 1 L. R. 2 Ran. 158.—IND.

been entered into through the medium of M., their agent, his powers as agent being restricted by the limitation of the powers of his principals.—*MONTREAL ASSURANCE CO. v. M'GILLIVRAY* (1859), 13 Moo. P. C. C. 87; 8 W. R. 165; 15 E. R. 33, P. C.; *subsequent proceedings* (1861), 13 Moo. P. C. C. 127, P. C.

**Marine insurance—Agent of insured—Authority to insure.]**—See Part II., Sect. 5, sub-sect. 1, B., *ante*.

**Agent of insurers.]**—See Part II., Sect. 5, sub-sect. 2, B., *ante*.

**SUB-SECT. 4.—PROPOSAL FORM FILLED UP BY AGENT.**

**189. Statement untrue to knowledge of agent—Insured ignorant of untruth—Buildings insured inspected but misdescribed by agent.]**—A fire insurance was effected in respect of certain property through an agent, D., who inspected the premises. One condition of the policy was, that any material misdescription of the property would render the policy void. The buildings were described as built of brick & slated, but it turned out that one of the buildings was not roofed with slate but with tarred felt. The co. alleged that D. was not their agent, but the agent of the insured; & that the misdescription rendered the policy void:—*Held*: the misdescription was immaterial, & not sufficient to vitiate the policy; but if material, it was made by D. as the agent of the insurance co., & the insured were not responsible for it.—*Re UNIVERSAL NON-TARIFF FIRE INSURANCE CO., FORBES & CO.'S CLAIM* (1875), L. R. 19 Eq. 485; 44 L. J. Ch. 761; 39 J. P. 500; 23 W. R. 461.

**190. ———.]**—(1) In an action to recover the amount of a policy of insurance upon the life of a child, pltf.'s step-sister, evidence was given of a promise made by pltf. to the mother of the child to take care of the child & help to maintain it. No objection was taken on behalf of defts. that pltf. had not in fact incurred any expenditure in respect of the child:—*Held*: the pltf. had an insurable interest in the child's life, & was entitled in the absence of any objection as to the amount in fact expended by her, to recover the amount of the policy.

(2) Pltf. told the agent all about the child, the agent accepted the proposed life, & the terms of the policy are those of which pltf. was informed at the interview between her & defts.' agent. Pltf. is not bound by false statements inserted, without her knowledge, in the policy by defts.' agent (*LORD COLERIDGE, C.J.*).

(3) Supposing a person enters into a contract to pay money which he is not bound to do by law, the securing repayment of that money to himself is an insurable interest (*LORD COLERIDGE, C.J.*).—*BARNES v. LONDON, EDINBURGH & GLASGOW LIFE INSURANCE CO.*, [1892] 1 Q. B. 864; 8 T. L. R. 143; 36 Sol. Jo. 125, D. C.

*Annotations*:—As to (1) *Dmd. Harse v. Pearl Life Assoc.*, [1903] 2 K. B. 92. *Reid, Griffiths v. Fleming*, [1909] 1 K. B. 805; *Tofts v. Pearl Life Assoc.* (1913), 110 L. T. 190.

**PART I. SECT. 14, SUB-SECT. 4.**

**190 I. Statement untrue to knowledge of agent—Insured ignorant of untruth.]**—*MAYE v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD.* (1924), 35 C. L. R. 14.—AUS.

**190 II. ———.]**—*WESTERN AUSTRALIAN INSURANCE CO., LTD. v. DAYTON*, [1925] V. L. R. 535; 35 C. L. R. 355; 31 Argus L. R. 170.—AUS.



**Proposal signed by insured without reading.]—**BIGGAR v. ROCK LIFE ASSURANCE Co., No. 170, *ante*.

**192. — Statements not agreeing with answers of assured—Proposal form signed in blank.]—**The agent of an insurance co. suggested to a married woman that she should insure the life of her husband, & obtained her signature to a proposal form which the agent of the co. took away with certain of the questions contained in the form left unanswered. He subsequently saw the husband & asked him certain questions as to his health, to which the husband returned true answers. The co.'s agent, however, filled in untrue answers to certain questions in the proposal form, & the policy was issued. The insurance co. claimed that the policy was vitiated by the untrue answers to the questions affecting the health of the assured's husband, & also by untrue statements in the proposal form as to his age. The date of birth was stated in the proposal as Nov. 28, 1863, & the age next birthday as forty-eight. The proposal form was signed in Oct. 1920, so that it was obvious that one of these answers was inaccurate, if not both:—*Held*: with regard to the untrue statements of age, as it must have been obvious to the insurance co. that there was a mistake somewhere, & they nevertheless chose, without further inquiry, to issue a policy upon a proposal form which contained a mistake on the face of it, there was no ground, in the absence of fraud, for vitiating the policy; & with regard to the untrue statements as to health, the agent of the insurance co. having been employed to negotiate such contracts & to fill up proposal forms for persons who could not fill them up for themselves, & having put down answers which were contrary to the facts stated to him by the assured, was in so doing the agent of the insurance co. & not of the assured, & the policy was not vitiated by such untrue statements.—KEELING v. PEARL ASSURANCE Co., LTD. (1923), 129 L. T. 573.

**193. — Whether knowledge of agent knowledge of insurers.]—**BAWDEN v. LONDON, EDINBURGH & GLASGOW ASSURANCE Co., No. 200, *post*.

**194. Innocent misrepresentation by agent—Proposal form filled up from recollection—Onus of proof of statement by insured.]—**A party applied to the agent of an insurance office, to effect an insurance on the life of his son. The agent gave to him a printed form of application, which was filled up, as to the name, age, etc., of his son, & signed, but he did not fill up the declaration as to the nature of his pecuniary interest in his son's life. The agent had inquired into these particulars, & filled them up after the insurer had left his office, with a statement which was incorrect. The insurance was effected; but, on the death of the nominee, the co. refused to pay the amount of the policy, on the ground that the interest of the insurer was falsely described, & that the policy

was therefore void. No evidence being produced as to the statements which were made to the agent respecting the matters inserted by him in the declaration, the ct. refused to rectify it, or to grant an injunction to restrain the co. from setting up the declaration as a defence to an action at law.—PARSONS v. BIGNOLD (1846), 15 L. J. Ch. 379, L. C.

*Annotation*:—*Consd. Re Universal Non-Tariff Fire Insce., Forbes' Claim* (1875), L. R. 19 Eq. 485.

**195. — Mistake—Premiums returned.]—**R. & K. entered into negotiations with C., the London agent of a Scottish insurance co., for the purpose of effecting a policy on the life of H., a merchant; & it was verbally agreed between R. & K. & C. that the policy should be granted authorising the assured, under certain conditions, to make voyages in the way of business to the ports of Morocco & other ports in the Mediterranean, & on the coasts of Africa & Asia. A written proposal, in the handwriting of one of the partners R. & K., was communicated by C. to the co., in the following terms, differing by mistake, as R. & K. alleged, from the agreement they had previously made with C.:—"Mr. H. to be at liberty to visit, on business, Tangiers, or any other port within the Mediterranean, without subjecting himself to any extra premium, or having to apply for a licence; but it is understood that he is not to reside out of Europe at any place in the Mediterranean beyond the period of three months, or to go to the interior of Asia & Africa. The above memorandum to be indorsed on the policy." A policy was accordingly granted, whereby £2,000 was assured to be paid to R. & K. after the death of H., with a proviso that in case H. should depart beyond the limits of Europe the policy should be void. A memorandum was indorsed on the policy to the effect that, notwithstanding the restriction contained in it, H. should enjoy such liberty as mentioned in the above-written proposal. H., in the course of his business, visited Casa Blanca, a small port on the Atlantic coast of Morocco, south of Tangiers, & died there before he had resided three months. The ct., on a bill being filed for that purpose by R. & K., refused to rectify the policy, as against the co., so as to express the true agreement between R. & K. & C., but declared the policy to be not binding on either plffs. or the co.; & ordered the premiums which plffs. had paid to be refunded, as having been paid by mistake, & the policy to be delivered up to defts.—FOWLER v. SCOTTISH EQUITABLE LIFE INSURANCE SOCIETY & RITCHIE (1858), 28 L. J. Ch. 225; 32 L. T. O. S. 119; 4 Jur. N. S. 1169; 7 W. R. 5.

**196. — — —.]—**As to the mistake in filling up the proposals, it was made by the co.'s own agent, who had been told the truth, & filled in the statement as he understood it, & accepted the proposals. Then, as to the other point, the object of the father was to benefit the children of

**191 i. — Proposal signed by insured without reading.]—**An application for insurance on the contents of a barn contained the question "Is there any incendiary danger threatened or apprehended?" to which the answer was "No." Plff., who had not previously carried any insurance, having learned that the owner of the barn had placed a high

the application, & was not told that the question had been answered in the negative:—*Held*: plff. was bound by his untrue answer to the question, it being material to the risk.—KNISELEY v. BRITISH AMERICA ASSURANCE Co. (1900), 32 O. R. 376.—CAN.

**191 ii. — — —.]—**M'MILLAN v. ACCIDENT INSURANCE Co., LTD., [1907] S. C. 484; 44 So. L. R. 334; 14 S. L. T. 710.—SCOT.

**191 iii. — — —.]—**VASSEN v. GARRETT (1911), E. D. L. 188.—S. AF.

**h. Innocent misrepresentation by agent—Mistake.]—**By the mutual mistake of the agent & appot., an application for insurance contained a wrong

description of the property:—*Held*: the insurance co. was not liable.—LAIRD v. CANADA WEATHER INSURANCE Co. (1914), 29 W. L. R. 570; 7 W. W. R. 321.—CAN.

**k. Insured not consulted.]—**An appot. for insurance is bound by a false statement contained in the application, even if the agent has filled in the answer to the question without putting the question to appot.—BLEAKLEY v. NIAGARA DISTRICT MUTUAL INSURANCE Co. (1869), 16 Gr. 198.—CAN.

**l. Premises inspected & misdescribed by agent—No fraud or collusion on part of insured.]—**SIMON v. EQUITABLE MARINE & FIRE INSURANCE Co.

This was to the co.'s agent who filled in the application & the answers to the questions. The application was then signed by appot., who was not an agent, but he did not read over

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his deceased daughter; & his other daughters assisted him in that object, & paid the premiums, taking assignments of the policies, not for their own benefit, but for the orphan children. The father really insured his life for his own benefit, to enable him to leave money for the benefit of the children. The co., having repudiated the policy, the father & the daughters were entitled to recover the premiums paid, & the verdict was right, & must be upheld (LORD ESHER, M.R.).—**BREWSTER v. NATIONAL LIFE INSURANCE SOCIETY** (1892), 8 T. L. R. 648, C. A.

**197. — Proposal put forward in wrong name.]**

—Goods, the property of A., stored at B.'s wharf, were insured against fire by a policy in the name of B. The agent of deft. co. had filled up the proposal form in the name of B., he knew A. was the owner, & intended to insure A. directly:—**Held**: A. was entitled to a declaration that he was insured by the policy.—**HOUGH v. GUARDIAN FIRE & LIFE ASSURANCE CO., LTD.** (1902), 18 T. L. R. 273.

**Annotations**:—**Refd.** *Holdsworth v. Lancashire & Yorkshire Insce.* (1907), 23 T. L. R. 521; *Paxman v. Union Assce. Soc.* (1923), 39 T. L. R. 424.

**198. — Knowledge of agent derived from insured.]—PAXMAN v. UNION ASSURANCE SOCIETY, LTD., No. 103, ante.****SUB-SECT. 5.—WHETHER KNOWLEDGE OF AGENT KNOWLEDGE OF INSURERS.****199. Notice of breach of condition.]—WING v. HARVEY, No. 177, ante.**

**200. Knowledge of material circumstance—Circumstance not disclosed to insurers.]—B.** effected an insurance with deft. co. through their agent against accidental injury. The proposal for the insurance contained a statement by

the assured that he had no physical infirmity, & that there were no circumstances that rendered him peculiarly liable to accidents, & it was agreed that the proposal should form the basis of the contract between him & the co. By the terms of the policy, the co. agreed to pay the insured £500 on permanent total disablement, & £250 on permanent partial disablement, the policy stating that by permanent total disablement was meant (*inter alia*) "the complete & irrecoverable loss of sight to both eyes," & by permanent partial disablement was meant (*inter alia*) "the complete & irrecoverable loss of sight in one eye." At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which defts.' agent was aware, though he did not communicate it to defts. The assured during the currency of the policy met with an accident, which resulted in the complete loss of sight in his other eye, so that he became permanently blind:—**Held**: it must be taken (1) that the assured had sustained a complete loss of sight to both eyes within the meaning of the policy; (2) that the knowledge of defts.' agent was under the circumstances the knowledge of defts., & that they were liable on the policy for £500.—**BAWDEN v. LONDON, EDINBURGH, & GLASGOW ASSURANCE CO., [1892]** 2 Q. B. 534; 61 L. J. Q. B. 792; 57 J. P. 116; 8 T. L. R. 566; 36 Sol. Jo. 502, C. A.

**Annotations**:—**As to (2) Consd.** *Levy v. Scottish Employers' Insce.* (1901), 17 T. L. R. 229. **Appld.** *Holdsworth v. Lancashire & Yorkshire Insce.* (1907), 23 T. L. R. 521; *Keeling v. Pearl Assce.* (1923), 129 L. T. 573. **Consd.** *Paxman v. Union Assce. Soc.* (1923), 39 T. L. R. 424. **Refd.** *Brewster v. National Life Insce. Soc.* (1892), 8 T. L. R. 648; *Biggar v. Rock Life Assce.*, [1902] 1 K. B. 516; *Hough v. Guardian Fire & Life Assce.* (1902), 18 T. L. R. 273; *Wells v. Smith*, [1914] 3 K. B. 722.

**201. — — —.]—If the agent of the co.** knew at the time the insurance was effected that pltf. was otherwise insured the knowledge would affect the co. (LORD COLERIDGE, C.J.).—**NEEDLER**

(1892), 9 S. C. 455; 2 C. T. R. 338.—**S. AF.**

**m. — No intentional concealment by insured.]—DRYSDALE v. UNION FIRE INSURANCE CO.** (1890), 8 S. C. 63.—**S. AF.**

**n. New form filled up from old form—& from personal observation of premises.]—RICHARDS v. GUARDIAN ASSURANCE CO.** (1907), T. H. 24.—**S. AF.**

**PART I. SECT. 14, SUB-SECT. 5.**

**200 i. Knowledge of material circumstance—Circumstance not disclosed to insurers.]—An agent filled up a proposal for insurance & concealed a material fact to the agent's knowledge:—Held**: the agent's knowledge must be imputed to the co.—**GALLAGHER v. UNITED INSURANCE CO.** (1893), 19 V. L. R. 228.—**AUS.**

**200 ii. — — —.]—DAVIS v. SCOTTISH PROVINCIAL INSURANCE CO.** (1865), 16 C. P. 176.—**CAN.**

**200 iii. — — —.]—SHANNON v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.** (1875), 37 U. C. R. 380.—**CAN.**

**200 iv. — — —.]—WILLIAMS v. CANADA FARMERS' MUTUAL FIRE INSURANCE CO.** (1876), 27 C. P. 119.—**CAN.**

**200 v. — — —.]—REDFORD v. MUTUAL FIRE INSURANCE CO. OF CLINTON** (1876), 38 U. C. R. 538.—**CAN.**

**200 vi. — — —.]—SINCLAIR v. CANADIAN MUTUAL FIRE INSURANCE CO.** (1876), 40 U. C. R. 206.—**CAN.**

**200 vii. — — —.]—CHATILLON v. CANADIAN MUTUAL FIRE INSURANCE CO.** (1877), 27 C. P. 450.—**CAN.**

**200 viii. — — —.]—The agent who filled up an application for insurance was informed of a mtg. on the premises but answered to the question as to incumbrances that there were none:—Held**: the co. could not set up that there were misrepresentations as to incumbrances.—**NAUGHTER v. OTTAWA AGRICULTURAL INSURANCE CO.** (1878), 43 U. C. R. 121.—**CAN.**

**200 ix. — — —.]—GOUNLOCK v. MANUFACTURERS & MERCHANTS' MUTUAL INSURANCE CO. OF CANADA** (1878), 43 U. C. R. 563.—**CAN.**

**200 x. — — —.]—MCQUEEN v. PHOENIX MUTUAL FIRE INSURANCE CO.** (1879), 4 S. C. R. 660.—**CAN.**

**200 xi. — — —.]—IMPERIAL BANK OF CANADA v. ROYAL INSURANCE CO.** (1906), 12 O. L. R. 519; 8 O. W. R. 148.—**CAN.**

**200 xii. — — —.]—LE BELL v. NORWICH UNION FIRE INSURANCE CO.** (1898), 34 N. B. R. 515; *reversd.*, 19 C. L. T. 239; 29 S. C. R. 470.—**CAN.**

**200 xiii. — — —.]—One of the questions in an application for insurance against injury to employees was, "Are machinery, boilers, or explosives to be used?" Pltf. left the space for the answer to this blank, explaining to defts.' agent that explosives were to be used, but not machinery or boilers, & asking the agent to answer the question correctly. The agent, however, after pltf. had signed the application, wrote "No" opposite his question, although he knew that explosives would be used:—Held**: defts. were bound by the knowledge of their agent.—**CARLIN v. RAILWAY PASSENGERS ASSURANCE CO.** (1913), 25 W. L. R. 706; 18 B. C. R. 477; 14

D. L. R. 315.—**CAN.**

**200 xiv. — — —.]—MAHOMED v. ANCHOR FIRE & MARINE INSURANCE CO.** (1913), 26 W. L. R. 695.—**CAN.**

**—.]—GABEL HOWICK FARMERS' MUTUAL FIRE INSURANCE CO.** (1917), 40 O. L. R. 158; 38 D. L. R. 139.—**CAN.**

**200 xvi. — — —.]—The fact that the agent of the cos. claiming their policies were avoided by change of location was aware of the change of location & that another agent not having authority to consent to the change took the policies from the assured with the intention of having the consent of the assurers to the change indorsed thereon, but neglected to do so, will not operate as an estoppel against the assurers claiming that the risk had been avoided.**—**ARNOLD v. BRITISH COLONIAL FIRE INSURANCE CO.** (1917), 45 N. B. R. 285.—**CAN.**

**200 xvii. — — —.]—Where an agent for a hail insurance co. has power merely to solicit, receive & transmit applications for insurance, his knowledge that the location of an insured's land is different from that stated in the application is not to be imputed to his principal, especially where such knowledge has not been acquired about or in connection with such application.**—**DOHERTY v. CANADA NATIONAL INSURANCE CO., LTD.**, [1918] 1 W. W. R. 366; 38 D. L. R. 494; 11 Sask. L. R. 32.—**CAN.**

**200 xviii. — — —.]—TAYLOR v. YORKSHIRE INSURANCE CO.**, [1913] 2 I. R. 1.—**IR.**

**e. Agent privy to fraud.]—A co. is not to be held to have knowledge of the truth when appct. & the agent**



*v. STANDARD ACCIDENT INSURANCE CO., LTD.* (1894), *Times*, Jan. 18.

202. ———.]—Pltf. insured a motor-car with an insurance co., but the co. refused to renew the insurance, & he mentioned this fact to an agent of defts., another insurance co. Defts.' agent offered to propose him to defts., & pltf., on receiving a proposal form with the question whether any co. had refused to renew his insurance, spoke about it to defts.' agent, who replied that he would make it all right. Pltf. did not fill in any answer to the question. The co. accepted the proposal & afterwards agreed that it should cover a new Vauxhall car. Subsequently pltf. insured a Siddeley car with defts., & they had notice that pltf. had had a previous insurance, but the spaces for answers to the questions on the proposal form were left blank. Accidents occurred to both cars, & defts. refused to pay on the ground that pltf. had originally represented that no insurance co. had refused to renew. Pltf. brought an action against defts. for a declaration that the policies on the Vauxhall & Siddeley cars were valid. There was no evidence of any collusion between pltf. & defts.' agent:—*Held*: as pltf. had made full disclosure to defts.' agent, & as there was no evidence of collusion, pltf. was entitled to the declaration.—*THORNTON-SMITH v. MOTOR UNION INSURANCE CO., LTD.* (1913), 30 T. L. R. 139.

*Annotation*:—*Refd. Paxman v. Union Assec. Soc.* (1923), 39 T. L. R. 424.

203. ———.]—The proposal form for a policy of life insurance contained a clause providing that if any information which ought to be made known to the insurance co., with reference to the assurance were withheld the policy would be absolutely void. The assured was described in the proposal form as a fisherman, which was his ordinary occupation. The fact that he was also a member of the Royal Naval Reserve, & was therefore exposed to additional risks, was not stated in the proposal form, but was communicated verbally to the district manager of the insurance co., & the premiums due under the policy were subsequently paid to & accepted by the district manager. In an action on the policy:—*Held*: the district manager's knowledge of the true facts was the knowledge of the co., the acceptance of the premiums by the district manager was a waiver by the co. of the breach of the clause in the proposal form, & the policy was therefore not invalidated.—*AYREY v. BRITISH LEGAL & UNITED PROVIDENT ASSURANCE CO.*, [1918] 1 K. B. 136; 87 L. J. K. B. 513; 118 L. T. 255; 34 T. L. R. 111.

204. Policy taken out in wrong name—Agent with full knowledge of facts.]—*HOUGH v. GUARDIAN FIRE & LIFE ASSURANCE CO., LTD.*, No. 197, *ante*.

205. Alteration of policy after issue—Estoppel by receipt of premiums.]—Pltf. effected an insurance with an insurance co. through their agent against liability to his workmen under Workmen's Comp. Act, 1897 (c. 37). Pltf. was, to the knowledge of the agent, a joiner & builder. The agent filled in a proposal form, which was stated to be the basis of the contract, & in which pltf.

was described as a joiner. Pltf. did not read the form, but when the policy arrived he objected to his being described as a joiner, & refused to take up the policy with that description in it, & the agent obtained the sanction of the chief clerk of the insurance co.'s branch office for the district to alter the policy by inserting the words "& builder" after the word joiner. This was accordingly done, & pltf. paid the first premium, & he continued to pay the premiums, which were forwarded to the co. No communication was made to the head office of the co. of the addition to the policy. A workman in his employment having been injured by an accident, pltf. had to pay him compensation under Workmen's Comp. Act, 1897 (c. 37), & sued to recover the amount from the co. under the policy:—*Held*: the co. were liable, upon the grounds that, by receiving the premiums, they were precluded from denying the agent's authority to alter the contract, & that in those circumstances the knowledge of the agent was the knowledge of the co.; & that, even if the policy had not been altered, the co. would have been liable, because the contract must be treated as having been negotiated by the agent with a joiner & builder, & the knowledge of the agent must be treated as the knowledge of the co.—*HOLDSWORTH v. LANCASHIRE & YORKSHIRE INSURANCE CO.* (1907), 23 T. L. R. 521.

*Annotation*:—*Refd. Paxman v. Union Assec. Soc.* (1923), 39 T. L. R. 424.

206. *Bonâ fide* mistake in proposal—Agent informed before issue of cover note.]—Where a person in making a proposal to an insurance co. for an insurance against fire makes a *bonâ fide* mistake in his answers to the questions on the proposal form, but before the issue of a cover note draws the attention of the agent of the co. to the mistake & corrects it, it is the duty of the agent to convey to the co. the correct answer, & if he fails to do so the co. are not entitled to refuse to pay a claim under the cover note on the ground that there was a misstatement in the answers to the questions on the proposal form.—*GOLDING v. ROYAL LONDON AUXILIARY INSURANCE CO., LTD.* (1914), 30 T. L. R. 350.

*Annotation*:—*Refd. Paxman v. Union Assec. Soc.* (1923), 39 T. L. R. 424.

#### SUB-SECT. 6.—REPRESENTATION BY AGENT TO INSURED.

207. As to insurable interest—Question for jury.]—*PARR v. LONDON, EDINBURGH, & GLASGOW ASSURANCE CO.*, No. 169, *ante*.

208. ———.]—Resp. effected an insurance with appts. on a life in which he had no insurable interest, the insurance, therefore, being void. The insurance was effected through an agent of appts., who represented, without any fraud, to resp. that the policy would be valid & effective in law, & resp. relying upon that representation, effected the policy & paid the premium. Resp. subsequently ascertained that the policy was invalid & immediately demanded back the premium:—

— together to suppress the truth, which is known to both of them.—*BASTEDO v. BRITISH EMPIRE INSURANCE CO., LTD.* (1913), 18 B. C. R. 377; 16 D. L. R. 244.—*CAN.*

*P. Insured not consulted.*]—If the agent does not ask the insured the questions contained in the application for insurance & fills the answers

up himself, & appt. signs the document without reading the replies, in reliance upon the assurance of the agent that they are all right, then, in the absence of fraud on the part of the agent or of proof that he acted merely for his own private ends, the knowledge of these facts must be imputed to the co., which, after acceptance of the premium &

the issue of the policy must be considered both to have waived the materiality of the questions & to be estopped from insisting upon an agreement in the application form constituting the insurance agent the agent of appt.—*WHITNEY v. GREAT NORTHERN INSURANCE CO.*, [1918] 2 W. W. R. 167.—*CAN.*

**Sect. 14.—Insurance agents: Sub-sects. 6, 7 & 8.**  
**Part II. Sects. 1, 2 & 3: Sub-sect. 1.]**

**Held:** as the representation, though an innocent one, was made by a man skilled in insurance matters to a person ignorant of the law, the premium could be recovered back.—**BRITISH WORKMAN'S & GENERAL ASSURANCE CO., LTD. v. CUNLIFFE** (1902), 18 T. L. R. 502, C. A.

**Annotations:—****Consd.** Harse v. Pearl Life Assce., [1904] 1 K. B. 558. **Apld.** Kettlewell v. Refuge Assce., [1908] 1 K. B. 545. **Consd.** Evanson v. Crooks (1911), 106 L. T. 264. **Expld.** Phillips v. Royal London Mutual Insee. (1911), 105 L. T. 136. There is no question that in the Div. Ct. the case of the *British Workman's & General Insurance Co. v. Cunliffe* proceeded upon the basis of there having been an innocent representation, & the Ct. of Appeal in deciding that case & in affirming the decision of the Div. Ct., did not in terms express any dissent from that proposition, but they did found their judgment upon the fact that the representation was false to the agent's knowledge (PICKFORD, J.). **Expld. & Apld.** Hughes v. Liverpool Victoria Legal Friendly Soc., [1916] 2 K. B. 482. **Refd.** London, Edinburgh, & Glasgow Assce. v. Partington (1903), 88 L. T. 732.

**209. — Innocent misrepresentation — Parties in pari delicto.]**—The agent of defts., an insurance co., in good faith & believing his statement to be true, represented to pltf. that an insurance effected by him on the life of his mother would be a valid insurance, & pltf., relying upon that representation, effected such an insurance & paid premiums thereunder. In an action to recover back the premiums:—**Held:** assuming the policy to be illegal & void for want of an insurable interest, the representation having been innocently made by the agent, the parties were *in pari delicto*, & the premiums could not be recovered back.—**HARSE v. PEARL LIFE ASSURANCE CO.**, [1904] 1 K. B. 558; 73 L. J. K. B. 373; 90 L. T. 245; 52 W. R. 457; 20 T. L. R. 264; 48 Sol. Jo. 275, C. A.

**Annotations:—****Apld.** Evanson v. Crooks (1911), 106 L. T. 264; Phillips v. Royal London Mutual Insee. (1911), 105 L. T. 136; Howarth v. Pioneer Life Assce. (1912), 107 L. T. 155. **Expld.** Hughes v. Liverpool Victoria Legal Friendly Soc., [1916] 2 K. B. 482. **Consd.** Goldstein v. Salvation Army Assce. Soc., [1917] 2 K. B. 291. **Refd.** Kettlewell v. Refuge Assce. (1907), 97 L. T. 896; Elson v. Crookes (1911), 106 L. T. 462; Tofts v. Pearl Life Assce. (1913), 110 L. T. 190. **Mentd.** Hermann v. Charlesworth (1905), 21 T. L. R. 368; Griffiths v. Fleming, [1909] 1 K. B. 805.

**210. — — — — Onus of proof.]** effected a policy of insurance with defts. upon the life of a person in whom she had no insurable interest, & for the purpose of taking out the policies, signed a card which contained untrue statements, filled in by defts.' agent as to her relationship to the person whose life was insured. The policy contained a term to the effect that if any material statement on the card was either fraudulent or untrue the policy should be void & the premiums forfeited. In an action by pltf. to recover back the premiums paid by her on the policy:—**Held:** (1) in the absence of a finding by the jury that she was induced by the fraud of defts.' agent to sign the contract without knowing its terms, she was not entitled to recover; & (2) the contract being an illegal one, the parties were *prima facie in pari delicto*, & in order to entitle pltf. to succeed, the onus was upon her to prove not only that there had been fraud on the part of the agent of the co., but also to obtain a finding by the jury exculpating her from participation in such fraud, & in the absence of such a finding, the premiums were not recoverable.—**HOWARTH v. PIONEER LIFE ASSURANCE CO., LTD.** (1912), 107 L. T. 155.

**Annotation:—****As to (2)** **Refd.** Hughes v. Liverpool Victoria Legal Friendly Soc., [1916] 2 K. B. 482.

**211. — — — —]**—Premiums paid under a policy of life insurance which is void by reason of the fact that the person paying the premiums had

no insurable interest in the life of the person insured cannot be recovered on the ground that the insurer was induced to take out the policy on the faith of an innocent misrepresentation by the agent of the insurance co. as to the validity of the policy.—**PHILLIPS v. ROYAL LONDON MUTUAL INSURANCE CO., LTD.** (1911), 105 L. T. 136,

**212. — — — —]**—A policy of insurance was effected with a friendly society on the life of a person in whom the person effecting the policy had no insurable interest, & a number of premiums were paid thereon. Subsequently, it became known that the policy was illegal & void for want of insurable interest, & an action for the return of the premiums was brought in which it was alleged that fraudulent misrepresentations as to the validity of the policy were made by the collector of the society. It having been held that there was no evidence of fraud on the part of the collector:—**Held:** fraud not having been proved, the premiums paid under the policy could not be recovered back, either on the ground of money had & received, or on the ground that the premiums were paid for a consideration which had wholly failed.—**EVANSON v. CROOKS** (1911), 106 L. T. 264; 28 T. L. R. 123.

**Annotation:—****Consd.** Hughes v. Liverpool Victoria Legal Friendly Soc., [1916] 2 K. B. 482.

**213. — — — — Fraudulent misrepresentation.]**—In 1902 pltf. effected two policies with defts. on the lives of his father & mother respectively to cover his expenses for mourning in the event of their deaths. He was induced to do so by the fraudulent misrepresentation of defts.' agent that such policies would be valid, whereas the agent knew they were in fact invalid for want of insurable interest. In 1909 Assurance Companies Act, 1909 (c. 49), was passed. Sect. 36 (2) of that Act validated certain policies, within which the policies in question came, effected before the Act, which, apart from the Act, would have been void for want of insurable interest:—**Held:** the sub-sect. did not validate policies which would otherwise come within its meaning, if such policies had been obtained by fraud.—**TOFTS v. PEARL LIFE ASSURANCE CO., LTD.**, [1915] 1 K. B. 189; 84 L. J. K. B. 286; 112 L. T. 140; 31 T. L. R. 29; 59 Sol. Jo. 73, C. A.

**214. — — — —]**—In 1908 & 1909 T. effected with defts. in their industrial branch five policies on the lives of others. Shortly afterwards T. determined not to keep the policies up, & he accordingly ceased paying the premiums & burnt the policies. At the end of 1910 one of defts.' agents brought five duplicate policies to pltf., who had no insurable interest in the lives in question & induced her to take up the policies by the representation, which the jury found to be fraudulent, that by paying the arrears due on premiums & keeping them up everything would be all right. Thomas had not assigned the policies, & did not ask for the duplicate policies, nor was he aware of what the agent was doing. Pltf., having discovered that the policies were illegal & void, sued to recover the premiums which she had paid:—**Held:** the parties were not *in pari delicto*, & pltf. was entitled to recover, her right not being affected by Assurance Companies Act 1909 (c. 49), ss 23, 36, which imposed a penalty upon a friendly society issuing such a policy.—**HUGHES v. LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY**, [1916] 2 K. B. 482; 85 L. J. K. B. 1643; 115 L. T. 40; 32 T. L. R. 525, C. A.

**Annotations:—****Refd.** Parkinson v. College of Ambulance, & Harrison, [1926] 2 K. B. 1. **Mentd.** Moody v. Cox & Hatt, [1917] 2 Ch. 71.



215. As to acceptance of proposals.]—LEVY v. SCOTTISH EMPLOYERS' INSURANCE CO., No. 184, ante.

216. As to amount secured.]—HORNCastle v. EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES, No. 185, ante.

217. —.]—COMERFORD v. BRITANNIC ASSURANCE CO., LTD., No. 186, ante.

218. As to conditions of policy—Receipt of free policy.]—The holder of a policy of insurance being minded to give up paying the premiums was persuaded to continue the payments by a false representation of the insurance co.'s agent that if she paid the premiums for a certain time she would receive a free policy. The representation was made without the authority or knowledge of the co., & the co. refused to grant a free policy, but retained the premiums:—*Held*: the holder of the policy was entitled to recover from the co. the premiums paid upon the faith of the representation.—REFUGE ASSURANCE CO., LTD. v. KETTLEWELL, [1909] A. C. 243; 78 L. J. K. B. 519; 100 L. T. 306; 25 T. L. R. 395; *sub nom.* KETTLEWELL v. REFUGE ASSURANCE CO., LTD., 53 Sol. Jo. 339, H. L.

*Annotations*:—*Reid*. Evanson v. Crooks (1911), 106 L. T. 264; Hughes v. Liverpool Victoria Legal Friendly Soc., [1916] 2 K. B. 482; Parkinson v. College of Ambulance, — Harrison, [1925] 2 K. B. 1. *Mentd.* Armstrong v. Jackson, [1917] 2 K. B. 822; Collins v. Hopkins, [1923] 2 K. B. 617.

#### SUB-SECT. 7.—FRAUD OF AGENT ON INSURED.

Representation inducing contract.]—See Subsect. 6, ante.

False answers inserted in proposals.]—See Subsect. 4, ante.

219. Admissibility of evidence—Similar frauds.]—In an action against a co. to recover a sum of money obtained by them from pltf., through a fraud of defts.' agent committed with their knowledge & for their benefit, evidence of similar frauds committed on persons other than pltf., by the same agent, in the same manner, with the knowledge, & for the benefit, of defts. is admissible, on behalf of pltf.—BLAKE v. ALBION LIFE ASSURANCE SOCIETY (1878), 4 C. P. D. 94; 48 L. J. Q. B. 169; 40 L. T. 211; 27 W. R. 321; 14 Cox, C. C. 246. *Annotations*:—*Reid*. R. v. Ollis, [1900] 2 Q. B. 758; R. v. Bond, [1906] 2 K. B. 389.

See, generally, EVIDENCE, Vol. XXII., pp. 71 et seq.

220. Mistake by insured as to identity of insurers.]—MACKIE v. EUROPEAN ASSURANCE SOCIETY, No. 168, ante.

#### SUB-SECT. 8.—COMMISSION.

221. Solicitor as agent to insurance company—Insurance effected for client—Receipt of commission unknown to client.]—COPP v. LYNCH & LAW LIFE ASSURANCE CO. (1882), 26 Sol. Jo. 348. *Annotation*:—*Appld.* Jordy v. Vanderpump (1920), 64 Sol. Jo. 324.

222. — Onus of proof of client's knowledge.]—The *onus* is on a solr. to show by some evidence in writing that his client knew of & consented to his receiving & retaining for his own use commissions paid by an insurance co. to him in respect of annual premiums payable on a policy taken out on the life of his client.—JORDY v. VANDERPUMP (1920), 64 Sol. Jo. 324.

Marine insurance.]—See Part II., Sect. 5, subsect. 1, *F.*, post.

## Part II.—Marine Insurance.

### SECT. 1.—NATURE OF MARINE INSURANCE.

See Marine Insurance Act, 1906 (c. 41), s. 1.

223. Contract of indemnity.]—BARCLAY v. COUSINS, No. 598, post.

224. —.]—PULLER v. STANFORTH, No. 627, post.

225. —.]—WHITE v. DOBBINSON, No. 2374, post.

226. —.]—CASTELLAIN v. PRESTON, No. 156, ante.

227. —.]—MORAN, GALLOWAY & CO. v. UZIELLI, No. 57, ante.

228. — Subject to qualification.]—PALMER v. BLACKBURN, No. 1893, post.

229. —.]—AITCHISON v. LOHRE, No. 1899, post.

#### PART I. SECT. 14, SUB-SECT. 6.

215 i. As to acceptance of proposals.]—An agent of deft. corp'n. on receiving an application for burglary insurance over the telephone made a memorandum of the particulars recited & stated that the property was covered:—*Held*: a contract was completed on the basis of the application form as filled in.—JAMES v. OCEAN ACCIDENT & GUARANTEE CO. (1911), 75 Sol. Jo. 576; 30 B. C.

Contrary to the statutory condition in a policy issued to him by defts., pltf., who was illiterate, being told & induced by the agent of

with M. Co. A fire having

occurred:—*Held*: the condition was nevertheless broken, & pltf. could not recover.—GAUTHIER v. WATERLOO INSURANCE CO. (1879), 44 U. C. R. 490; 2 Ont. Dig. 3341; *affd.* 6 A. R. 231.—CAN.

r. Whether company bound.]—An agent of an insurance co. had authority to solicit insurance & receive proposals:—*Held*: he was a general agent whose representations would bind the co.—SPLENTS v. LEFEVRE (1864), 11 L. T. 114.—IR.

t. As to nature of policy.]—EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES v. BERTIE (1890), 8 N. Z. L. R. 579.—N.Z.

a. As to conditions in policy.]—POTGIETER v. NEW YORK MUTUAL LIFE INSURANCE SOCIETY (1900), 17 S. C. AF.

Contract uberrimæ fidel.]—See Part I., Sect. 2, ante.

### SECT. 2.—SUBJECT-MATTER OF MARINE INSURANCE.

See Marine Insurance Act, 1906 (c. 41), ss. 2, 3; Sect. 8, post.

#### SECT. 3.—THE POLICY.

##### SUB-SECT. 1.—IN GENERAL.

See Stamp Act, 1891 (c. 39); Merchant Shipping Act, 1894 (c. 60), s. 506; Marine Insurance Act, 1906 (c. 41), s. 22.

230. Necessity for.]—ROGERS v. MCCARTHY, No. 332, post.

#### PART I. SECT. 14, SUB-SECT. 8.

b. Shipbuilder as agent to insurance company—Insurance effected for shipowner—Not liable to account to shipowner.]—Pltfs. insured a vessel they were building for defts. & deposited the policies with a bank as security for loans made to defts.:—*Held*: pltfs. were not obliged to account to defts. for commissions received by one of their number who acted as agent for the insurance co. with which the insurance was effected.—BOEHNER v. BACKMAN (1922), 55 N. S. R. 325.—CAN.

#### PART II. SECT. 3, SUB-SECT. 1.

230 i. Necessity for.]—SURAJMULL NARGOREMULL v. TRITON INSURANCE CO. (1924), L. R. 53 Ind. App. 126.—IND.

*Sect. 3.—The policy: Sub-sects. 1, 2 & 3, A.]*

**231. — Stamp Act, 1891 (c. 39).]**—By a document called an "open cover" deft., with other underwriters, agreed to reinsure plths. to the extent of the excess, over certain amounts mentioned in the document, upon risks undertaken by them from time to time, on goods shipped by certain steamship lines therein mentioned. The limit of the excess on any one ship & the proportion of this amount taken by each underwriter were specified. Goods which were insured by plths. on a steamship of one of the lines, were lost by a peril insured against, & plths. paid the insurance & sued deft. for his proportion of the excess:—*Held*: the document was a "contract for sea insurance" within s. 93 (1) of above Act, which by that sub-sect. was not valid unless expressed in a policy of sea insurance, & as it did not specify "the sum or sums insured" as required by sub-sect. 3, it was invalid as a policy of sea insurance, & could not be stamped & sued on as such, nor could it be sued on as a contract to issue a policy.—*HOME MARINE INSURANCE CO., LTD. v. SMITH*, [1898] 2 Q. B. 351; 67 L. J. Q. B. 777; 78 L. T. 734; 46 W. R. 661; 14 T. L. R. 459; 3 Com. Cas. 201; 8 Asp. M. L. C. 408, C. A.

*Annotations*:—*Consd. Royal Exchange Assce. Corp'n. v. Sjöforskrings Akt. Vega*, [1902] 2 K. B. 384. *Refd. Empress Assce. Corp'n. v. Bowring* (1905), 11 Com. Cas. 107; *Genforskrings Akt. (Skandinavia Reinsurance Co. of Copenhagen) v. Da Costa*, [1911] 1 K. B. 137; *Glasgow Assce. Corp'n. v. Symondson* (1911), 104 L. T. 254.

**232. — — — — —.] — GENFORSKRINGS AKT. (SKANDINAVIA REINSURANCE CO. OF COPENHAGEN) v. DA COSTA**, No. 250, *post*.

**233. — Marine Insurance Act, 1906 (c. 41).]**—Under a contract for the sale of goods to be shipped from American seaboard c.i.f. Gothenburg, the sellers tendered, with an invoice for the goods, (a) a document purporting to be a bill of lading, & (b) a certificate of insurance issued by an American insurance corp'n., which, as the certificate declared, "represents & takes the place of the policy & conveys all the rights of the signed policy holder . . . as fully as if the property was covered by a special policy direct to the holder of this certificate":—*Held*: the buyers were entitled to reject upon the ground that proper documents had not been tendered by the sellers in conformity with the contract; for document (a) did not acknowledge shipment, & was therefore not a bill of lading within the c.i.f. contract, & as to (b), a document of insurance is not good tender in England under an ordinary c.i.f. contract unless it be an actual policy, & unless it falls within above Act.—*DIAMOND ALKALI EXPORT CORPN. v. BOURGEOIS*, [1921] 3 K. B. 443; 91 L. J. K. B. 147; 126 L. T. 379; 15 Asp. M. L. C. 455; 26 Com. Cas. 310.

*Annotations*:—*Apprvd. Scott v. Barclays Bank*, [1923] 2 K. B. 1. *Refd. Harper v. Mackechnie*, [1925] 2 K. B. 423. *Mentd. Aron v. Comptoir Wegimont*, [1921] 3 K. B. 435.

**234. — — — — —.] — No contract for sea insurance is valid unless it is expressed in a sea policy. The contract in this case was a contract for sea insurance & not being expressed in a policy, was unenforceable.**—*NAGOREMULL v. TRITON INSURANCE CO., LTD.* (1924), 41 T. L. R. 168, P. C.

**235. Certificate of Insurance—Whether valid as policy—Sale of goods.]**—*DIAMOND ALKALI EXPORT CORPN. v. BOURGEOIS*, No. 233, *ante*.

**236. — — — — —.] — An approved insurance policy is one to which no reasonable objection can be made.**

The ct. refused to decide whether a policy in foreign currency is an approved insurance policy

Bankers issued a letter of credit to English sellers of one hundred tons of steel plates to Dutch buyers. By the terms of the letter of credit the bankers agreed to honour the sellers' draft for the amount of the purchase money, which included freight & insurance to Rotterdam, provided the draft were accompanied by an approved insurance policy covering the shipment of the goods. The sellers presented their draft accompanied by a certificate of insurance which did not contain & did not offer any means of ascertaining the full terms of the insurance. In an action by the sellers against the bankers for not honouring the draft:—*Held*: the certificate was not an "approved insurance policy" within the meaning of the letter of credit, & the bankers were justified in refusing to honour the draft.—*SCOTT (DONALD H.) & CO. v. BARCLAYS BANK, LTD.*, [1923] 2 K. B. 1; 92 L. J. K. B. 772; 129 L. T. 108; 39 T. L. R. 198; 67 Sol. Jo. 456; 28 Com. Cas. 253, C. A.

*Annotations*:—*Distd. Malmberg v. Evans* (1924), 41 T. L. R. 38. *Refd. Harper v. Mackechnie*, [1925] 2 K. B. 423.

**237. Policy incorporating other document—Document not produced.]**—It seems to me quite obvious that a document does not necessarily cease to be a policy because it incorporates another document which is not produced. I take it that a Lloyd's policy incorporating Institute clauses without setting them out in full would not cease to be a policy because it did not appear on the face of the policy what the Institute clauses were (*SCRUTTON, L.J.*).—*MALMBERG v. EVANS (H. J.) & CO.* (1924), 41 T. L. R. 38; 30 Com. Cas. 107, C. A.

## SUB-SECT. 2.—CLASSIFICATION.

*See Marine Insurance Act, 1906 (c. 41), ss. 25-29.*

"Valued policy."—*See Sect. 10, post.*

"Floating policy."—*See Sect. 7, sub-sect. 2, post.*

Time policy.]—*See Sect. 12, sub-sect. 1, post.*

Mixed policy.]—*See Sect. 12, sub-sect. 2, post.*

Voyage policy.]—*See Sect. 12, sub-sect. 3, post.*

Wagering policy.]—*See Part IX., post.*

## SUB-SECT. 3.—REQUISITES OF.

## A. What must be Specified.

*See Stamp Act, 1891 (c. 39), s. 93; Marine Insurance Act, 1906 (c. 41), ss. 23, 24.*

**238. Risk of adventure.]**—A policy of marine insurance upon a ship for the period of twelve months contained the following continuation clause: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the continent of Europe at a *pro rata* daily premium." On the expiration of the twelve months the ship was abroad, & on her voyage home was lost. In an action on the policy:—*Held*: the policy was one entire contract of insurance for a time exceeding twelve months, & therefore invalid as being in contravention of Stamp Act, 1891 (c. 39), s. 93 (3), & if the continuation clause could be regarded as

a separate insurance, either for a voyage or time, it did not specify the particular risk or adventure insured sufficiently to satisfy the requirements of the sub-sect. ; & therefore in either view the policy was invalid.—**ROYAL EXCHANGE ASSURANCE CORPN. v. SJOFORSKRINGS AKT. VEGA**, [1902] 2 K. B. 384 ; 71 L. J. K. B. 739 ; 87 L. T. 356 ; 50 W. R. 694 ; 18 T. L. R. 714 ; 9 Asp. M. L. C. 329 ; 7 Com. Cas. 205, C. A.

*Annotations*.—**Reid. Empress Assco. Corpn. v. Bowring** (1905), 11 Com. Cas. 107 ; **Glasgow Assco. Corpn. v. Symondson** (1911), 104 L. T. 254.

**239. Sum or sums insured.**—**HOME MARINE INSURANCE CO., LTD. v. SMITH**, No. 231, *ante*.

**240.** —.]—The Admty. requisitioned a steamer upon the terms of a charterparty, clause 19 of which provided that "the risks of war which are taken by the Admty. are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: 'Warranted free of capture, seizure & detention & the consequences thereof, or of any attempt thereat, piracy excepted, & also from all consequences of hostilities or warlike operations, whether before or after declaration of war. Such risks are taken by the Admty. on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury.' The steamer was lost by war risks, & the owners claimed to be paid by the Admty. interest on the ascertained value of the steamer from the date of the loss on the footing that clause 19 was either a policy of insurance or was a contract of indemnity:—**Held**: the ship-owners were not entitled to interest under Civil Procedure Act, 1833 (c. 42), s. 29, because clause 19 of the Admty. charterparty was not a policy of marine insurance within Marine Insurance Act, 1906 (c. 41), s. 25, as the sum insured was not stated therein ; nor was it a contract of indemnity, as the liability of the Admty. was in terms limited to the ascertained value of the steamer at the time of the loss.—**ADMIRALTY COMRS. v. ROPNER & CO., LTD.** (1917), 86 L. J. K. B. 1030 ; 117 L. T. 58 ; 33 T. L. R. 362 ; 14 Asp. M. L. C. 89, D. C.

**241. Name of assured.**—According to 25 Geo. 3, c. 41, the name of the party interested must be inserted in a policy of insurance, otherwise he cannot recover upon it.—**COX v. PARRY** (1786), 1 Term Rep. 464 ; 90 E. R. 1190.

*Annotations*.—**Mentd. Gutteridge v. Smith** (1794), 2 Hy. Bl. 374 ; **Bennett v. Francis** (1801), 2 Bos. & P. 550 ; **Yate v. Willan** (1801), 2 East, 128 ; **Broadhurst v. Baldwin** (1817), 4 Price, 58 ; **Seaton v. Benedict** (1828), 5 Bing. 28 ; **Lochmore v. Fletcher** (1833), 3 Tyr. 450 ; **Reid v. Dickons** (1833), 5 B. & Ad. 499 ; **Steavenson v. Berwick Corpn.** (1841), 4 Per. & Dav. 546.

**242.** —.]—**WILTON v. REASTON** (1787), 1 Hy. Bl. 22, n. ; 126 E. R. 14.

**243.** —.]—A declaration stating the pltfs., M. & another, caused to be effected a policy, containing that G. & Co. did make assurance & averring the interest in S., with a promise by deft. to pltfs., in consideration of the premium paid by them, was held good after verdict ; for it must be intended that pltfs. insured under the names of G. & Co., & that they were proved to be within one or other of the descriptions of persons in 28 Geo. 3, c. 56, in whose name or usual style or firm of dealing, insurance may be made.—**MELLISH v. BELL** (1812), 15 East, 4 ; 104 E. R. 745.

**244. Signature of insurer—Firm name.**—A declaration stated that deft. & B., S., & O. & 500 other persons, were united in partnership, by the name of the General Maritime Assurance Co., "for carrying on the business of insurers of ships" ; that the co. had a capital of £1,000,000 in ten thousand shares of £100 each ; that deft. was proprietor of one hundred shares, in respect of which only £5 per share had been paid up, & £95 per share remained due ; that pltfs. made with the co. a policy of insurance on the body, tackle, etc., of the ship "Elizabeth," & it was agreed that the capital stock of the co. should be alone liable to make good all claims under the policy ; & that no proprietor should be liable to any claim by reason of that policy, beyond the amount of his shares, in witness whereof, & that the co. were content with that insurance for £1,500. B., S., & O., for & on behalf of the co. did then thereunto set their hands ; that, in consideration that pltfs. at the request of deft., being such shareholder, paid to the co. £94 as a premium for the insurance, deft. promised pltfs. that he would become & be an insurer to them of £1,500 upon the said ship, & would perform all things in the policy on his part as such insurer to be performed ; & deft. then became & was an insurer to pltfs. of the sum of £1,500 upon the said ship, & B., S., & O. for & on behalf of defts., as such insurer, duly subscribed the policy. The declaration alleged a loss by storms, & averred that, by reason of the premises, the capital stock of the co. was liable to pay the loss ; that the capital stock was sufficient to answer all claims in that action ; & that the amount unpaid in respect of the shares of which deft. was proprietor was sufficient to answer all claims in that action.

Breach, non-payment. Plea, that the policy was in writing, & made after the passing of 35 Geo. 3, c. 63 ; & that deft. did not subscribe the policy, nor was the name of deft. expressed or specified in or upon the policy, according to the intent & meaning of that Act. On special demurrer :—**Held** : the plea was bad in substance ; for 6 Geo. 1, c. 18, which prohibited any partnership other than the two chartered cos. from underwriting a marine policy, having been repealed by 5 Geo. 4, c. 114, it is not necessary that the name of every individual subscriber constituting the assuring firm should be expressed on the policy ; but a subscription in the name of the partnership firm is a sufficient compliance with 35 Geo. 3, c. 63, s. 11, which requires the names of the underwriters to be expressed or specified in or upon the policy.—**REID v. ALLAN, CROSS v. SAME** (1849), 4 Exch. 326 ; 19 L. J. Ex. 39 ; 7 L. T. 75 ; 13 Jur. 1082 ; 154 E. R. 1237

*Annotation*.—**Folld. Hallett v. Dowdall** (1852), 18 Q. B. 2.

**245.** —.]—To a declaration on a policy of insurance upon a ship & cargo, alleged to have been duly made & subscribed by defts. & three others jointly, as proprietors & shareholders in an insurance co., it was pleaded by one of defts., that he did not subscribe the policy *modo et formâ*, & by both respectively that his name was not expressed or specified in or upon the said policy, by reason whereof the same became void under 35 Geo. 3, c. 63 :—**Held** : upon demurrer to the pleas, that it was not necessary that defts.' names should be subscribed to the policy or

PART II. SECT. 3, SUB-SECT. 3.—A.

or sums insured.]—**NARGOREMULL v. TRITON** & Co. (1924), L. R. 52 Ind.

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e. By part owner.]—The part owner of a vessel may insure the shares of other owners with his own, without disclosing the interest really insured,

under a policy issued to himself insuring the vessel "for whom it may concern."—**MERCHANTS MARINE INSURANCE CO. v. BARRS** (1888), 15 S. C. R. 185.—CAN.

F







contract, & he might recover.—GREY v. AUBER (1862), 1 New Rep. 33.

—.]—See, also, Part I., Sect. 3, sub-sect. 2, A., ante.

**Warranties.**—See Sect. 18, post.

**Reasonable time.**—See Marine Insurance Act, 1906 (c. 41), s. 88.

### B. Written and Printed Clauses.

See, generally, Part I., Sect. 3, sub-sect. 2, B., ante.

**263. Written words — Prevail over printed words.**—HAUGHTON v. EWBANK, No. 447, post.

**264. — — — Although latter not struck out.**—DUDGEON v. PEMBROKE, No. 1581, post.

**265. Printed clause — Ineffective if inconsistent with purpose of insurance.**—By a policy of marine insurance "upon freight of meat valued at £3,000," the underwriters were "to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel, the ship called Hydarnes lost or not lost, at & from Monte Video to any ports or places in any order in the River Plate . . . & thence to the United Kingdom . . ." This part of the policy was written. Then followed a clause to the effect that the assurance should commence upon the freight & goods or merchandise from the loading of the said goods on board the ship at Monte Video. With the exception of the words "Monte Video" this clause was in print, being part of the form of policy generally used by defts., an insurance co. After discharging her outward cargo at Monte Video, the ship proceeded to the river Plate to obtain a cargo of frozen meat, but her refrigerating machinery broke down under such circumstances that she was unable to take any frozen meat on board, so that the adventure, so far as the carriage of meat was concerned, had to be abandoned. By the contract under which she was to have taken a cargo of frozen meat the ship-owners, the assured, became entitled to freight on all carcasses shipped. At the date of the policy it was known to both assured & underwriters that there were no proper appliances at Monte Video for loading frozen meat, so that the ship could not possibly take any frozen meat on board at that port. In an action by the assured upon the policy:—*Held*: in construing the policy, so much of the printed clause in the document as was insensible should be rejected, & the risk attached at Monte Video & did not depend upon the loading of the cargo.—HYDARNES S.S. Co. v. INDEMNITY MUTUAL MARINE ASSURANCE Co., [1895] 1 Q. 500; 64 L. J. Q. B. 353; 72 L. T. 103; 11 T. L. R. 173; 7 Asp. M. L. C. 553; 11 R. 216, C. A.

**266. — — — Suing & labouring clause —**

PRITCHARD v. MERCHANTS MARINE INSURANCE CO., 1 N. B. R. 232.—CAN.

1. *Condition as to counter-signature.*—DELAWARE MUTUAL INSURANCE Co. v. CHAPMAN (1885), Cass. Dig. 2nd ed. —CAN.

### PART II. SECT. 3, SUB-SECT. 4.—B.

**Prevail over words.**—In a policy of insurance the words "fish & oil" were in the margin of the policy, specification of the goods insured and a vessel:—*Held*: these the effect of the of "

**263 ii. — — —**—A condition clause written across the face of a marine policy of insurance must prevail over the printed parts of the policy which are at variance with it.—MEAGHER v. HOME INSURANCE Co. (1861), 11 C. P. 328.—CAN.

**263 iii. — — —**—BELCHER v. CO., LTD. (1872), 2 C. A. 59.—N.Z.

**263 iv. — — —**—SEARLE v. NEW ZEALAND INSURANCE Co. (1884), 3 N. Z. L. R. 148 (S. C.).—N.Z.

**265 i. Printed clause—Ineffective if inconsistent with purpose of insurance.**—LORD v. GRANT (1875), 10 N. S. R. (1 R. & C.) 120.—CAN.

### PART II. SECT. 3, SUB-SECT. 4.—C.

**m. Whether interpretation inclu-**  
**"Barge" — Steam barge.**—A policy upon a vessel described

**Policy of re-insurance.**—UZIELLI v. BOSTON MARINE INSURANCE Co., No. 712, post.

**267. — — —**—WESTERN ASSURANCE Co. OF TORONTO v. POOLE, No. 731, post.

**268. — — — Insurance of shipowners liability to cargo owners.**—CUNARD S.S. Co. v. MARTEN, No. 1912, post.

### C. Technical Words.

See, generally, Part I., Sect. 3, sub-sect. 2, E., ante.

**269. Whether interpretation inclusive—"Corn" — Peas.**—MASON v. SKURRAY (1780), 1 Park's Marine Insurances, 8th ed. p. 253.

*Annotations*:—*Refd.* Hart v. Standard Marine Insce. (1889), 22 Q. B. D. 499. *Mentd.* Cocking v. Fraser (1785), 4 Doug. K. B. 295; Anderson v. Royal Exchange Assce. (1805), 3 Smith, K. B. 48; Gabay v. Lloyd (1825), 5 Dow. & Ry. K. B. 641.

**270. — — — Malt.**—Malt is corn, within the meaning of the clause in the policies of insurance, "to be free from average," etc.—MOODY v. E (1798), 2 Esp. 633, N. P.

*Annotation*:—*Refd.* Hart v. Standard Marine Insce. (1889), 22 Q. B. D. 499.

**271. — — — Rice.**—Rice is not corn within the meaning of the memorandum of a policy of insurance.—SCOTT v. BOURDILLION (1806), 2 Bos. & P. N. R. 213; 127 E. R. 606.

*Annotation*:—*Refd.* Hart v. Standard Marine Insce. (1889), 22 Q. B. D. 499.

**272. — — — "Ship, furniture, etc." — Fishing tackle & stores.**—An insurance upon a ship employed in the Greenland trade on "ship, tackle, apparel, & furniture," does not, by the usage of the trade, cover the fishing tackle.—HOSKINS v. PICKERSGILL (1783), 3 Doug. K. B. 222; 99 E. R. 623.

*Annotations*:—*Consd.* The Dundee (1823), 1 Hag. Adm. 109. *Refd.* Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1882), 7 App. Cas. 795; Re Margetts & Ocean Accident & Guarantee Corp., [1901] 2 K. B. 792.

**273. — — — "Salt" — Saltpetre.**—JOURNU v. BOURDIEU (1787), 1 Park's Marine Insurances, 8th ed., p. 245.

**274. — — — "Iron" — Steel.**—HART v. STANDARD MARINE INSURANCE Co., No. 1431, post.

**275. — — — "Free of loss" — Total & partial loss.**—OTAGO FARMERS' CO-OPERATIVE ASSOCN. OF NEW ZEALAND v. THOMPSON, No. 296, post.

**276. — — — "Gold" — Gold coin.**—NATIONAL BANK OF SOUTH AFRICA v. STANDARD MARINE INSURANCE Co. (1915), 139 L. T. Jo. 27.

**277. Letters of marque—Trade usage.**—PARR v. ANDERSON, No. 1107, post.

**278. Admissibility of evidence to explain — Dictionary.**—A general dictionary of the English language is not authority to show, on a

as a "steam barge" was warranted by the assured "to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge." There was nothing else in the policy as to the vessel insured carrying a deck load:—*Held*: the "barge" mentioned in the policy did not mean the insured vessel, nor did it refer to a steam barge.—STEINHOFF v. ROYAL CANADIAN INSURANCE Co. (1877), 42 U. C. R. 307.—CAN.

**n. — — — "Stone" — Phosphate.**—A policy of marine insurance contained a stipulation that the vessel was not to load more than register tonnage with stone, ores, etc.:—*Held*: phosphate rock was not stock or ore within such condition.—DELAWARE INSURANCE Co. v. CHAPMAN (1885), Cass. Dig. 2nd ed. 387.—CAN.

for  
CHAPMAN v. PROVIDENCE

*Sect. 3.—The policy: Sub-sect. 4, C., D., E. & F.; sub-sect. 5, A. & B.]*

trial, the meaning of a word ["cargo"] which is relied on as deriving a peculiar meaning from mercantile usage.—*HOUGHTON v. GILBART* (1836), 7 C. & P. 701.

*Annotation:—Refd. Kreuger v. Blanck* (1870), L. R. 5 Exch. 179.

—.]—*See, generally, Part I., Sect. 3, sub-sect. 2, E., ante.*

*Port.*—*See Sub-sect. 4, D., post*

*Incorporation of usage.*—*See Sub-sect. 5. post.*

#### D. Geographical Terms.

**279. Port—Technical interpretation.]—MARITIME INSURANCE CO., LTD v. ALIANZA INSURANCE CO. OF SANTANDER, No. 287, post.**

**280. — Name designating town & port — Inclusion of district round coast.]—CONSTABLE v. NOBLE, No. 894, post.**

**281. — Whether outlying places included.]—PAYNE v. HUTCHINSON, No. 893, post.**

**282. — —.]—Insurance on a ship "at & from her port of lading in North America to Liverpool." She took in part of her cargo at K., in New Brunswick, & then sailed from thence to B., in the same province, seven miles distant, on the same bay of the sea. She there completed her cargo, & then returned to K. to receive provisions, etc., after which she sailed for England, & was lost on the voyage. B. was not in the way from K. to Liverpool. B. & K. were situate on creeks opening into the bay, & were spoken of by some persons as ports, but neither of them had a custom-house. They had custom-house officers, & were under the jurisdiction of the custom-house of St. John, New Brunswick:—*Held*: after the ship had begun to load at K., that was her port of lading; the term "port of lading" in the policy did not allow of her afterwards going to B., & her doing so was a deviation.—*BROWN v. TAYLEUR* (1835), 4 Ad. & El. 211; 1 Har. & W. 578; 5 Nev. & M. K. B. 472; 5 L. J. K. B. 57; 111 E. R. 777.**

*Annotations:—Refd. Roelandts v. Harrison* (1854), 23 L. J. Ex. 169; *Maritime Insce. v. Alianza Insce. of Santander* (1907), 77 L. J. K. B. 69.

**283. — Where in jurisdiction of port authorities.]—THE DIONE, SWEET v. MONTIFIORE** (1858), 7 L. T. 76.

**284. — —.]—HUNTING & SON v. BOULTON, No. 786, post.**

**285. — Open roadstead — Usual place of loading & unloading.]—Policy on ship for four months, at & from a place to any port or ports whatsoever:—*Held*: an open roadstead, being the usual place of loading & unloading, was a port within the meaning of this policy.—*COCKEY v.***

*WASHINGTON INSURANCE CO.* (1883), 23 N. B. R. 105.—CAN.

**p. — "Fish"—Cod-fish.]—The word "fish" without further addition means in the Newfoundland trade "cod-fish."—*NEWMAN v. ROW* (1848), 3 Nfld. L. R. 22.—NFLD.**

**q. "When clear of the ice."—The words, "when clear of the ice" in a marine insurance policy mean that the vessel must arrive, at some point on her voyage, where & from which the ordinary risks of the voyage would not be sensibly increased by ice.—*HYNDMAN v. MONTREAL INSURANCE CO.* (1876), 2 P. E. I. 132.—CAN.**

#### PART II. SECT. 3, SUB-SECT. 4.—D.

**281 i. Port—Whether outlying places included.]—A ship was insured under a policy of marine insurance, "at &**

*ATKINSON* (1819), 2 B. & Ald. 460; 106 E. R. 434.

*Annotation:—Refd. Harrower v. Hutchinson* (1870), L. R. 5 Q. B. 584.

**286. — Popular or commercial sense — As understood by marine traders.]—A ship insured for a voyage to any port of discharge in the United Kingdom, " & whilst in port during thirty days after arrival," arrived at Greenock, discharged her cargo, & was placed in a dock for repairs. Within thirty days after her arrival she left the dock in ballast for the port of Glasgow, in tow of a steam-tug, to proceed on a new voyage, & had reached the fairway of the channel of the Clyde, her stern being about 500 feet distant from the harbour works, when she was capsized by a sudden gust of wind, & sustained damage:—*Held*: the ship at the time of the accident was not "in port" within the meaning of the policy, & the underwriters were not liable.**

I agree with the view which has been more than once expressed by learned judges, that in construing such a contract as that with which we are dealing the word "port" must be taken to have been used in its popular or commercial sense, that is to say, as applying to what would be understood as the port by shippers, shipowners & underwriters (*LORD HERSCHELL*).—*HUNTER v. NORTHERN MARINE INSURANCE CO.* (1888), 13 App. Cas. 717, H. L.

*Annotation:—Refd. Re Goodbody & Balfour, Williamson* (1899), 82 L. T. 484.

**287. — Used in conjunction with "place or places."—A ship was insured whilst at port or ports, place or places in New Caledonia. Whilst within the geographical limits of New Caledonia, & on her way to a port in that island, she struck upon a reef & incurred losses:—*Held*: the words "place or places," occurring in connection with the words "port or ports," meant place or places at which the vessel might arrive with some object other than that of merely passing on her way to some other point; the vessel was not, therefore, "at a port or ports, place or places in New Caledonia" within the meaning of the policy; & the insurers were not liable.—*MARITIME INSURANCE CO., LTD v. ALIANZA INSURANCE CO. OF SANTANDER*, [1907] 2 K. B. 600; 77 L. J. K. B. 69; 97 L. T. 606; 23 T. L. R. 703; 51 Sol. Jo. 674; 10 Asp. M. L. C. 579; 13 Com. Cas. 46.**

**288. Seas or countries—Seas—Baltic—Gulf of Finland included.]—In an action on a policy of insurance on a voyage "to any port in the Baltic," evidence admitted to prove that the Gulf of Finland is considered in mercantile contracts as within the Baltic, although the two seas are treated as separate & distinct by geographers.—*UHDE v. WALTERS* (1811), 3 Camp. 16, N. P.**

*Annotations:—Folld. Robertson v. Money* (1824), Ry. & M. 75. *Consd. Birrell v. Dryer* (1884), 9 App. Cas. 315. *Refd. Spallall v. Bencke* (1850), 10 C. B. 212.

**285 i. — Open roadstead—place of loading & unloading.]—At Lobos & the other guano islands are strictly no ports, but vessels load at open roadsteads. In an action on a marine insurance policy:—*Held*: the jury were justified in finding that Lobos was a port on the western coast of South America.—*GEROW v. PROVIDENCE WASHINGTON INSURANCE CO.* (1889), 28 N. B. R. 435; *affd.* 17 S. C. R. 387.—CAN.**

**285 ii. —**  
*INSURANCE CO. OF SCOTLAND v.* (1830), 4 Will. & S. 17; *affd.* 5 of Scss.) 525; 2 Fac. Coll. 299.—SCOT.

**i. — Waters of river.]—**  
*OCEAN MUTUAL MARINE INSURANCE* (1885), 18 N. B. R. (6 R. & O.) 6 C. L. T. 540.—CAN.

from Sydney to St. John," etc. She called at Sydney for orders, but was not at anchor there, coming only within waters known on the charts & to practical men as "Sydney harbour," but 5 miles distant from the harbour of North Sydney, & 10 miles distant from the harbour of Sydney:—*Held*: the vessel was at Sydney, within the meaning of the policy.—*TROOP v. ST. PAUL FIRE & MARINE INSURANCE CO.* (1895), 33 N. B. R. 105; *affd.* 26 S. C. R. 5.—CAN.

**r. — Whether fairway of river included.]—"In port" as applied to Greenock does not include the fair way of the navigable channel of the Clyde off the harbour works.—*AFTON (OWNERS) v. NORTHERN MARINE INSUR-***

**289.** ——— **Pacific.]** — ROYAL EXCHANGE ASSURANCE CORPN. v. TOD (1892), 8 T. L. R. 669.

**290.** ——— **Countries—East India Islands—Mauritius included.]**—In an action on a policy of insurance on a voyage “at or from the port or ports of discharge & loading in India, & the East India Islands,” evidence admitted to prove that Mauritius is considered in mercantile contracts as an East India Island, although treated by geographers as an African Island.—ROBERTSON v. MONEY (1824), Ry. & M. 75, N. P.

*E. Usage.*

See Sub-sect. 5, *post*.

*F. The Memorandum.*

Sect. 22, sub-sect. 4, *post*.

SUB-SECT. 5.—INCORPORATION OF USAGE.

*A. In General.*

See Marine Insurance Act, 1906 (c. 41), s. 87.

**291. Policy interpreted by aid of usage.]**—(1) The sails & furniture of a ship taken thereout & lodged in a warehouse, if accidentally burnt by fire before the ship returns from the voyage, shall be made good by the underwriters.

(2) The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, & the usual manner & course of doing it. Every thing done in the usual course must have been foreseen & in contemplation, at the time he engaged. He took the risk upon a supposition that what was usual or necessary would be done (LORD MANSFIELD, C.J.).

(3) When goods are insured “till landed,” without express words, the insurance extends to the boat, the usual method of landing goods out of a ship, upon the shore (LORD MANSFIELD, C.J.).

If there had been a British ship there, & the goods had been put into a lighter in order to go to the British ship & lost in the way; that would have been a loss within the policy (LORD MANSFIELD, C.J.).

(4) The usage being foreseen, is more strongly allowed to be done, than what is left to the master's discretion upon unforeseen events: yet if the master, *ex justa causa*, goes out of the way (as to refit, or to avoid enemies, pirates, etc.) the insurance continues (*per CUR.*).—PELLEY v. ROYAL EXCHANGE ASSURANCE CO. (1757), 1 Burr. 341; 97 E. R. 212

*Annotations:*—As to (1) **Refd.** Harrison v. Ellis (1857), 7 E. & B. 465. As to (3) **Consd.** Rodocanachi v. Elliott (1873), L. R. 8 C. P. 649; Pearson v. Commercial Union Assce. (1876), 1 App. Cas. 498. **Refd.** Brough v. Whitmore (1791), 4 Term Rep. 206; Johnston v. Benson (1819), 4 Moore, C. P. 90. As to (4) **Refd.** Palmer v. Blackburn (1841), 10 Bing. 61; Gabay v. Lloyd (1825), 5 Dow. & Ry. K. B. 641; Australian Agricultural Co. v. Saunders (1875), 44 L. J. C. P. 391.

**292.** ———.] — FARQUHARSON v. HUNTER (1785), 1 Park's Marine Insurances, 8th ed., p. 105.

**293.** ———.] — BROUGH v. WHITMORE, No. 515, *post*.

**294.** ———.] — LOHRE v. AITCHISON, No. 1904, *post*.

**295.** ——— **Interpretation of terms.]** — PARR v. ANDERSON, No. 1107, *post*.

**296.** ———.]—A policy of marine insurance upon frozen meat expressed the period of the risk to be as follows: “Risk commencing at the freezing station works & includes a period of not exceeding sixty days after arrival of the vessel.” It also contained the following clause: “Warranted free from particular average & loss unless caused by stranding sinking burning or collision of the ship or craft.” Owing to causes arising during the voyage other than the stranding, sinking, burning, or collision of the ship the meat arrived in such a condition that it had to be condemned as unfit for human food, & was consequently a total loss. The judge found as a fact upon the evidence of underwriters that the words “Warranted free from particular average & loss” were a well-known formula used in connection with the insurance of frozen meat; that the words “& loss” in that formula were well understood amongst underwriters to mean all loss, total as well as partial; & that the clause, however inapt to express that meaning, was in fact intended to mean that the underwriters only undertook the marine risks of stranding, sinking, burning, or collision:—**Held:** notwithstanding the provision as to the risk commencing before & continuing after the termination of the voyage, the clause had that meaning in this policy, & the underwriters were not liable for the loss.—OTAGO FARMERS' CO-OPERATIVE ASSOCN. OF NEW ZEALAND v. THOMPSON, [1910] 2 K. B. 145; 79 L. J. K. B. 692; 102 L. T. 711; 11 Asp. M. L. C. 403; 15 Com. Cas. 28.

**297. Insurer presumed to know usage.]** — PELLEY v. ROYAL EXCHANGE ASSURANCE CO., No. 291, *ante*.

**298.** ———.] — OUGIER v. JENNINGS (1800), 1 Camp. 505, n., N. P.

*Annotations:*—**Refd.** Mount v. Larkins (1831), 8 Bing. 108; Phillips v. Irving (1844), 7 Man. & G. 325; De Wolf v. Archangel Insce. (1874), L. R. 9 Q. B. 451.

*B. Consistency of Usage with Policy.*

See, generally, CUSTOM & USAGES, Vol. XVII., pp. 47-50, Nos. 523-556; Part I., Sect. 3, sub-sect. 2, G., *ante*.

**299. Admissibility of evidence of usage—To contradict plain terms of policy.]**—PARKINSON v. COLLIER (1797), 2 Park's Marine Insurances, 8th ed., p. 653.

**300.** ———.] — Count on a policy of marine insurance, from C. to P., in the ordinary form & with the ordinary memorandum. The interest was declared to be “on money advanced on account of freight.” Averments: that the interest was in the shipowner in money advanced to him by the owners of the cargo; that on the voyage from C. to P. the ship was damaged by stormy weather, & forced to go out of her course to V. to be repaired, & there necessarily unloaded her cargo & loaded again, & that divers of the costs so incurred were a general average, to which pltf. in respect of his interest had to contribute. Breach: not indemnifying against these. Plea, that the policy was made in London, & that by custom these insurers, on money advanced on account of freight, are not liable to make good a general average. On demurrer to the plea:—**Held:** (1) the interest

Evidence of usage, & of the meaning in a commercial sense of certain expressions in a policy of marine insurance may be given by shipowners & shipmasters.—GEROW v. PROVIDENCE WASHINGTON INSURANCE CO. (1889), 28 N. B. R. 435; *affd. on appeal*, 14 S. C. R. 731.—CAN.

PART II. SECT. 3, SUB-SECT. 5.—A.

i. Policy interpreted by aid of  
———  
contract, but not  
that

—CAN.

**291 II.** ———.]—STEINHOFF v. ROYAL CANADIAN INSURANCE CO. (1877), 42 U. C. R. 307.—CAN.

**291 III.** ———.]—NAPIER v. WOOD (1825), 4 Sh. (Ct. of Sess.) 19.—SCOT.

**295 I.** ——— **Interpretation of terms.]**—



*Sect. 3.—The policy: Sub-sect. 5, B., C. & D.; sub-sect. 6. Sect. 4: Sub-sects. 1 & 2.]*

was sufficiently described in the policy, & that as, at least, the expense of loading & unloading was the subject of a general average, the count was good; (2) the custom set up in the plea was inconsistent with the terms of the written policy, & was therefore inadmissible.—*HALL v. JANSON* (1855), 4 E. & B. 500; 3 C. L. R. 737; 24 L. J. Q. B. 97; 24 L. T. O. S. 289; 1 Jur. N. S. 571; 3 W. R. 213; 119 E. R. 183.

*Annotations:—As to (1) Consd. Allison v. Bristol Marine Insee. (1876), 1 App. Cas. 209; Atwood v. Sellar (1880), 5 Q. B. D. 286; Svensden v. Wallace (1884), 13 Q. B. D. 69. Refd. Hamel v. Peninsular & Oriental Steam Navigation Co., [1908] 2 K. B. 298.*

**301.** ———.] — *DICKENSON v. JARDINE*, No. 1874, *post*.

### C. Notoriety of Usage.

*See, generally, CUSTOM & USAGES, Vol. XVII., pp. 28 et seq.*

**302. Usage must be general & notorious.]** — East India insurances include the chance of detention in India, & the risk of the country voyage there.

The usage of the East India Co.'s trade & the course of their voyages, are in fact so notorious, & so well known both to the insurers & the insured, that they must be supposed fully apprised & sufficiently conversant of it: & the obligation of this policy is to be taken from the words of the charter party, which refer to the usage, & the usage of these voyages, in the same manner as if it was expressly inserted in the policy (*per CUR.*).—*SALVADOR v. HOPKINS, HEATON v. RUCKER* (1765), 3 Burr. 1707; 97 E. R. 1057.

*Annotation:—Refd. Grant v. Paxton (1809), 1 Taunt. 463*

———.]—*See, generally, Part I., Sect. 3, sub-sect. 2, G., ante.*

**303. Assured ignorant of usage — Not bound thereby—Usage at Lloyd's.]**—Policy on horses "warranted free from mortality [& jettison]". Special verdict finding, that on the voyage, in consequence of a storm, the horses broke down the partitions between them, & by kicking, bruised each other so much that they died; that a particular usage with respect to policies on live stock prevailed at Lloyd's Coffee House in London, & was adopted both by the underwriters subscribing & the merchants effecting policies there; & that this policy was effected there:—*Held*: (1) this was a loss by perils of the sea, for which *pltf.* might recover notwithstanding the warranty; (2) as it did not appear that *pltf.* knew of the usage prevailing at Lloyd's, or was in the habit of effecting policies there, such usage did not bind him.—*GABAY v. LLOYD* (1825), 3 B. & C. 793; 5 Dow. & Ry. K. B. 641; 3 L. J. O. S. K. B. 116; 107 E. R. 927.

*Annotations:—As to (1) Refd. Robertson v. Jackson (1845), 2 C. B. 412; Taylor v. Dunbar (1869), L. R. 4 C. P. 206. As to (2) Refd. Bartlett v. Pentland (1830), 10 B. & C. 760; Bayliffe v. Butterworth (1847), 1 Exch. 425; Maxwell v. Deare (1854), 23 L. T. O. S. 1; Sweeting v. Pearce (1855), 2 C. B. 412. Mentd. Allen v.*

**304.** ———.] — *BARTLETT v. PENTLAND*, No. 2392, *post*.

**305.** ———.] — *SCOTT v. IRVING*, No. 2417, *post*.

### PART II. SECT. 3, SUB-SECT. 5.—C.

**308.1. Assured ignorant of usage—Not bound thereby—Usage at Lloyd's.]** — *WARD v. HARRIS* (1880), 8 L. R. 1r. 365.—*IR.*

**a. Knowledge of insurers — Evi-**

*dence.]*—To render insurers liable for a loss of cargo carried on deck in accordance with a usage so to carry it, very strong evidence should be given that the insurers knew of such usage when issuing the policy.—*WARREN v. SWISS LLOYD'S INSURANCE CO.* (1883),

**306.** ———.] — *SWEETING v. PEARCE*, No. 2415, *post*.

**307.** ———.] — A policy of insurance was effected on a cargo of teas by an insurance broker on behalf of *pltf.*, & *deft.*, a member of the policy. In accordance with a custom at Lloyd's, the broker & *deft.* had a running account which was periodically settled, whereby premiums due to *deft.* were set off as against losses due to the broker. A loss under the policy was thus settled in an account. The broker, before paying *pltf.* the sum so due, became *bkpt.*, & *pltf.* sued *deft.*:—*Held*: *pltf.* was not bound by the custom unless he knew of its existence, & it lay on *deft.* to prove that *pltf.* knew of the custom.—*MATVEIEFF & CO. v. CROSSFIELD* (1903), 51 W. R. 365; 19 T. L. R. 182; 47 Sol. Jo. 258; 8 Com. Cas. 120.

**308.** ———.] — *MCCOWIN LUMBER & EXPORT CO., INCORPORATED v. PACIFIC MARINE INSURANCE CO., LTD.*, No. 2421, *post*.

**309. — Proof of ignorance—Onus on defendant.]**—*MATVEIEFF & CO. v. CROSSFIELD*, No. 307, *ante*.

**310. Proof of usage—Evidence from other localities.]** — *NOBLE v. KENNOWAY*, No. 41, *ante*.

———.]—*See, generally, CUSTOM & USAGES, Vol. XVII., pp. 34 et seq.*

**Presumption as to insurer's knowledge.]**—*See Sub-sect. 5, A., ante.*

### D. Particular Usages.

**311. Liability of underwriters — In order of subscription.]**—A custom of merchants that, in subscribing a policy of insurance, the underwriters, in the order they subscribe, shall be liable to the amount of the loss; & that the subsequent underwriters shall return the premium, & be exonerated from responsibility, is good.—*AFRICAN CO. v. BULL* (1690), 1 Show. 132; 89 E. R. 495.

**312. Change of convoy.]** — *DE GAREY v. CLAGGET* (1795), 2 Park's Marine Insurances, 8th ed., p. 708.

**313. To sail with convoy.]**—Warranted to depart with convoy shall intend from the place of having convoy.

The clause warranted to depart with convoy must be construed according to the usage among merchants, *i.e.* from such place as convoys are to be had (*per CUR.*).—*LETHULIER'S CASE* (1692), 2 Salk. 443; 91 E. R. 384.

*Annotations:—Folld. Gordon v. Morley, Campbell v. Bordieu (1747), 2 Stra. 1265. Refd. Shore v. Wilson (1842), 5 Scott, N. R. 958. Mentd. Anderson v. Pitcher (1800), 2 Bos. & P. 164.*

**314. Storage of goods at Gibraltar.]** — *TIERNEY v. ETHERINGTON* (1743), cited in 1 Burr. at p. 348; 97 E. R. 347.

*Annotation:—Consd. Pelly v. Royal Exchange Assce. (1757), 1 Burr. 341.*

**315. Money advanced by captain — For ship's benefit.]** — *GREGORY v. CHRISTIE*, No. 563, *post*.

**316. Intermediate voyages.]** — *GREGORY v. CHRISTIE*, No. 563, *post*.

**317.** ———.] — *FARQUHARSON v. HUNTER* (1785), 1 Park on Marine Insurance, 8th ed., p. 105.

**318.** ———.] — *OUQUIER v. JENNINGS* (1800), 1 Camp. 505, n., N. P.

*Annotations:—Expld. De Wolf v. Archangel Insee. (1874), L. R. 9 Q. B. 451. Refd. Mount v. Larkins (1831), 8 Bing. 108; Phillips v. Irving (1844), 7 Man. & G. 325.*

9 V. L. R. 397.—*AUS.*

### PART II. SECT. 3, SUB-SECT. 5.—D.

**b. Local custom—Construction must be reasonable.]** — *KANJI DWARKADAS v. HARIDAS PURSHOTTAM* (1911), 1 L. R. 36 Bom. 484.—*IND.*



**319. — Prior to attachment of risk.] —**VAL-  
LANCE *v.* DEWAR, No. 1246, *post*.

**320. Landing of goods at port.] —**BROWN *v.*  
CARSTAIRS, No. 849, *post*.

**321. Port of departure — In Amelia Island.] —**  
Policy on goods "at & from the ship's loading  
port or ports in Amelia Island to London." The  
ship never touched at Amelia Island, but took in  
her cargo at Tigre Island, which lies a little  
farther up the River St. Mary's:—*Held*: the  
policy nevertheless attached, this being the usual  
mode in which ships in that trade take in their  
cargoes.—MOXON *v.* ATKINS (1812), 3 Camp. 200,  
N. P.

**322. Jettison of goods on deck.] —**A custom  
that underwriters are not liable, under the ordinary  
form of policy, for general average in respect of  
the jettison of goods stowed on deck, is a valid  
custom & does not contradict the terms of the  
policy.—MILLER *v.* TETHERINGTON (1862), 7  
H. & N. 954; 31 L. J. Ex. 363; 9 L. T. 231; 8  
Jur. N. S. 1039; 10 W. R. 356; 1 Mar. L. C.  
388; 158 E. R. 758, Ex. Ch.

*Annotations:—*Expld. British & Foreign Marine Insce. *v.*  
Gaunt, [1921] 2 A. C. 41. *Refd.* The Milwaukee Belle  
(1869), 21 L. T. 800; Stewart *v.* West India & Pacific  
S.S. Co. (1873), L. R. 8 Q. B. 88.

**323. Declaration in bill of lading.] —**STEPHENS  
*v.* AUSTRALASIAN INSURANCE Co., No. 617, *post*.

**Deviation.] —**See Sect. 14, sub-sect. 2, B. (d),  
*post*.

**Duration & commencement of risk.] —**See Sect.  
12, *post*.

**Settlement of claims.] —**See Sect. 26, sub-sect. 1,  
C., *post*.

**Interpretation of technical terms.] —**See Nos.  
269, 272, 274, 275, 277, *ante*.

**Liability of broker to underwriter for premium.] —**  
See Nos. 413–416, *post*.

**Right of broker to commission from under-  
writer.] —**See Nos. 422, 423, *post*.

#### SUB-SECT. 6.—PROPERTY IN POLICY.

**324. Action of trover maintainable.] —**HARD-  
ING *v.* CARTER (1781), 1 Park's Marine Insurances,  
8th ed., p. 4.

**325. —.] —**SNOOK *v.* DAVIDSON, No. 437,  
*post*.

### SECT. 4.—THE COURSE OF BUSINESS OF INSURANCE.

#### SUB-SECT. 1.—INSURANCE BROKERS.

See Sect. 5, sub-sect. 1, *post*.

#### SUB-SECT. 2.—THE INSURANCE SLIP.

See Marine Insurance Act, 1906 (c. 41), ss. 21,  
89, 91 (1) (a).

**326. Binding nature of slip.] —**IONIDES *v.*  
PACIFIC INSURANCE Co., No. 523, *post*.

**327. —.] —**Where underwriters have, as by  
initialling a slip, made a contract of assurance,  
which, although invalid at law & in equity for  
want of statutory requisites, is nevertheless, in  
practice, & according to the usage of those engaged  
in marine insurance, a complete & final contract  
binding upon them in honour & good faith what-  
ever events may subsequently happen, the assured

need not communicate to the underwriters facts  
which afterwards come to his knowledge material  
to the risk insured against; & the non-disclosure  
of such facts will not vitiate the policy of insurance  
afterwards executed.—CORY *v.* PATTON (1872),  
L. R. 7 Q. B. 304; 41 L. J. Q. B. 195, n.; 26  
L. T. 161; 20 W. R. 364; 1 Asp. M. L. C. 225.

*Annotations:—*Apld. Morrison *v.* Universal Marine Insce.  
(1872), L. R. 8 Exch. 40; Lishman *v.* Northern Maritime  
Insce. (1875), L. R. 10 C. P. 179. *Refd.* Ionides *v.* Pacific  
Fire & Marine Insce. (1872), 41 L. J. Q. B. 190; Fisher *v.*  
Liverpool Marine Insce. (1873), L. R. 8 Q. B. 469; Home  
Marine Insce. *v.* Smith, [1898] 1 Q. B. 829.

**328. —.] —**Pltf.'s insurance broker effected  
an insurance with defts. on the chartered freight  
of pltf.'s ship *Cambria*, without disclosing to defts.  
certain information in his possession which it was  
material that they should know (Oct. 10). In so  
doing he acted in good faith, supposing from  
inquiries that he had made that the information  
was incorrect. After initialling the slip, but  
before executing the policy, defts. (Oct. 13)  
became possessed of the information which the  
broker had not disclosed; & they afterwards  
executed & delivered out the policy without any  
protest or any notice that they would treat it as  
void (Oct. 14 or 15). Upon receiving news of the  
loss of the vessel, they gave notice to pltf. that  
they did not consider the policy binding on them  
(Oct. 20). On the trial of the action upon the  
policy, the judge directed the jury, in substance,  
that defts. were bound to make their election  
within a reasonable time after they became aware  
of the concealment, & left it to them, without  
expressing any opinion whether defts. had elected  
to go on with the policy. The jury having found  
that defts. did not so elect, & a rule for a new  
trial on the ground of misdirection having been  
obtained & afterwards made absolute in the ct.  
below:—*Held*: (1) this direction was right; &  
there being no election in fact, & no evidence that  
pltf. had been prejudiced by defts.' not electing  
earlier to disaffirm the policy, defts. were not  
estopped from denying its validity, nor was it  
material to consider whether their conduct in  
delivering out the policy without a protest had  
been such as to entitle pltf. to consider it as an  
election.

(2) In effecting marine insurances the matter is  
considered merely as negotiation till the slip is  
initialled, but when that is done the contract is  
considered to be concluded (*per Cur.*).—MORRISON  
*v.* UNIVERSAL MARINE INSURANCE Co. (1873),  
L. R. 8 Exch. 197; 42 L. J. Ex. 115; 21 W. R.  
774, Ex. Ch.

*Annotation:—*As to (1) *Refd.* Marsden *v.* Sambell (1880), 43  
L. T. 120.

**329. —.] —**Where underwriters have, by  
initialling a slip, made a contract of assurance  
which although invalid at law & in equity for  
want of statutory requisites, is, nevertheless, in  
practice, & according to the usage of those engaged  
in marine insurance, a complete & final contract  
binding upon them in honour & good faith,  
whatever events may subsequently happen, the  
assured need not communicate to the underwriters  
facts which afterwards come to his knowledge  
material to the risk insured against; & the non-  
disclosure of such facts will not vitiate the policy  
of insurance afterwards executed. & it makes  
no difference that, the insurance being negotiated  
by an agent of the assured, the slip was initialled  
subject to the ratification of the assured.—CORY *v.*

#### PART II. SECT. 3, SUB-SECT. 6.

*c. Before payment of premium — Property in company.] —*SCOTT & GIFFORD *v.* SEA INSURANCE Co. (1825), 3 Sh. (Ct. of  
Sessions) 417.

**Sect. 4.—The course of business of insurance: Sub-sects. 2 & 3.]**

**PATTON** (1874), L. R. 9 Q. B. 577; 43 L. J. Q. B. 181; 30 L. T. 758; 23 W. R. 46; 2 Asp. M. L. C. 302.

*Annotations:—***Refd.** Home Marine Insce. v. Smith, [1898] 1 Q. B. 829; Lower Rhine & Wurttemberg Insce. Asscn. v. Sedgwick (1898), 68 L. J. Q. B. 186.

**330. —**—]—These interim protection notes, given by fire insurance companies, bear an analogy to the "slips," commonly used in cases of marine insurance, preliminary to the issuing of policies. The slip contains the heads of the contract & is in itself a contract of insurance (**SIR MONTAGUE SMITH**).—**CITIZENS INSURANCE CO. OF CANADA v. PARSONS, QUEEN INSURANCE CO. v. PARSONS** (1881), 7 App. Cas. 96; 51 L. J. P. C. 11; 45 L. T. 721, P. C.

*Annotations:—***Mentd.** Dobie v. Temporalities Board (1882), 7 App. Cas. 136; Russell v. R. (1882), 7 App. Cas. 829; Colonial Building & Investment Asscn. v. A.-G. of Quebec (1883), 9 App. Cas. 157; Hodge v. R. (1883), 9 App. Cas. 117; Bank of Toronto v. Lambe, Merchants' Bank of Canada v. Lambe, Canadian Bank of Commerce v. Lambe, North British Mercantile Insce. v. Lambe (1887), 12 App. Cas. 575; A.-G. for Ontario v. A.-G. for the Dominion, [1896] A. C. 348; A.-G. for Manitoba v. Manitoba Licence-Holders' Asscn. (1901), 71 L. J. P. C. 28; *Re* Coleman's Depositories & Life & Health Assce. Asscn. (1907), 76 L. J. K. B. 865; John Deere Plow Co. v. Wharton, [1915] A. C. 330; Great West Saddlery Co. v. R., [1921] 2 A. C. 91; A.-G. for Ontario v. Reciprocal Insurers, [1924] A. C. 328; Caron v. R., [1924] A. C. 999; Toronto Electric Comrs. v. Snider, [1925] A. C. 396.

**331. —**—]—Pltfs., a firm of merchants in New Zealand, in Oct. 1886, employed a firm of insurance brokers in London to effect for them insurances against fire upon goods in New Zealand. The brokers instructed B., an insurance broker at Lloyd's, to effect a portion of the insurances, & B. prepared a slip containing particulars of the risk, which was initialled by deft. & other underwriters at Lloyd's. Owing to a misunderstanding between the insurance brokers no policy was put forward for signature by deft. & the other underwriters, & in Feb. 1887, the goods in New Zealand were seriously damaged by fire. No premiums had then been paid, but two days after the fire the insurance premiums were paid by pltfs. to the insurance brokers. A policy was then tendered to deft. for signature, but he refused to sign it or to pay the amount for which he had initialled the slip. In an action to recover the amount:—**Held**: the slip formed a complete & binding contract of insurance, that it was not subject to an implied condition that a policy should be put forward for signature within a reasonable time, & in the absence of circumstances showing an intention on the part of pltfs. to abandon the insurance, they were entitled to recover.—**THOMPSON v. ADAMS** (1889), 23 Q. B. D. 361.

*Annotation:—***Distd.** *Re* Yager & Guardian Assce. (1912), 108 L. T. 38.

**332. Cannot be sued upon.]**—The slip of paper on which underwriters take down the risks they insure, is not such an instrument as an action could be maintained upon. In order to enforce an undertaking of this nature, it must be on a stamped policy.—**ROGERS v. MCCARTHY** (1800), 3 Esp. 106, N. P.

**333. —**—]—**MACKENZIE v. COULSON**, No. 1318, *post*.

**334. —**—]—**IONIDES v. PACIFIC INSURANCE CO.**, No. 523, *post*.

**335. — Specific performance.]**—An underwriter's "slip" will not be enforced in equity.

Pltfs.' agent, being master of a vessel in which they had a valuable cargo, opened negotiations for effecting an insurance through the shipping agent. He took the vessel to the Downs, & then having received information that the "slip" had, on that day, been signed by or on behalf of pltf., & other underwriters, immediately left the vessel to proceed under the charge of the mate. The vessel being wrecked, pltf. refused to complete the contract for insurance:—**Held**: the ct. would not enforce specific performance of such an instrument; & even if it would, the conduct of pltfs.' agent would disentitle them to such relief.—**MOROCCO LAND CO. v. FRY** (1865), 5 New Rep. 234; 11 L. T. 618; 11 Jur. N. S. 76; 13 W. R. 310; 2 Mar. L. C. 157.

**336. Representations made at signing—By broker—Binding on assured—Unless qualified or withdrawn before policy issued.]**—A representation made by an insurance broker, when the names of the underwriters are put upon a slip is binding on the assured, unless qualified or withdrawn by some communication upon the subject between that time & the execution of the policy.—**EDWARDS v. FOOTNER** (1808), 1 Camp. 530, N. P.

**337. Not legal insurance.]**—Pltf., being in a position to sign judgment for the sum of £5,350 in an action against the owners of a ship, agreed to abstain from so doing, upon the terms that he should receive a mtge. upon the vessel, & that the amount of his claim should be kept insured by defts. The then insurance expired upon Sept. 23. Slips were signed on Sept. 22 for an amount which covered pltf.'s claim, but the policies were not appropriated to pltf. until Sept. 30; one, bearing date Sept. 21 for £350 at Lloyd's, the other, dated Sept. 27 for £5,000 & effected with an insurance co. Pltf. signed judgment on Sept. 28:—**Held**: (1) that it was obligatory upon defts., under the agreement, to keep up a legal insurance upon which an action would be maintainable, & inasmuch as the slips constituted no such insurance, defts. had committed a breach of the agreement, & pltf. was entitled to sign judgment; (2) the ct. would not, in the exercise of its equitable jurisdiction, relieve defts. from the consequence of such breach, although no damage had resulted to pltf.—**PARRY v. GREAT SHIP CO.** (1863), 4 B. & S. 556; 3 New Rep. 79; 33 L. J. Q. B. 41; 9 L. T. 379; 10 Jur. N. S. 294; 12 W. R. 78; 1 Mar. L. C. 397; 122 E. R. 568.

*Annotations:—***Refd.** Xenos v. Wickham (1867), L. R. 2 H. L. 296; Roddick v. Indemnity Mutual Marine Insce., [1895] 1 Q. B. 836.

**338. Admissibility in evidence—In action on policy—Material stipulation.]**—In an action on a policy of insurance on a ship, for a loss by capture, a material stipulation contemporaneously agreed to by the parties, though by a separate slip, is admissible under *non assumpsit*; *aliter*, if it were an after stipulation to vary the terms of the original policy, by substituting a different definition of capture.—**HEATH v. DURANT** (1844), 12 M. & W. 438; 1 Dow. & L. 571; 13 L. J. Ex. 95; 2 L. T. O. S. 331; 8 Jur. 131; 152 E. R. 1268.

**339. — To ascertain intention of parties.]**—**IONIDES v. PACIFIC INSURANCE CO.**, No. 523, *post*.

**PART II. SECT. 4, SUB-SECT. 2.**

**332 i. Cannot be sued upon.]**—**KASAM HAJI MITHA v. BRITISH & FOREIGN MARINE INSURANCE CO.** (1899), 1 L. R.

23 Bom. 737.—**IND.**

**d. Admissibility in evidence—In action on policy.]**—**MCKENZIE v. CO.** (1883), Cass. Dig. 2nd ed. 381.

**e. Obligation to ——— policy—Company in liquidation.]**—A co. is under no legal obligation to a policy to the holder of an slip; although the co. may

**340.** ———.]—A time policy on a ship contained the following clause: "Being a re-insurance of policy or policies" (here followed a blank space) "& subject to the same terms, conditions, & clauses as original policy or policies, whether reinsurance or otherwise, & to pay as may be paid thereon." At the time this policy of reinsurance was effected there were in existence two time policies of insurance on the ship underwritten by the reassured, in both of which the valuation of the ship was the same as in the policy of re-insurance. During the currency of the policy of reinsurance one of these policies expired & the other was cancelled, & thereupon the reassured underwrote a new time policy of insurance on the ship, in which the valuation of the ship was less than in the policy of reinsurance. By the time clauses in the different policies the insured value was to be taken as the repaired value in ascertaining whether the ship was a constructive total loss. The ship having become a total loss, the reassured paid his assured under the new policy as for a total loss:—*Held*: (1) upon the true construction of the policy of reinsurance, the reassured was insured only against loss incurred under the two policies in existence at the time the policy of reinsurance was effected, & therefore that the reinsurers were not liable to indemnify him against a loss incurred under the new policy underwritten by him; (2) the slip upon which the policy of reinsurance was effected was admissible in evidence to explain the meaning of the expression in the policy "original policy or policies."—*LOWER RHINE & WÜRTEMBERG INSURANCE ASSOCN. v. SEDGWICK*, [1899] 1 Q. B. 179; 68 L. J. Q. B. 186; 80 L. T. 6; 47 W. R. 261; 15 T. L. R. 65; 8 Asp. M. L. C. 466; 4 Com. Cas. 14, C. A.

*As to* (1) *Distd.* *Reliance Marine Insce. v. 1913* 1 K. B. 265. *Apld.* *Norwich Union Fire Insce. Soc. v. Colonial Mutual Fire Insce.*, [1922] 2 K. B. 161. *Refd.* *Scottish National Insce. v. Poole* (1912), 107 L. T. 687; *Emanuel v. Weir* (1914), 30 T. L. R. 518.

**341. "Open cover" or proposal to insure—Action for specific performance.]**—An open cover, or proposal to insure before the goods to be insured are shipped, was given by resps. to M. in order that he might give it to the charterer, who after shipment applied for policies to the amount mentioned in the cover & was refused:—*Held*: such application constituted an acceptance of a subsisting proposal, & there was a binding contract with the charterer to issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient as there was a refusal to give any.—*BHUGWANDASS v. NETHERLANDS INDIA SEA & FIRE INSURANCE CO. OF BATAVIA* (1888), 14 App. Cas. 83, P. C.

*Annotation*: *Refd.* *Nagorenull v. Triton Insce.* (1924), 41 T. L. R. 168.

**342. ——— Risk not covered by slip.]**—*ROYAL EXCHANGE ASSURANCE CORPN. v. TOD* (1892), 8 T. L. R. 669.

**Non-disclosure of material matter—Between signing slip & issue of policy.]**—*See Nos. 328, 329, ante No. 1291, post.*

### SUB-SECT. 3.—THE PREMIUM.

*See Marine Insurance Act, 1906 (c. 41), ss. 52–54.*

**343. Recovery by insurer—Contract illegal.]**—Where credit was given by insurance brokers in an

account delivered in by them to an underwriter for the premiums of reassurances, declared illegal by 19 Geo. 2, c. 37, after which the assured gave notice to the brokers not to pay the money over to the underwriter, & indemnified them for withholding it:—*Held*: the underwriter could not maintain an action against the brokers to recover such premiums as for money had & received by them to his use, the transaction being illegal, & the money not having been actually paid, but only credit given for it in account.—*EDGAR v. FOWLER* (1803), 3 East, 222; 102 E. R. 582.

*Annotations*:—*Refd.* *Universo Insce. of Milan v. Merchants Marine Insce.*, [1897] 2 Q. B. 93. *Mentd.* *Taylor v. Chester* (1869), L. R. 4 Q. B. 309.

**344. ———.]**—(1) If a policy of assurance be in its language large enough to comprise an illegal adventure, & the assured contemplated an illegal adventure, the underwriter is not entitled to sue for the premium; therefore, where a broker effected a policy with pltf., an underwriter on goods on board a Spanish ship at & from New Orleans & Pensacola, both or either, to her port of discharge in the United Kingdom, with a memorandum of receipt of the premium from J. P., a merchant in London, which policy was on behalf of a Spanish merchant at Vera Cruz, & at the time of effecting it New Orleans belonged to the Americans, who were at war with this country, Pensacola to the Spaniards, who were neutrals; & the object of the assured was to cover an importation of cotton wool in Spanish ships, from New Orleans to Great Britain:—*Held*: the underwriter could not recover from the broker the premium, inasmuch as such adventure from New Orleans with cotton wool was illegal, & if pltf. intended to protect it, his subscription was illegal: & if he did not, it was void, & so no consideration.

(2) By the usage in this branch of business, the premium, as between the underwriter & the assured, is considered to have been paid at the time of the subscription: the underwriter acknowledges his receipt of it; & if he does not actually receive it, he accepts the broker for his debtor & substitutes him for this purpose in the place of the assured (*LORD ELLENBOROUGH, C.J.*).—*JENKINS v. POWER* (1817), 6 M. & S. 282; 105 E. R. 1248.

*As to* (2) *Refd.* *Xenos v. Wickham* (1867), L. R. 2 H. L. 296.

**345. ——— Insurance lost or not lost—Safe arrival of subject matter.]**—*NATUSCH v. HENDWERK* (1871), 7 Q. B. D. 460, n.

*Annotation*:—*Apprvd.* *Bradford v. Symondson* (1881), 7 Q. B. D. 456.

—.]—Deft., who had insured a cargo by a certain vessel lost or not lost for a certain voyage, believing such vessel to be overdue, effected a policy of reinsurance with pltf. on the same cargo & risk. Before effecting the policy of reinsurance, the vessel & cargo had in fact arrived safely at the port of destination; but this was not known to either pltf. or deft. at the time the policy was effected:—*Held*: the policy had attached, & therefore pltf. was entitled to the premium at which it had been effected.—*BRADFORD v. SYMONDSON* (1881), 7 Q. B. D. 456; 50 L. J. Q. B. 582; 45 L. T. 364; 30 W. R. 27; 4 Asp. M. L. C. 455, C. A.

**347. Policy conclusive evidence of payment—As between insurer & assured—Recovery of premium.]**—In an action by the assured against

been under an honourable obligation to issue a policy to such a holder, the liquidator has no power to order the liquidator to do so; & whether or not

interest to do so, the liquidator is not entitled to issue a policy to a slip holder.—*CLYDE MARINE ASSURANCE CO. v. RENWICK & CO.*, [1924] 8. C. 113.—*SCOT.*

### PART II. SECT. 4, SUB-SECT. 3.

**1. Recovery by insurer—Risk incurred—Safe arrival of subject-matter.]**—*SMITH v. FLEMING & CO.* (1849), 22 Sc. Jur. 7.—*SCOT.*



*Sect. 5.—Insurance agents: Sub-sect. 1, B. (a) & (b), & C. (a), (b) & (c) i. & ii.]*

broker, who has received from the underwriters the full amount of the sums subscribed, on a total loss, although there are several other persons interested as part owners, & who had given depts. notice of their interest, where pltf. insured on the whole ship generally, by means of his captain, who gave the order for effecting the insurance.

The broker cannot, as an agent, dispute the claim of his only known principal, on the ground that other persons were interested in the subject matter of the insurance. Their claims would be a question between the assured, & the persons so claiming to be interested.—**ROBERTS v. OGILBY** (1821), 9 Price, 269; 147 E. R. 89.

*Annotations:—***Refd.** *Suart v. Welsh* (1839), 4 My. & Cr. 305. **Mentd.** *Hardman v. Willcock* (1832), 9 Bing. 382, n.

**372.** ———.]—H., the managing owner of a ship, directed an insurance broker to effect an insurance on the entire ship, upon an adventure in which all the part owners were jointly interested; the amount of the entire premium was carried to the ship's account in H.'s books, which were open to the inspection of all the part owners, who saw the account, & never objected to it: it did not appear that the insurance broker knew the names of all the part owners, or whether or not they had given authority to H. to insure:—**Held:** the jury were warranted in inferring a joint authority to insure, & all the part owners were jointly liable for the premium to the insurance broker, notwithstanding he had debited H. alone, & divided with him the profits of commission upon effecting the insurance.—**ROBINSON v. GLEADOW** (1835), 2 Bing. N. C. 156; 1 Hodg. 245; 2 Scott, 250; 132 E. R. 62.

**373.** ——— **Express authority from co-owner—Binding on co-owner's assignee.]—**Where part owners of a vessel authorise co-owners to insure the whole vessel, & afterwards assign their interest in the freight, & the assignees do not give express notice of the assignment, the co-owners are entitled to insure the vessel & deduct the costs of insurance from the freight.—**LINDSAY v. GIBBS** (1859), 3 De G. & J. 690; 28 L. J. Ch. 692; 33 L. T. O. S. 20; 5 Jur. N. S. 376; 7 W. R. 320; 44 E. R. 1435, L. J.J.

**Partners.]—**See **PARTNERSHIP**.

(b) *Revocation of Authority.*

See **AGENCY**, Vol. I., pp. 688 *et seq.*

C. *Duty to Insure and Use Care.*

(a) *In General.*

Duty of agent to obey instructions, generally, see **AGENCY**, Vol. I., pp. 424 *et seq.*

**374. Degree of skill & care required.]—**Deft., a broker, having effected policies of insurance on goods for R., R., putting into his hands a letter from the supercargo of the ship conveying the goods, told deft. the policies were to be altered, & he must do the needful. In an action against deft. for negligence in this matter:—**Held:** brokers might be called to say, looking at the policies, the invoices of the goods, & the letter, what alterations in the policies a skilful broker ought to have made.

Deft. did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable & ordinary proportion of it (**TINDAL, C.J.**).—**CHAPMAN v. WALTON** (1833), 10 Bing. 57; 3 Moo. & S. 389; 2 L. J. C. P. 210; 131 E. R. 827.

*Annotation:—***Refd.** *The Lancastrian* (1916), 32 T. L. R. 655.

**375. Order to insure—Duty of agent—Having funds in hand.]—**It is now settled as clear law, that there are three instances in which such an order to insure must be obeyed, (1) where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when & in what manner he pleases; (2) where the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them be such, that the one has been used to send orders for insurance, & the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing; (3) if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction. It is true as it has been observed, that unless something has been held out by the person here to induce the other to think that he will procure insurance, he shall not be compelled to insure. But if the commission from the merchant abroad consist of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent here cannot accept it in part, & reject it as to the rest (**BULLER, J.**).—**SMITH v. LASCELLES** (1788), 2 Term Rep. 187; 100 E. R. 101.

*Annotation:—***As to (2) Consd.** *Callander v. Oelrichs* (1838), 5 Bing. N. C. 58.

**376.** ——— **Arising out of ordinary course of business.]—****SMITH v. LASCELLES**, No. 375, *ante*.

**377.** ——— **Acceptance of bills of lading.]—****SMITH v. LASCELLES**, No. 375, *ante*.

**378.** ——— **Gratuitous agent.]—**(Case will lie where a party undertakes to get a policy done for another therein, without any consideration if the party so undertaking it takes any steps for that purpose but does it so negligently, that the person has no benefit from it.—**WILKINSON v. COVERDALE** (1793), 1 Esp. 74.

*Annotation:—***Mentd.** *Balfo v. West* (1853), 13 C. 466.

**379.** ———.]—In an action against an underwriter for not insuring, the declaration set out that the underwriter had undertaken to insure a certain ship, upon the usual terms of insurance of ships; & the breach was, that, though a reasonable time had elapsed, etc., yet the underwriter had not caused the said ship to be insured, according to the usual terms of marine insurance, etc.:—**Held:** the declaration had well alleged an absolute duty to do a specific thing, & the contract stated cast upon deft. the duty not only to use proper care & diligence in effecting the policy, but, at all events, to insure the ship mentioned.—**TURPIN v. BILTON** (1843), 5 Man. & G. 455; 8 Scott, N. R. 447; 12 L. J. C. P. 167; 4 L. T. 341; 7 Jur. 950; 134 E. R. 641.

*Annotations:—***Refd.** *Xenos v. Wickham* (1867), L. R. 2 H. L. 296; *Great Western Insce. v. Cunliffe* (1874), 9 Ch. App. 531, n.

**380.** ——— **Delegation of authority.]—**Deft., resident at Liverpool, & the agent of a foreign merchant, was instructed by his principal to effect a policy on a cargo, & thinking that he could effect it on better terms in London than at Liverpool, wrote to L. there, instructing him to get the policy. L. obtained a policy in his own name through his broker N. An average loss occurred, & the money which became due upon the policy was paid to N. who claimed to retain it upon a lien for premiums



on other policies unpaid by L. The merchant then sued deft. for negligence:—*Held*: it was a material question whether L. showed his letter of instructions to N., as in that case, assuming that deft. had committed a breach of duty, he would still not be liable for the whole amount due on the policy, though he might be for nominal damages.

*Qu.*: whether an agent employed by his principal to effect a policy of insurance is liable for a breach of his duty as agent if he employs another person to get the policy effected by a policy broker.—*CAHILL v. DAWSON* (1857), 3 C. B. N. S. 106; 26 L. J. C. P. 253; 7 L. T. 45; 3 Jur. N. S. 1128; 140 E. R. 679.

**381. Duty of owner—As co-adventurer.]**—Though a ship's husband is under no implied obligation to insure the ship, yet, where the owner of a ship makes an agreement with the captain, whereby they become co-adventurers in the voyaging of the ship & the owner is to have the external administration of the ship & to make all external arrangements concerning her voyage, the owner ought, for the benefit of all concerned in the venture, to insure up to the sum for which a reasonably prudent owner would be content to insure.—*CALIFATIS v. OLIVIER* (1920), 36 T. L. R. 223, C. A.

(b) *To Whom Duty Owed.*

**382. Negligence.]**—A broker effecting a contract of insurance with an underwriter on the instructions of a principal owes no duty of care or skill to the underwriter.

A firm of insurance brokers effected with an insurance company a number of open covers for the purpose of reinsuring risks taken by their principals. The premiums under the open covers were to be the same as those received by the original insurers less a brokerage to the firm. The brokers in declaring risks under the open covers stated definite amounts of premiums, without explaining what deductions had been made by the original insurers, their principals, in order to determine the rates received by them. In each case policies were drawn up by the co. containing the premiums stated by the brokers. The insurance co. afterwards learning the facts, disputed the correctness of these deductions, & sued the brokers for breach of duty to the co. in not securing correct amounts of premiums. The brokers acted in good faith:—*Held*: apart from any question of the correctness of the actual figures, the brokers owed no duty to the insurance co. & could not be held liable to such a claim even if negligence on their part were proved.

The mere fact of the reliance of another person upon the accuracy of my statements made to him in regard to a matter of business in which such reliance is natural enough, although not obligatory, is not of itself sufficient to make negligence on my part in regard to some statement which I make to him honestly, but inaccurately, an actionable wrong (*KENNEDY, J.*).—*EMPRESS ASSURANCE CORPN., LTD. v. BOWRING (C. T.) & Co., LTD.* (1905), 11 Com. Cas. 107.

*Annotation*:—*Refd.* *Glasgow Assce. Corpn. v. Symondson* (1911), 104 L. T. 254.

**383. Disclosure of facts.]**—(1) Under ordinary circumstances an insurance broker effecting a contract of maritime insurance with an underwriter owes no duty to the latter in respect of erroneous but honest statements made by him. The material facts which must be disclosed to the underwriter are as to the subject matter, the ship & the perils to which she is exposed. Knowing these facts

the underwriter must form his own judgment of the premium, & other people's judgment is quite immaterial. If true disclosure is made as to the ship & the perils affecting her, the name of the person interested in her who is desiring to insure or reinsure his interest need not be disclosed. If the underwriter desires to know who the assured is he must ask.

(2) A broker employed to place an insurance cannot himself underwrite part of the risk unless he makes full disclosure to the principal who employs him. The broker insures with the underwriter by the terms of the policy & treaty either as principal or as agent for another principal, & owes no duty of agency to the underwriter.

When one finds a broker paid commission by an underwriter, & preparing documents for an underwriter, one is tempted to treat him as the underwriter's agent, & owing a legal duty to the underwriter. But . . . this conclusion would generally be erroneous, & the broker personally under ordinary circumstances knows no duty to the underwriter in respect of erroneous but honest statements made by him (*SCRUTTON, J.*).—*GLASGOW ASSURANCE CORPN., LTD. v. SYMONDSON (WILLIAM) & Co.* (1911), 104 L. T. 254; 27 T. L. R. 245; 11 Asp. M. L. C. 583; 16 Com. Cas. 109.

*Annotation*:—*As to* (1) *Expld.* *Glicksman v. Lancashire & General Assce.*, [1925] 2 K. B. 593.

(c) *What Constitutes Breach.*

i. *Failure to Insure.*

**384. Limiting premium to be paid.]**—*WALLACE v. TELFAIR* (1786), 2 Term Rep. 188, n.; 100 E. R. 102.

*Annotation*:—*Refd.* *Smith v. Lascelles* (1788), 2 Term Rep. 187.

**385. Delay in insuring.]**—*TURPIN v. BILTON*, No. 379, *ante*.

**386. —.]**—Insurance broker delaying to insure goods according to instructions, verdict against him for damages.—*WEARE v. BARNETT* (1850), 7 L. T. 24.

ii. *Failure to Insure Efficiently.*

**387. Gratuitous agent—Negligence.]**—*WILKINSON v. COVERDALE*, No. 378, *ante*.

**388. Insurance effected after loss communicated—Letter announcing loss unopened.]**—A broker, in pursuance of instructions previously received from Sunderland, effected a policy at Lloyd's, at a time when a letter lay on his table at the coal exchange unopened, announcing the ship's loss:—*Held*: the jury were warranted in finding this was no such want of diligence as avoided the policy.—*WAKE v. ATTY* (1812), 4 Taunt. 493; 128 E. R. 422.

**389. Failure to communicate material letter.]**—A broker, effecting an insurance, omitted to communicate a material letter, by reason whereof the assured failed in actions against some underwriters, & offered the broker the defence of others; & on his refusal, without further consulting him, made restitution to others who had paid the losses without suit:—*Held*: the assured might recover against the broker as well the amount of these losses so repaid, as of the others.—*MAYDEW v. FORRESTER* (1814), 5 Taunt. 615; 128 E. R. 831.

**390. Failure to insert "touch & stay" clause.]**—Insurance brokers were ordered to effect a policy "at & from Teneriffe to London":—*Held*: they were liable for not inserting in it a liberty "to touch & stay at all or any of the Canary Islands," that being usually inserted in policies from Teneriffe.—*MALLOUGH v. BARBER* (1815), 4 Camp. 150, N. P.

*Sect. 5.—Insurance agents: Sub-sect. 1, C. (c) ii., (d), (e),*

**391. Failure to insert port of lading.]**—A., at Malaga, directs his broker, in London, "to insure goods shipped on board the Pearl, from Gibraltar to Dublin;" adding that "he will take the risk on himself from Malaga to Gibraltar bay, where he shall send a letter on shore"—*Held*: taking the whole of these instructions together, the broker should have stated in the policy, that the goods were loaded at Malaga; & should have effected the insurance at & from Gibraltar bay, & not at & from Gibraltar.—*PARK v. HAMMOND* (1816), 6 Taunt. 495; 2 Marsh. 189; Holt, N. P. 82, n.; 128 E. R. 1127; *previous proceedings* (1815), 4 Camp. 344, N. P.

*Annotation*:—*Refd.* *Rickmar v. Carstairs* (1833), 5 B. & Ad. 651.

**392. Failure to insure "against all risks."]**—A contract was made at Buenos Ayres for the sale & shipment of cattle from Buenos Ayres to Durban at a price which included cost, freight, & insurance, the insurance to be "against all risks." The seller obtained & delivered to the purchasers an ordinary Lloyd's "all risks live stock" policy, which contained the clause "Warranted free of capture, seizure, & detention, & the consequences thereof." During the voyage foot & mouth disease broke out amongst the cattle, & the authorities at Durban refused to allow the vessel to enter the port, with the result that the cattle were slaughtered on board & sold at a considerable loss. The underwriters refused to pay upon the policy, except for losses by death during the voyage, on the ground that they were protected by the free of capture & seizure clause. In an action by the purchasers against the seller:—*Held*: the seller, in procuring an insurance which did not protect the purchaser against the risk of the landing of the cattle being prohibited by the authorities, had broken his contract to procure an insurance "against all risks" & was liable for the loss, & evidence was not admissible to show that a policy containing the free of capture & seizure clause was a performance of the contract to procure an insurance against all risks.—*YUILL & Co. v. ROBSON*, [1908] 1 K. B. 270; 77 L. J. K. B. 259; 98 L. T. 364; 24 T. L. R. 180; 52 Sol. Jo. 192; 11 Asp. M. L. C. 40; 13 Com. Cas. 166, C. A.

*Annotations*:—*Consd.* *Upjohn v. Hitchens, Upjohn v. Ford*, [1918] 2 K. B. 48. *Refd.* *Enlayde v. Roberts*, [1917] 1 Ch. 109.

**393. — Reasonable interpretation of instructions.]**—*VALE (JAS.) & Co. v. VAN OPPEN & Co., LTD.* (1921), 37 T. L. R. 367.

**394. Failure to insert "&/or other steamers."]**—The client of an insurance broker is not, as between himself & the broker, bound to see whether his instructions to insure have been carried out & for that purpose to look at the documents himself. Pltfs. instructed deft., an insurance broker, to "insure, marine & war risks, machinery to the value of £500 dispatched for shipment to-day per s.s. Suwa Maru & or other steamers London to Port Dickson." Deft. effected an insurance against marine risks per Suwa Maru &/or other steamers, & an insurance against war risks per Suwa Maru, the words "&/or other steamers" being in the latter case omitted through the mistake of his clerk. Policies in these terms were sent to pltfs. The goods were shut out of the Suwa Maru & were shipped in the Yasaka Maru. The latter steamer was sunk by an enemy submarine & the goods were lost, but pltfs. were unable to recover on the policy against war risks because it only insured the goods per the Suwa

Maru. In an action by pltfs. against deft. for negligence in effecting the insurance:—*Held*: pltfs. were not bound to see whether their instructions had been carried out, & therefore the loss was due to deft.'s negligence & pltfs. were entitled to recover.—*DICKSON & Co. v. DEVITT* (1916), 86 L. J. K. B. 315; 32 T. L. R. 547; 21 Com. Cas. 291.

(d) *Excuses for Non-Performance.*

**395. Illegality.]**—Where a mate of a ship or a sailor is to receive something at the end of the voyage in lieu of wages, e.g. slaves, he cannot insure it: nor can he recover the value of such thing in an action against his agent for negligence in not procuring such an insurance.—*WEBSTER v. DE TASTET* (1797), 7 Term Rep. 157; 101 E. R. 908.

*Annotations*:—*Expld.* *Egerton v. Brownlow* (1853), 8 State Tr. N. S. 193; *Hawkins v. Twizell* (1856), 5 E. & B. 883. *Consd.* *Cheshire v. Vaughan*, [1920] 3 K. B. 240. *Refd.* *White v. Wilson* (1800), 2 Bos. & P. 116; *King v. Glover* (1806), 2 Bos. & P. N. R. 206; *Jesse v. Roy* (1834), 3 L. J. Ex. 268; *Cohen v. Kittell* (1889), 22 Q. B. D. 680.

**396. —.]**—Pltfs., who were owners of warehouses at B. & elsewhere, on being informed that a cargo of goods destined for their warehouse had been despatched from abroad, instructed defts., who were insurance brokers, to insure the cargo against all risks, including that of diversion by the Govt., & defts. obtained a policy accordingly. The cargo was diverted & never reached pltfs. An action on the policy failed because, in negotiating the insurance, defts. did not disclose that there was a risk of the cargo being diverted. Plts. now sued defts. for negligence in failing to make full disclosures so as to obtain an effective policy:—*Held*: though defts. had been negligent, yet, as the policy obtained by them was in accordance with their instructions in a form which rendered it void as a p.p.i. policy under Marine Insurance Act, 1906 (c. 41), s. 4, & pltfs. could not in any event have recovered under it, pltfs. had not suffered any damage through such negligence.—*CHESHIRE (T.) & Co. v. VAUGHAN BROTHERS & Co.*, [1920] 3 K. B. 240; 89 L. J. K. B. 1168; 123 L. T. 487; 84 J. P. 233; 15 Asp. M. L. C. 69; 25 Com. Cas. 242, C. A.

*Annotations*:—*Consd.* *Edwards v. Motor Union Insee.*, [1922] 2 K. B. 249. *Refd.* *Re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67.

**397. Partial illegality.]**—A broker who has neglected to insure the premium according to the directions of his principal, cannot set up as a defence that he was directed also to insure against British capture; for that is not a crime so as to render the whole insurance illegal, though it would be void *pro tanto*.—*GLASER v. COWIE* (1813), 1 M. & S. 52; 105 E. R. 20.

**398. Defective instructions—Names of insurer not specified.]**—(1) If a merchant orders an insurance broker to effect a policy of insurance for him on a cargo of corn, without giving any directions as to those with whom the policy is to be effected, & the insurance broker effects the policy with one of the chartered cos., by whose policies corn is warranted against partial losses, although the ship be stranded; upon a large partial loss happening upon this cargo after a stranding of the ship, the merchant cannot maintain an action against the insurance broker for not effecting the policy with private underwriters, who, by the common form of a policy of insurance, would have been liable for this partial loss.

(2) Although an insurance broker is bound to obey the positive directions of the assured to

abandon, yet if it is referred to his discretion whether to abandon or not, & he acts *bonâ fide*, he is not liable to an action for neglecting to abandon.—*COMBER v. ANDERSON* (1808), 1 Camp. 523, N. P.

**399. — No written instructions.]**—Insurance brokers are not liable to an action for neglecting to insert in a policy a liberty to carry simulated papers, if the written instructions given them contain no direction for that purpose, although it may have been verbally communicated to them that simulated papers were to be used in the voyage.

Where a ship was condemned for carrying simulated papers; & the policy containing no liberty to do so, the assured could not recover upon it:—*Held*: an action could not be maintained against the insurance brokers for having neglected to include the premiums & duties, contrary to the instructions given them for effecting the policy; as in the result the assured were not damnified by this neglect.—*FOMIN v. OSWELL* (1813), 3 Camp. 357, N. P.; *subsequent proceedings*, 1 M. & S. 393.

**400. Impossibility — Duty to give notice to principal.]**—In *assumpsit* for the breach of an undertaking to effect an insurance according to special instructions, the declaration alleged the duty of defts. to be to effect the insurance according to the instruction, or, in the event of their inability to do so, to give pltf. notice of such their inability:—*Held*: this was a duty necessarily implied from the nature of the employment.—*CALLANDER v. OELRICHS* (1838), 5 Bing. N. C. 58; 1 Arn. 401; 6 Scott, 761; 8 L. J. C. P. 25; 4 L. T. 341; 2 Jur. 967; 132 E. R. 1026.

(e) *Measure of Damages.*

**401. What underwriter would have paid.]** — A creditor by bond cannot stand his own insurer, & charge the premium to his debtor.

Where a man undertakes to insure for another, & does not, he will be liable in an action, & the damages will be what the party would have recovered from the insurers; but where the insurance is not made, he can never charge for it (LORD LOUGHBOROUGH, C.).—*HUTCHINSON v. WILSON* (1794), 4 Bro. C. C. 488; 29 E. R. 1003, L. C.

*Annotation*:—*Refd.* *Grey v. Ellison* (1856), 1 Giff. 438.

**402. —.]**—An agent employed to ship & insure goods having wilfully omitted to insure them is liable to the same extent as an underwriter would have been had he insured.—*SMITH v. PRICE* (1862), 2 F. & F. 748, N. P.

(f) *Evidence of Breach.*

**403. Evidence of other brokers & underwriters — As to degree of skill—Admissible.]**—*CHAPMAN v. WALTON*, No. 374, *ante*.

**404. — As to materiality of matters not communicated — Inadmissible.]**—*CAMPBELL v. RICKARDS*, No. 1315, *post*.

(g) *Commercial Agent.*

*See, generally*, AGENCY, Vol. I., pp. 429 *et seq.*

**405. Degree of skill & care required — Question for jury.]**—On the employment of any mercantile or commercial agent, it is for the jury, in the absence of any express evidence of the nature of his duties on such employment, to judge, from their

own knowledge, what those duties are; & thus on the employment of an insurance agent to effect an insurance, or get it effected, it is for the jury, in the absence of any express evidence, to judge whether he was employed to get the insurance effected, or only to place the business in the hands of brokers to effect it; & whether he is responsible for their neglect or default, especially in not getting it effected with responsible insurers, & in not informing his employer, the insured, who they are, in order to enable him to sue them. It is matter of law that the agent is only bound to use due care & do what is usual, but it is matter for the jury what duty involves, or whether there has been a breach of it.—*HURRELL v. BULLARD* (1863), 3 F. & F. 445, N. P.

**406. Where no directions given — Exercise of discretion.]**—Pltf., if he pleased, might have given orders to deft. not to insure at the L. office, but at some other office where this exception would not have been insisted on. But he gives no directions at all. Therefore he left it to the discretion of his correspondent, who if he meant no fraud, was it liberty to elect between the underwriters (LORD MANSFIELD, C.J.).—*MOORE v. MOURGUE* (1776), 2 Cowp. 479; 98 E. R. 1197.

*Annotation*:—*Consd.* *Doorman v. Jenkins* (1834), 2 Ad. & El. 256.

**407. Acts of agent adopted.]** — *SMITH v. COLOGAN* (1788), 2 Term Rep. 188, n.; 100 E. R. 102, N. P.

*D. Duty after Effecting Policy.*

(a) *In General.*

**408. Abandonment left to discretion — Broker not liable.]**—*COMBER v. ANDERSON*, No. 398, *ante*.

*Abandonment.]*—*See Sect. 24, post.*

*Settlement of losses.]*—*See Sect. 26, sub-sect. 1,*

(b) *Policy left with Agent.*

**409. Duty to use diligence—In procuring settlement & payment.]**—If an insurance broker keeps a policy he has effected in his hands, he is bound to use reasonable diligence to procure the underwriters to settle & pay any loss that may happen upon it.—*BOUSFIELD v. CRESWELL* (1810), 2 Camp. 545, N. P.

*Annotation*:—*Consd.* *Williams, Torrey v. Knight, The Lord of the Isles*, [1894] P. 342.

**410. Duty to do what is necessary — To carry out contract.]**—Pltfs.' broker, by their directions agreed with defts., a marine insurance co., for the insurance of pltfs.' ship on certain terms; a policy of insurance under seal, etc. was duly executed in the absence of the broker; & according to the usual practice the deed was retained in the co.'s office to await the broker's application for it, & the broker debited with the premium; when the premium became payable according to the debiting & was demanded, the broker, who had charged to & been paid by pltfs. the amount thereof, declared that the insurance was a mistake, & without pltfs.' authority had the deed cancelled. Pltfs. brought an action on the deed:—*Held*: although retained in defts.' office, under the above circumstances the deed was fully perfected & constituted a complete contract of insurance between the parties, & as the broker had no authority to cancel it, the action was maintainable.

The insurers had a right to consider him [pltfs. broker] as having authority to do all which a

II. SECT. 5, SUB-SECT. 1.—  
D. (a).

n. *Notice of abandonment.]*—An  
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agent effecting insurance under authority for that purpose only may, in case of loss, give notice of abandonment to the underwriters without any

other or special authority.—*MERCHANTS MARINE INSURANCE CO. v. BARRS* (1888), 15 S. C. R. 185.—*CAN.*



**Sect. 5.—Insurance agents: Sub-sect. 1, D. (b), F. & G. (a).]**

broker can do in discharge of his duty in effecting a policy & they might safely settle with him in case of a loss, if that be the ordinary mercantile usage; but there is no suggestion that it is part of the ordinary duty or power of a broker to cancel agreements once validly & completely entered into (LORD CRANWORTH).—**XENOS v. WICKHAM** (1866), L. R. 2 H. L. 296; 36 L. J. C. P. 313; 16 L. T. 800; 16 W. R. 38; 2 Mar. L. C. 537, H. L.

**Annotations:—Consd.** Morocco Land Co. v. Fry (1865), 5 New Rep. 234; Cory v. Patton (1872), L. R. 7 Q. B. 304; Morrison v. Universal Marine Insce. (1872), L. R. 8 Exch. 40; Fisher v. Liverpool Marine Insce. (1873), L. R. 8 Q. B. 469. **Refd.** Bullen v. Sharp (1865), L. R. 1 C. P. 86; Roberts v. Security Co. (1896), 75 L. T. 531; Universo Insce. of Milan v. Merchants Marine Insce., [1897] 2 Q. B. 93; Nagoremull v. Triton Insce. (1924), 41 T. L. R. 168. **Mentd.** Macedo v. Stroud, [1922] 2 A. C. 330.

**411. Duty to recover insurance moneys.]—**Pltfs., barge owners, hired deft.'s tug on the terms of indemnifying deft. against all loss, damage, expenses or costs to which deft. might be put by reason of collision or otherwise in connection with the tug, & deft. undertook to keep the tug fully insured against all risks, including collision risk & damage to or by craft in tow of the tug or such craft colliding with others, & to indemnify pltfs. in respect of such damage to the extent of the moneys received by him under the insurance.

Deft. effected policies of insurance to cover the specified risks to the extent of £2,000 on an admitted valuation of the tug of £2,800.

A barge of pltfs., whilst, it was alleged, in tow of deft.'s tug, came into collision with, & damaged, a steamer. The owners of the steamer sued pltfs., who admitted liability, & on the reference, the damages were assessed at £335 10s., which sum was increased to £458 19s. 7d. by interest, the costs of the reference, & the costs incurred by pltfs. in the proceedings against them.

Deft. sent in pltfs.' claim to the underwriters, & on their refusal to pay, offered to hand over the policies to pltfs.; but pltfs. required deft. to sue the underwriters, & in default, to pay pltfs. the above amount by way of damages for breach of contract. Deft. denied liability beyond the proportion of the claim for the damage on the uninsured value of the tug, & in respect of this liability paid £165 1s. into ct.:—**Held:** deft. was entitled to judgment, as he had not broken his contract, & was not bound, without an indemnity, to take legal proceedings, at his own cost & risk, against the underwriters.—**WILLIAMS TORREY & CO. v. KNIGHT, THE LORD OF THE ISLES**, [1894] P. 342; 64 L. J. P. 15; 71 L. T. 92; 7 Asp. M. L. C. 500; 11 R. 736.

**412. No authority to cancel policy.]—XENOS v. WICKHAM**, No. 410, *ante*.

**E. Rights and Liabilities in respect of Premium.**

See Marine Insurance Act, 1906 (c. 41), ss. 52–54.

**413. Broker liable to underwriter—By usage.]—AIRY v. BLAND** (1774), 2 Park's Marine Insurances, 8th ed. 811.

**PART II. SECT. 5, SUB-SECT. 1.—E.**

**o. Broker liable to underwriter—Bankruptcy of broker.]—**The insurance broker continues still to be liable as guarantee for payment of the premiums to the underwriters though the unlifted premiums are not part of his estate when he becomes bkpt.—**SMITH v. RICHMOND & FREEBAIN'S TRUSTEE** (1812), 16 Fac. Coll. 557.—**SCOT.**

**p. Recovery by broker from assured—Reinsurance—Proof of payment.]—**

**RANNEY v. GREGORY** (1868), 12 N. B. R. (1 Han.) 152.—**CAN.**

**q. —.]—**An agent or broker, who effects an insurance, is entitled to recover from the insured the whole amount of the premium & charges paid, or settled for between him & the underwriters; & his claim cannot be met or compensated by the plea that a return of the whole, or a part of the premium is due by the underwriters.—**BERTRAMS v. HODGE** (1810), 16 Fac. Coll. 61.—**SCOT.**

**414. — — —.]—JENKINS v. POWER**, No. 344, *ante*.

**415. — — —.]—**(1) A innsurance broker by a policy under seal covenanted with the insurers to pay the premiums. He having become bkpt.:—**Held:** his assignees were entitled to recover against the assured on an *indebitatus* count for "premiums & sums of money due to bkpt. for having caused to be underwritten policies of insurance" the amount of the premiums which he had not actually paid to the underwriters.

(2) According to the ordinary course of trade between the assured, the broker, & the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But as between the assured & the underwriter the premiums are considered as paid. The underwriter to whom in most instances, the assured are unknown, looks to the broker for payment, & he to the assured. The latter pays the premiums to the broker only, & he is a middleman between the assured & the underwriter (**BAYLEY, J.**).—**POWER v. BUTCHER** (1829), 10 B. & C. 329; L. & Welsb. 115; 5 Man. & Ry. K. B. 327; 8 L. J. O. S. K. B. 217; 109 E. R. 472.

**Annotations:—As to (2) Consd.** Xenos v. Wickham (1867), L. R. 2 H. L. 296. **Appld.** Universo Insce. of Milan v. Merchants Marine Insce., [1897] 2 Q. B. 93.

**416. — — — Custom of Lloyd's.]—**The underwriter of a policy of marine insurance containing a covenant by the insured to pay the premiums is precluded by the custom of Lloyd's from enforcing payment against the assured, & must look to the broker who effects the insurance for such payment.

The custom which has been proved in ct. so often that the cts. take judicial notice of it, is that the underwriter does not look to the assured for payment of the premium, but to the broker who effected the policy between the two; that is to say that, having agreed with the assured for the payment of the premium the underwriter agrees to take the credit of the broker instead of the assured (**LORD ESHER, M.R.**).—**UNIVERSO INSURANCE CO. OF MILAN v. MERCHANTS MARINE INSURANCE CO.**, [1897] 2 Q. B. 93; 66 L. J. Q. B. 564; 76 L. T. 748; 45 W. R. 625; 13 T. L. R. 432; 8 Asp. M. L. C. 279; 2 Com. Cas. 180, C. A.

**Annotation:—Mentd.** G. N. Ry. v. I. R. Comrs. (1901), 65 J. P. 275.

**417. — — — Notwithstanding covenant by assured—To pay underwriter.]—UNIVERSO INSURANCE CO. OF MILAN v. MERCHANTS MARINE INSURANCE CO.**, No. 416, *ante*.

**418. — — — Less deductions — If part of premium returnable.]—**The broker effecting a policy, being the common agent of the assured & of the underwriter, while the premium remains in his hands for the one party, & the policy for the other; & having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium; is authorised to deduct such return, &

**r. Recovery by broker from mortgagees.]—ROXBURGH, RICHARDSON & CO. v. THOMSON** (1860), 22 Dunl. (Ct. of Sess.) 1187.—**SCOT.**

**t. Rights of agents who guarantee.]—**Agents who guarantee premiums to the insurers are entitled to sue without an assignment.—**ALLAN & SONS v. HYND** (1830), 8 Sh. (Ct. of Sess.) 612; 5 Fac. Coll. 482.—**SCOT.**

**u. Right to deal with arrested premiums.]—**Premiums on policies of insurance may be arrested by the



only to pay over the difference to the underwriter. —*SHEE v. CLARKSON* (1810), 12 East, 507; 104 E. R. 199.

*Annotations*:—*Distd. Minett v. Forrester* (1811), 4 Taunt. 511, n.; *Houstoun v. Robertson* (1816), 6 Taunt. 448.

**419. Recovery by broker from assured—Recovery by assignees—Bankruptcy of broker.**—*AIRY v. BLAND* (1774), 2 Park's Marine Insurances, 8th ed. 811.

**420.** — — — — —.] — *POWER v. BUTCHER*, No. 415, *ante*.

**421.** — — — — — **Names of underwriters not disclosed to assured—No request for names.**—Pltf. engaged to effect for deft. an insurance with such names as should be to deft.'s satisfaction. The voyage having been performed, & deft. never having required to set the names on the policy:—*Held*: in an action for the premium, he could not object that the names of the underwriters had never been exhibited to him for his approval.—*DIXON v. HOVILL* (1828), 4 Bing. 665; 1 Moo. & P. 656; 6 L. J. O. S. C. P. 155; 130 E. R. 925.

**Return of premium.**—See Part I., Sect. 6, sub-sect. 2, *ante*.

**Set-off in bankruptcy of underwriter.**—See *BANKRUPTCY*, Vol. V., p. 391, Nos. 3584 *et seq.*

#### *F. Discounts and Agents' Commission.*

See *AGENCY*, Vol. I., p. 481, Nos. 1612–1615.

**422. Discount allowed by underwriters—Whether justified by trade usage.**—An insurance broker is not entitled, upon the ground of any usage of trade, to a commission of 12 per cent. on the balances which he pays over to the underwriters who employ him. Such allowance, however general it has been, is a gratuity merely, & not a demand of right. Nor can it be claimed, but upon the footing of contract, either express or implied, between the parties.—*LEVI v. BARNES* (1816), Holt, N. P. 412, N. P.

**423.** — — — — — **Retention as against insured.**—In an action by insurance brokers to recover their commission, evidence admitted of a custom for the broker to be allowed discount by the underwriters, & to retain it as against their employers, the insurers.—*RUCKER v. LUNT* (1863), 3 F. & F. 959, N. P.

**424.** — — — — — **On prompt payment of premiums—Recoverable by principal.**—The 10 per cent. discount usually allowed by insurance cos. on punctual payment of the premiums belongs, in the absence of agreement to the contrary, not to the insurance agent, but to his principals.—*SPAIN (QUEEN) v. PARR* (1869), 39 L. J. Ch. 73; 21 L. T. 555; 18 W. R. 110.

*Annotations*:—*Consd. Great Western Inseo. v. Cunliffe* (1874), 9 Ch. App. 525; *Baring v. Stanton* (1876), 3 Ch. D. 502.

**425.** — — — — — **Not recoverable under contract—Express or implied.**—*LEVI v. BARNES*, No. 422, *ante*.

**426.** — — — — — **Extra rebate received by broker—Liability to account to principal.**—Pltfs. employed defts., who were insurance brokers, to effect marine insurances & defts. rendered to pltfs. an account which stated that the premiums payable

by pltfs. were at a "net" rate, whereas the amount paid by defts. to the underwriters was the gross amount of premium less 5 per cent. commission, & less a further discount of 10 per cent. In the case of two large insurances defts. got a special rebate of 25 per cent. from the insurance cos. Pltfs. brought an action against defts. to recover the 5 per cent. commission, the 10 per cent. brokerage, & the 25 per cent. special rebate. According to pltfs., when "net" premiums were quoted they were only subject to a deduction of 5 per cent.:—*Held*: though in an ordinary case defts. would be entitled to retain the commission of 5 per cent., yet if a broker represented to his principal that the premiums charged to the principal were subject only to a deduction of 5 per cent. commission the broker was not entitled to retain an additional 10 per cent. as discount, & the same rule applied to the 25 per cent. special rebate, & as an agent could not retain a commission which he had obtained by acting dishonestly towards his principal, pltfs. were entitled to recover the full amount claimed.—*GREEN (E.) & SON, LTD. v. TUGHAN (G.) & Co.* (1913), 30 T. L. R. 64.

**Del credere commission.**—See *AGENCY*, Vol. I., p. 502, No. 1723.

#### *G. Lien on Policy.*

##### *(a) Lien of Commercial Agent.*

See, generally, *AGENCY*, Vol. I., pp. 547 *et seq.*; *LIEN*.

**427. Agent's right to lien.**—(1) Insurance made by a factor who has a lien, does not pass by a consignment of the goods insured to a third person by the principal.

I take it to be now a settled point that a factor to whom a balance is due has a lien upon all goods of his principal so long as they remain in his possession (*LORD MANSFIELD, C.J.*).

(2) Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurer's in distinct policies a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it; & if the same man really & for his own proper account insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing: for the same person is to have the benefit of both policies; & if the whole should be recovered from one, he ought to stand in the place of the insured to receive contribution from the other, who was equally liable to pay the whole (*LORD MANSFIELD, C.J.*).

(3) Two persons may insure two different interests: each to the whole value: as the master, for wages, the owner for freight, etc. But a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same goods or the same ship (*LORD MANSFIELD, C.J.*).—*GODIN*

insurer's creditors in the hands of the broker though he has not in fact received them. After such arrestment the broker is not at liberty to pay away the premiums generally in payment of losses on the policies underwritten in his office.—*PITCAIRN & ADAM v. ADAM* (1809), 15 Fac. Coll. 59.—*SCOT*.

**b. Retention of amount recovered.**—*DOWSON & SON v. ORR & Co.* (1862),

34 Sc. Jur. 289.—*SCOT*.

**c. Liability of sub-broker—After settlement with underwriter.**—*ALLAN v. BROADFOOT* (1820), 8 Sh. (Ct. of Sess.) 615.—*SCOT*.

#### **PART II. SECT. 5, SUB-SECT. 1.—G. (a).**

**427 i. Agent's right to lien.**—When an agent effects an insurance for his principal he has a lien over the policy for his general balance, & the agent's

lien is equally effectual, whether the document continue in the broker's custody or his own, the possession of the broker being taken as the possession of the agent.—*WILMOT v. WILSON (WILMOT'S ASSIGNEE)* (1841), 3 Dunl. (Ct. of Sess.) 815; 16 Fac. Coll. 816.—*SCOT*.

**427 ii.** — — — — —.]—*GAIRDNER v. MILNE & Co.* (1858), 20 Dunl. (Ct. of Sess.) 565; 30 Sc. Jur. 387.—*SCOT*.

**Sect. 5.—Insurance agents: Sub-sect. 1, G. (a) & (b) i. & ii.]**

*v.* LONDON ASSURANCE CO. (1758), 1 Burr. 489; 2 Keny. 254; 1 Wm. Bl. 103; 97 E. R. 419.

*Annotations:—As to (1) Refd.* Glover v. Black (1763), 3 Burr. 1394; Bell v. Jutting (1817), 1 Moore, C. P. 155. *As to (2) Apld.* North British & Mercantile Insco. v. London, Liverpool & Globe Insce. (1877), 5 Ch. D. 569. *As to (3) Refd.* Palmer v. Pratt (1824), 9 Moore, C. P. 358; Ebsworth v. Alliance Marine Insce. (1873), L. R. 8 C. P. 596.

**428. —.**—(1) The assignee of a policy of insurance on goods, who became such by the indorsement to him of the bill of lading of the goods by the consignor after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; & can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent. (2) But the broker has no sub-lien on the policy for the general balance of his own account with such correspondent if he knew at the time that the policy was effected for another person.—*MAN v. SHIFFNER* (1802), 2 East, 523; 102 E. R. 469.

*Annotation:—As to (1) Refd.* Taylor v. Robinson (1818), 2 Moore, C. P. 730.

**(b) Brokers Lien.**

**i. In General.**

*See* Marine Insurance Act, 1906 (c. 41), s. 53 (2); &, generally, LIEN.

**429. Broker's right to lien—For general balance.]**—*Ex p.* BOSANQUET (1847), De G. 432, Ct. of R.

**430. —.**—**Brokers acting as brokers & general agents.]**—A factor can only claim a lien for his general balance, upon goods which come to his hands as factor. A. & Co. who carried on business at Hull, as merchants, factors, ship & insurance-brokers, & general agents, had had various dealings, as factors, with B. & Co. of London. Whilst these dealings were going on between them, B. & Co. wrote to A. & Co. requesting them to get a policy of insurance effected for them on the ship *Exporter* for a voyage from the Downs to South America, & thence to the West Indies. A. & Co. procured the insurance to be effected, & B. & Co. remitted them the premiums, the policy remaining in the hands of A. & Co.:—*Held*: A. & Co. were not entitled to hold the policy as a lien for the general balance due to them, as factors, from B. & Co.—*DIXON v. STANSFELD* (1850), 10 C. B. 398; 16 L. T. O. S. 150; 138 E. R. 160.

**431. —.**—**Effect of special agreement—Monthly accounts & payments.]**—The lien of a broker upon policies of insurance which he has effected, & on which he has paid the premiums, may be superseded by a special arrangement or contract, or by his particular mode of dealing with the parties for whom he has effected them. But where he has merely agreed to state monthly accounts & to receive monthly payments, but has never delivered up the policies until after actual payment made to him, his general right of lien is not superseded in any way by this special arrangement. This is so though he has effected the policies through an intermediary, whom he knew to be an intermediary & not the principal, & who has received payment from the principal, but who has not paid the broker.—*FISHER v. SMITH* (1878),

4 App. Cas. 1; 48 L. J. Q. B. 411; 39 L. T. 430; 27 W. R. 113; 4 Asp. M. L. C. 60, H. L.

*Annotation:—Apld.* Hope v. Glendinning, [1911] A. C. 419.

**Policy effected through agent of assured.]**—

*See* Sub-sect. 1, G. (b) ii., *post*.

**Duty to produce policy at trial of action.]**—

*See* EVIDENCE, Vol. XXII., p. 431, No. 4468.

**432. Effect of parting with policy—Lien extinguished—Revival on repossession.]**—*LEVY v. BARNARD*, No. 433, *post*.

**To stranger on promise to pay debts—Action against stranger in default of payment.]**—

*See* GUARANTEE, Vol. XXVI., p. 30, No. 178.

**ii. As against Agent of Assured.**

*See* Marine Insurance Act, 1906 (c. 41), s. 53 (2); &, generally, LIEN.

**433. General rule.]**—Pltf., resident abroad, ordered A., his correspondent here, to effect an insurance on his account. A. was in the habit of employing deft. as his broker, to effect insurances on his own account & for his correspondents abroad, & instructed him to effect this insurance, but did not mention pltf.'s name. Pltf. paid the amount of the premiums, £280, to A.; but that fact was not known to deft. at the time of effecting the insurance. A. was indebted to deft. in £21,000 including the amount of the premiums, & in the course of the next year paid deft. £33,000, & incurred further debts, so as always, throughout the year, to leave a balance in favour of deft. to a greater amount than the sum due for the premiums. Deft. received £385 from the underwriters, on the loss, & passed the same to A.'s account:—*Held*: deft. had no general lien, & the particular lien was discharged, as deft. must be considered as having been paid the amount of the premiums. If a broker, having a lien on a policy, part with it, his lien revives on repossession.

It is clear that the broker had a right to retain the policy, until paid, against A., by whose order it was effected (*DALLAR, C.J.*).—*LEVY v. BARNARD* (1818), 8 Taunt. 149; 2 Moore, C. P. 34; 129 E. R. 340.

**434. —.]**—*FISHER v. SMITH*, No. 431, *ante*.

**435. Lien for general balance against agent—As against principal of agent—Broker with knowledge of agency.]**—Where an English subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was neutral; this is a sufficient indication to the broker that the party acted as agent & not on his own account, & therefore the broker has no lien on the policy so effected for his general balance against such agent, as between such broker & the principal.—*MAANSS v. HENDERSON* (1801), 1 East, 335; 102 E. R. 130.

*Annotations:—Apld.* Maspons y Hermano v. Mildred (1882), 9 Q. B. D. 530. *Refd.* Fisher v. Smith (1876), 34 L. T. 912.

**436. —.**—*MAN v. SHIFFNER*, No. 428, *ante*.

**437. —.**—A., a merchant, at different times employed C., an insurance broker, to effect policies of insurance for him; C., without A.'s concurrence, employed B. another insurance broker to effect these policies, informing him that they were for a correspondent in the country; B. got the policies effected in A.'s name, & delivered them all, except one, to C.; C. became bkpt.,

**PART II. SECT. 5, SUB-SECT. 1.—G. (b) i.**

**d. Broker's right to lien—Policy in possession of sub-broker.]**—Where a broker commits the charge of effect-

ing an insurance to a sub-broker, who retains the policy in his hands, he must remit the money he recovers, in the event of a loss, to the broker, who will be entitled to the same preference over it as if he had effected the insur-

ance himself.—*ROSS' ASSIGNEE v. GALLOWAY* (1806), 13 Fac. Coll. 558.—*SCOT*.

*e.*—*For premium.]*—*LOSH v. WILSON, BELL v. DOUGLAS* (1857), 20 Duil. (Ct. of Sess.) 58.—*SCOT*.



without having paid B. any part of the premiums & A. being indebted to his estate beyond that amount:—*Held*: B. had not a lien on the policy he detained for the general balance due to him from C., & A. could maintain trover for this policy against B., after tendering him the premiums & commission due in respect of it alone.—*SNOOK v. DAVIDSON* (1809), 2 Camp. 218, N. P.

*Annotations*:—*Distd.* *Westwood v. Bell* (1815), 4 Camp. 349. *Refd.* *Fisher v. Smith* (1876), 34 L. T. 912.

438. ————.] — *LADBROKE v. LEE*, No. 664, *post*.

439. ————.] — *CAHILL v. DAWSON*, No. 380, *ante*.

440. ————.] — Merchants in London upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants & after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf & for the benefit of all parties whom it might concern. The Havannah agents shipped & consigned the tobacco in their own names, but were in fact acting as commission agent for Havannah merchants to whom the tobacco belonged; & the London merchants before effecting the policies had notice that the Havannah agents had an unnamed principal. A total loss having occurred, the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals:—*Held*: (1) an action lay by the Havannah principals against the London merchants for the policy moneys; (2) the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents & could not in that action set off their claim to that balance, or set off anything except the premiums, stamps & commission in respect of the insurance.—*MILDRED, GOYENECHÉ & Co. v. MASPONS* (1883), 8 App. Cas. 874; 53 L. J. Q. B. 33; 49 L. T. 685; 32 W. R. 125; 5 Asp. M. L. C. 182, H. L.; *affg.* *S. C. sub nom. MASPONS y HERMANO v. MILDRED* (1882), 9 Q. B. D. 530, C. A.

*Annotations*:—*As to* (1) *Refd.* *Kaltenbach v. Lewis* (1885), 10 App. Cas. 617. *Generally, Mentd.* *Harper v. Keller, Bryant* (1915), 20 Com. Cas. 291.

441. ————.] — Pltfs., builders of the steamship *Volturmo* in Jan. 1908, were mtgees. in possession. On Jan. 28, 1908, they chartered her, with an option of purchase, to R. S. & Co. on time charter. Clause 6 provided that the charterers were to insure the hull, etc. at Lloyd's in the owners name for £40,000 all risks, & £20,000 total loss only "All policies to be held by approved London brokers, who shall deal with all claims as they arise on behalf of owners, & charterers shall have all the benefit & shall be held free of all claims & liabilities covered by the said policies." R. S. & Co. instructed defts., insurance brokers, to effect a number of policies on the *Volturmo* including beside the £40,000 all risks & £20,000 total loss only, insurance on disbursements & freight. At the request of R. S. & Co. defts. wrote to pltfs. a letter dated Mar. 18, informing them of the insurances for £40,000 & £20,000 & concluding: "We have received instructions from R. S. & Co. to hold the above policies to your order, which we hereby undertake to do, subject to our lien on same for unpaid premium, if any." At this time defts. had an agreement with R. S. & Co. that, though premiums were due on one payment from defts. to the underwriters, R. S. & Co. should pay defts. in four payments, one cash down, & three by three, six, & nine months bills with

interest. R. S. & Co. informed pltfs. of the arrangement, & also that they need have no misgivings as to the unpaid portion. As a matter of fact the cash portion was not paid as arranged. The first bill became due on June 21, 1908, & defts. extended the time for payment for one month, & informed pltfs., who did not object.

On June 29, it was brought to pltfs. attention by their brokers that defts. might have a claim for premiums to set off against any sum they collected for losses. The *Volturmo* suffered damage, & pltfs. paid the cost of repairs. On June 24, defts. informed pltfs. that the postponed bill was not paid, & that "if not paid by R. S. & Co. on Monday next we shall be compelled to cancel these policies"; & on June 29, informed pltfs. that the cash portion of the premium was still unpaid, & they must cancel the policies unless pltfs. guaranteed them the cash payment of £868 18s. 0d. & the bill for £635 8s. 8d. Pltfs. did not guarantee the payments, & defts. thereupon cancelled the policies & received a large sum for return premiums. The brokers then, with the consent of pltfs., collected the average loss, but claimed to retain it by virtue of their lien for premiums. In an action brought by pltfs. claiming £768 11s. 11d. as balance of a loss collected by defts. as brokers, after crediting them with certain premiums paid by them:—*Held*: (1) the unpaid premiums must be limited to those on the two policies in question; (2) defts., being under no duty to disclose to pltfs. the amount of premiums unpaid, were not estopped from alleging that the cash portion of the premium was in fact unpaid. *Qu.*: whether a lien on documents gives a lien on proceeds collected under them.—*FAIRFIELD SHIPBUILDING & ENGINEERING CO., LTD. v. GARDNER, MOUNTAIN & Co., LTD.* (1911), 104 L. T. 288; 27 T. L. R. 281; 11 Asp. M. L. C. 594.

442. ————.] — **Broker without knowledge of agency.**—If an agent employed to effect an insurance on goods represents himself as the owner of the goods to another person whom he employs to effect the policy, the latter has not a general lien on the policy for the balance due to him from the agent.—*LANYON v. BLANCHARD* (1811), 2 Camp. 597, N. P.

*Annotations*:—*Expld.* *Westwood v. Bell* (1815), 4 Camp. 349. *Refd.* *Fisher v. Smith* (1876), 34 L. T. 912; *Maspens y Hermano v. Mildred* (1882), 9 Q. B. D. 530.

443. ————.] — Insurance brokers who have effected a policy without notice that it is not on account of the person from whom they receive the order, have a lien upon it for their general balance due from him, & have a right to apply to the satisfaction of that balance money received upon the policy as well after as before notice that it belongs to a third person; but if they pay the overplus received after such notice to the agent, the amount may still be recovered from them in an action for money had & received by the principal.—*MANN v. FORRESTER* (1814), 4 Camp. 60, N. P.

*Annotations*:—*Fold.* *Westwood v. Bell* (1815), 4 Camp. 349. *Refd.* *Fisher v. Smith* (1876), 34 L. T. 912; *Maspens y Hermano v. Mildred* (1882), 9 Q. B. D. 530.

444. ————.] — If A. employs B. to effect a policy of insurance for his benefit, & B. without A.'s knowledge employs C. to effect the policy representing himself to C. as the principal, C. has a lien on the policy as against A. for the general balance due to him from B.—*WESTWOOD v. BELL* (1815), 4 Camp. 349; *Holt*, N. P. 122, N. P.

*Annotations*:—*Appld.* *Taylor v. Kymer* (1832), 3 B. & Ad. 320. *Distd.* *Fisher v. Smith* (1876), 34 L. T. 912.

445. ————.] — Pltfs. employed B., C., & Co., who were merchants & shipowners, to

*Sect. 5.—Insurance agents: Sub-sect. 1, (i) (b) ii.; sub-sect. 2, A. & B. Sect. 6: Sub-sect. 1.]*

collect for them moneys due under policies marine insurance. B., C. & Co. employed defts., who were insurance brokers, to collect these moneys. Defts. were not informed, & did not inform B., C. & Co., were not principals. After defts. had collected the money plffs. gave them notice to pay it over to them. B., C. & Co. had then become bkpts. Defts. claimed to set off against the moneys which they had collected, a larger sum which was due to them from B., C. & Co. Plffs. sued defts. to recover the amount collected by them upon the policies of insurance:—*Held*: defts. were entitled to set off their claim against the agents against the claim of the undisclosed principals, & plffs. could not recover from defts. the money collected by them upon the policies of insurance.—*MONTAGU v. FORWOOD*, [1893] 2 Q. B. 350; 69 L. T. 371; 42 W. R. 124; 9 T. L. R. 634; 37 Sol. Jo. 700; 4 R. 579, C. A.

SUB-SECT. 2.—AGENTS OF INSURER.

A. In General.

**446. Liability of principal—Agent subscribing policy on principal's name—Production of power of attorney unnecessary—Where general practice proved.]**—When one person subscribes a policy with the name of another, proof of his having done it in many instances, is sufficient to charge him whose name is so subscribed without producing any power of attorney.—*NEAL v. IRVING* (1793), 1 Esp. 61, N. P.

**447. ———— Where payment by principal proved.]**—(1) In an action on a policy of insurance subscribed by deft.'s agent under a power of attorney, it is sufficient proof of the agency that deft. is in the habit of paying losses upon policies so subscribed by the agent in his name, without producing the power of attorney.

(2) Where a policy in the common printed form on ship & goods contains a written memorandum, declaring the insurance to be on goods, a general averment is proper that deft. became an assurer on the premises in the policy mentioned.—*HAUGHTON v. EWBANK* (1814), 4 Camp. 88, N. P.

**448. ———— "Slip" signed by agent under power of attorney—Policy signed by clerk—Good execution of power.]**—(1) *Seem*: under a power of attorney by A. to B. "to underwrite any policy of insurance not exceeding £100 & to subscribe the same in his A.'s name, & to settle & adjust losses, etc." Although B. cannot delegate his whole authority to another, yet, having signed a slip for a policy of insurance, the signature of his clerk for him, & in his absence, to a policy made in pursuance thereof, is a good execution of the power, that being only a ministerial act, which he might authorise another to do for him; but he must himself execute the power, in all matters in which his judgment & discretion are requisite.

(2) In the present case, the policy, after it was so executed by the clerk for B. having been shown to A. who then offered terms of settlement:—*Held*: A. had adopted the act of C.—*MASON v. JOSEPH* (1804), 1 Smith, K. B. 406.

**449. ———— Ratification by agent.]**—*MASON v. JOSEPH*, No. 448, *ante*.

**450. ———— Memorandum on policy for change of voyage—Signed by agent—General practice proved.]**—A memorandum indorsed on a ship's policy of insurance for a change of voyage, was signed by an agent of the insurance co. It was proved that

the agent had signed similar memoranda on many other policies, & that his habit was to do so, & advise the co. of it; though, when a new policy was required, he always sent the proposals to the co.:—*Held*: this was sufficient proof of the agent's authority to sign such memoranda; & the other policies, on which such memoranda had been signed, need not be produced.—*BROCKELBANK (OR BROCKLEBANK) v. SUGRUE* (1831), as reported in 5 C. & P. 21, N. P.

**451. ———— Giving power of attorney—"Lost, or not lost" policy—Executed after loss known.]**—A policy of insurance on a ship, lost or not lost, is good, the ship having been accepted for insurance, & the premium paid, before loss, although the policy was not actually executed & stamped till loss had happened, & both insurer & assured knew it. By the rules of a mutual insurance society, with which the above insurance was effected, the insurance on a ship was to commence on the day of her being accepted as insurable, & to continue in force twelve months. A member of the society gave a power of attorney to his agent, to insure ships for him under the terms, restrictions & regulations by which the society might be governed:—*Held*: the power, though it did not refer to the case of a vessel being lost, & though such a case was not expressly provided for in the regulations of the society, was special enough to warrant the agent in executing the above-mentioned policy for the principal as insurer, after a loss had happened within the knowledge of all the parties, as before stated.

Equity would have compelled him to execute the formal policy, whenever tendered to him: in voluntarily executing, he has only performed a manifest duty, & cannot now retract the obligation (*LORD DENMAN, C.J.*).—*MEAD v. DAVISON* (1835), 3 Ad. & El. 303; 1 Har. & W. 156; 4 Nev. & M. K. B. 701; 4 L. J. K. B. 193; 111 E. R. 428.

**452. Joint & several authority to several agents—Under power of attorney—Policy underwritten by some only—Action maintainable against one.]**—Where a power of attorney was given to fifteen persons by name, "jointly or separately for me & in my name, & as my act & deed, to sign & underwrite all such policy or policies of assurance upon all such ship or ships as they my said attornies or any of them shall jointly or separately think proper":—*Held*: this was to be construed as a joint & several authority, & plff. might maintain an action upon a policy underwritten by four of the attornies only against one.—*GUTHRIE v. ARMSTRONG* (1822), 5 B. & Ald. 628; 1 Dow. & Ry. K. B. 248; 106 E. R. 1320.

**453. Agent to subscribe—Implied authority to adjust.]**—If an agent has authority to subscribe a policy, he may also adjust it; & here, as you have admitted the agents subscription to the policy, & that he was authorised to subscribe it, you are bound to admit that he had authority to sign the adjustment (*LORD ELLENBOROUGH, C.J.*).—*RICHARDSON v. ANDERSON* (1805), 1 Camp. 43, n. *Annotation*:—*Reid. Xenos v. Wickham* (1863), 14 C. B. N. S. 435.

**454. Lloyd's agents—No authority to adjust—To bind subscribing member.]**—In an action against an underwriter upon goods which sustained sea damage:—*Held*: although deft. was a subscriber to Lloyd's, a certificate granted by their agent, resident abroad, was not admissible to prove the amount of the damage.

If the agent had been employed by both parties to make a certificate of the loss, that might have been conclusive between them. But that was not



## PART II.—MARINE

so, & in the very instrument of appointment, the agent is spoken of as one whose co-operation will facilitate the settlement of loss or average, not as one who had authority to settle it himself. The certificate was, therefore, properly rejected (*per Cur.*).—**DRAKE v. MARRYAT** (1823), 1 B. & C. 473; 2 Dow. & Ry. K. B. 696; 1 L. J. O. S. K. B. 161; 107 E. R. 175.

### *B. Extent of Agent's Authority.*

See, generally, AGENCY, Vol. I., pp. 295 *et seq.*, 562 *et seq.*

**455. Agent with authority to sign policies—Implied authority to adjust.]**—**RICHARDSON v. ANDERSON**, No. 453, *ante*.

**456. — Implied authority to refer to arbitration.]**—An agent who underwrites & settles losses for another, has an implied authority from him to refer a dispute about a loss to arbn.—**GOODSON v. BROOKE** (1815), 4 Camp. 163, N. P.

*Annotation*:—**Refd.** **Xenos v. Wickham** (1863), 14 C. B. N. S. 435.

**457. — Limited authority exceeded—Existence of limitation notorious—Knowledge imputed to assured.]**—Deft. authorised an insurance broker at Liverpool to underwrite policies of marine insurance in his name & on his behalf, the risk not to exceed £100 by any one vessel. The broker acting in excess of this authority, & without the knowledge of deft., underwrote a policy for pltf. for £150. Pltf. was not aware that the broker's authority was limited to any particular sum, but it is notorious in Liverpool that in nearly all cases there is a limit of some sort, which remains undisclosed to third persons, imposed on brokers by their principals. In an action upon the policy:—**Held**: (1) deft. was not liable for the whole amount underwritten, the broker having exceeded his authority: (2) the contract whereon the action was founded was not capable of division, & therefore deft. was not liable to the extent of £100.—**BAINES v. EWING** (1866), L. R. 1 Exch. 320; 4 H. & C. 511; 35 L. J. Ex. 194; 14 L. T. 733; 14 W. R. 782; 2 Mar. L. C. 368; *sub nom.* **BARNES v. EWING**, 12 Jur. N. S. 787.

*Annotations*:—**As to** (1) **Distd.** **Willis, Faber v. Joyce** (1911), 104 L. T. 576. **Refd.** **Re Norwich Equitable Fire Assce. Soc.** (1887), 58 L. T. 35. **Generally**, **Mentd.** **Elliston v. Deacon** (1866), L. R. 2 C. P. 20.

**458. — Limitation unknown to assured.]**—**BRITISH MARINE MUTUAL INSURANCE ASSOCN., LTD. v. DRAFFEN, READ & MORGAN** (1903), 47 Sol. Jo. 672.

**459. — Written authority not exceeded—Agent acting in fraud of his principal.]**—Where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other person has acted *bonâ fide*, repudiate liability on the ground that the agent, in making it, acted in his own interests, & not in those of his principal.—**HAMBRO v. BURNAND**, [1904] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803; 52 W. R. 583; 20 T. L. R. 398; 48 Sol. Jo. 369; 9 Com. Cas. 251, C. A.; *reversg.*, [1903] 2 K. B. 390.

*Annotations*:—**Consd.** **Willis, Faber v. Joyce** (1911), 104 L. T. 576. **Refd.** **British Marine Mutual Insco. Asscn. v. Draffen, Read & Morgan** (1903), 47 Sol. Jo. 672; **Ruben v. Great Pingall Consolidated**, [1904] 2 K. B. 712; **Underwood v. Bank of Liverpool, Same v. Barclays Bank**, [1924] 1 K. B. 775. **Mentd.** **Malcolm, Brunner v. Waterhouse** (1908), 24 T. L. R. 854; **Cuthbert v. Roberts, Lubbock**, [1909] 2 Ch. 226; **Lloyd v. Grace, Smith**, [1912] A. C. 716.

**460. — Authority terminated—No notice given by principal—Policies subsequently effected by agent.]**—An underwriter employed A. as his agent to underwrite for him by a written authority which expired on Dec. 31, 1909. Prior to this date the underwriter had paid many losses on policies effected through A. but neither at the end of 1909 nor at any time had he ever given any notice to those with whom he had done such underwriting business that A.'s authority to act for him had been determined, nor had he given any notice of the fact at Lloyd's. In an action by pltf. in respect of certain policies ostensibly underwritten by deft., through the agency of A. after Dec. 31, 1909:—**Held**: deft. was estopped from denying A.'s authority to act on his behalf.—**WILLIS, FABER & CO., LTD. v. JOYCE** (1911), 104 L. T. 576; 27 T. L. R. 388; 55 Sol. Jo. 443; 16 Com. Cas. 190; 11 Asp. M. L. C. 601.

## SECT. 6.—AVAILABILITY OF POLICY.

### SUB-SECT. 1.—IN GENERAL.

**Description of assured or agent.]**—See Marine Insurance Act, 1906 (c. 41), s. 23.

**461. Policy effected in name of joint owners—Interest of one only averred.]**—Joint owners of property insured for their joint use & on their joint account, cannot recover upon a count on the policy, averring the interest to be in one of them only.—**BELL v. ANSLEY** (1812), 16 East, 141; 104 E. R. 1042.

*Annotations*:—**Apld.** **Cohen v. Hannam** (1813), 5 Taunt. 101. **Distd.** **Wright v. Welbie** (1819), 1 Chit. 49. **Refd.** **Ebsworth v. Alliance Marine Insce.** (1873), L. R. 8 C. P. 596. **Mentd.** **Harrison v. Vallance** (1822), 7 Moore, C. P. 304.

**462. Description of assured—As person on whose interest policy effected.]**—K. & N. declared in debt. against a co. for assurance on the freight of goods to be carried in the ship "M." on a deed poll sealed with the common seal of the co.; which deed recited that K. had represented to the co. that he was interested in, or authorised as owner, agent or otherwise, to make, the assurance after mentioned with the co., & had covenanted to pay £12 12s. to them, as a premium at four per cent. for the assurance: & it was witnessed & agreed that, in consideration of the £12 12s., the capital stock & funds of the co. should, according to the provisions of the deed of settlement of the co., be liable to make good, & be applied to pay, all such losses & damages thereafter expressed as might happen to the subject matter of the policy in respect of the sum of £300: & it was declared that, touching the adventures & perils which the capital & stock & funds of the co. were made liable to by the assurance, they were of the seas, etc.: & the capital stock & funds of the co. should bear the charges of the assurance in proportion to the sum assured; & that the interest of the assured was on freight. "Provided, nevertheless, that the capital stock & funds of the said co. should alone be liable, according to the provisions of the said deed of settlement, to answer & make good all claims & demands whatsoever, under or by virtue of the said policy: & that no shareholder of the said co., his, or her heirs, exors. or administrators, should be in anywise subject or liable to any claims or demands, nor be in anywise charged, by reason of the said policy," "beyond the amount of his or her shares in the capital stock of the said

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**1. Policy effected by vendor—In name of purchaser as owner.]**—**PHILLIPS v. PACIFIC FIRE & MARINE INSURANCE CO. OF SYDNEY** (1894), 15 N. S. W. L. R. 79; 10 N. S. W. W. N. 149.—**AUS.**

**Sect. 6.—Availability of policy: Sub-sects. 1, 2 & 3.]**

co.: it being one of the original & fundamental principles of the said co. that the responsibility of the individual proprietors should in all cases be limited to their respective shares in the capital stock." That thereupon defts. became insurers to pltfs. for £300 on the freight; that pltfs. were interested in the freight to the amount of all the money insured; & that the vessel, with the goods on board, was wholly lost by perils of the sea: & pltfs. thereby lost the freight of the goods. Defts. took issues of fact, all of which were found for pltfs.: & judgment was entered for £300 debt, with damages & costs: on error:—*Held*: (1) the declaration was not deficient for omitting to allege that the co. had funds: for that, it appearing that defts. were a corpn., the remedy against them in this action would only be upon the corporate funds, & the proviso made no difference in this respect, but the action lay whether there were funds or not: & if the existence of the funds had been a condition necessary to the maintenance of the action, it lay upon defts. to deny, & not upon pltfs. to assert, the existence of the funds, which, in default of denial, would be presumed to exist; (2) it was not a valid objection that the contract appeared to be collateral, & the demand not liquidated, & debt therefore not maintainable: for that the liability to the action was direct, & not merely contingent on the existence or non-existence of the funds; & the declaration claiming £300 for a total loss, which, after verdict, must be assumed as a fact, the claim was for the liquidated sum of £300; (3) the action was maintainable by K. & N. jointly, because the deed poll enured to the benefit of all interested in the assurance, & the declaration showed the interest to be in K. & N. jointly.—*SUNDERLAND MARINE INSURANCE CO. v. KEARNEY* (1851), 16 Q. B. 925; 20 L. J. Q. B. 417; 18 L. T. O. S. 33; 15 Jur. 1006; 117 E. R. 1136.

*Annotations*:—*Generally*, *Mentd.* *Metcalf v. Hetherington* (1855), 11 Exch. 257; *Gresty v. Gibson* (1866), 13 L. T. 676.

**463. Policy effected by vendors—Evidence of interest of assured—Necessity for.]—**Resp., who carried on a business at Colombo, bought teak logs to be shipped at a price "ex ship, payment against documents." The sellers shipped from Bangkok to Colombo 382 logs, of which 144 were in part fulfilment of their contract with resp., & informed him of the shipment. The sellers insured the whole 382 logs with applts. for the voyage & to cover craft & raft risk. The policy identified the parcels of logs by their marks, & was expressed, in the usual form, to be made for all persons to whom the goods should appertain in part or in all. Resp., having paid the price, took delivery of the logs "ex ship," but, while they were still afloat in the form of rafts, a large part were driven out to sea by a gale & lost. Resp. sued applts. upon the policy:—*Held*: there was no evidence that the policy was effected on behalf of resp., or to cover his interest; & consequently he could not maintain the suit.—*YANGTSE INSURANCE ASSOCN. v. LUKMANJEE*, [1918] A. C. 585; 87 L. J. P. C. 111; 118 L. T. 736; 34 T. L. R. 320; 14 Asp. M. L. C. 296, P. C.

*Annotation*:—*Refd.* *Samuel v. Dumas, Graham Joint Stock Shipping Co. v. Merchants Marine Insee.* (No. 2), [1923] 1 K. B. 592.

**SUB-SECT. 2.—POLICY IN NAME OF AGENT.**

**464. As "agent."—**(1) If the name of the broker effecting a policy of insurance be inserted

in the policy as "agent," it is a sufficient compliance with Marine Insurance Act, 1788 (c. 56).

(2) Goods, the produce of Holland, purchased in that country during hostilities between Holland & Great Britain, by a British agent resident there, & shipped for British subjects, were insured by them in this country:—*Held*: this was a legal insurance.—*BELL v. GILSON* (1798), 1 Bos. & P. 345; 126 E. R. 942.

*Annotations*:—*As to* (1) *Refd.* *Browning v. Provincial Insee. of Canada* (1873), 28 L. T. 853. *As to* (2) *Refd.* *Esposito v. Bowden* (1857), 7 E. & B. 763; *Tingley v. Müller*, [1917] 2 Ch. 144; *Rodriguez v. Speyer*, [1919] A. C. 59.

**465. Action by agent—Averring interest in self or principal.]—***WOLFF v. HORNCastle*, No. 678, *post*.

**466. — Implied authority.]—**A. at Rouen ordered goods of B. & Co., to be shipped at Bristol, & before the vessel sailed he directed his agents in London to insure her. B. & Co., having shipped the goods, caused another insurance to be effected, they being ignorant of the former insurance by A. Neither of the policies was cancelled, but that effected by A. was void on the ground of concealment. In an action against an underwriter by B. & Co., on the policy effected by them:—*Held*: they were entitled to recover, A.'s agent having directed it to be effected; & the jury were warranted in finding that he had an implied authority so to do.—*BARLOW v. LECKIE* (1819), 1 Moore, C. P. 8.

**467. — In own name.]—***PROVINCIAL INSURANCE CO. OF CANADA v. LEDUC*, No. 1435, *post*.

**468. Action by principal.]—***DE VIGNIER v. SWANSON* (1798), 1 Bos. & P. 346, n.; 126 E. R. 943.

*Annotation*:—*Refd.* *Browning v. Provincial Insee. for Canada* (1873), L. R. 5 P. C. 263.

**469. —.]—***BROWNING v. PROVINCIAL INSURANCE CO. OF CANADA*, No. 2133, *post*.

**SUB-SECT. 3.—BY RATIFICATION.**

**Ratification generally.]—***See* AGENCY, Vol. I., pp. 396 *et seq.*

**Ratification after loss.]—***See* Marine Insurance Act, 1906 (c. 41), s. 86.

**470. — General rule.]—**Comrs. were authorised by a commission granted in pursuance of a statute, to take into their possession ships & goods belonging to subjects of the United Provinces, which had been or might be detained in or brought into the ports of this kingdom, & to manage, sell, & dispose of the same to the best advantage, according to such instructions as they should receive from the King in Council; before any declaration of war against the United Provinces, one of His Majesty's ships took several Dutch East Indiamen, & carried them into St. Helena. The comrs., with the assent of the Lords of the Treasury, insured them at & from St. Helena to London. War soon after declared against the United Provinces, & the ships were finally condemned as prize to His Majesty, as having "belonged, when taken, to subjects of the United Provinces, since become enemies." Upon a loss happening, the comrs. declared on the policy, & averred the interest to be in the King, & held that the action well lay.—*LUCENA v. CRAUFURD* (1808), 1 Taunt. 325; 127 E. R. 858, H. L.; *previous proceedings* (1806), 2 Bos. & P. N. R. 269, H. L.

*Annotations*:—*Apld.* *Routh v. Thompson* (1811), 13 East, 274. *Distd.* *Watson v. Swann* (1862), 11 C. B. N. S. 756. *Refd.* *Hagedorn v. Oliverson* (1814), 2 M. & S. 485; *Hull v. Pickersgill* (1819), 1 Brod. & Bing. 282; *Ebsworth v. Alliance Marine Insee.* (1873), L. R. 8 C. P.

**471.** — — —.]—After an order made by the King in Council on Sept. 2, & gazetted on Sept. 5, 1807, to detain & bring into port all Danish vessels, a hired armed ship of His Majesty took, off Lisbon, on Sept. 10, & carried in thither, a Danish vessel; & without instituting any proceeding in the Admty. Ct. there, though Portugal was an ally with England in the war, sold her cargo to defray the expense of repairs, & took in a loading on freight for London, with which she sailed on Nov. 3, on which day hostilities were declared against Denmark by another Order of Council: & on Nov. 12, an insurance was made by order of the prize agent appointed by the captors, in consequence of a letter written by him in Oct., before the declaration of hostilities; directing pltf. to insure "for my account the Danish vessel *Knud Terkelson*, which has been detained by His Majesty's armed ship *Duchess of Bedford*, & for which I am authorised to act as agent"; & concluding with expressing the agent's confidence that pltf. would do the best for the interest of the concerned: & after such insurance was effected, the King, by another Order of Council, reciting the circumstances, adopted the insurance:—*Held*: His Majesty, having a lawful possession of the captured vessel through the act of his officers & servants, whose possession was legalised by the previous order to detain Danish vessels, whether known to them or not at the time of the capture, had an insurable interest therein; & it was competent for him to adopt the insurance made by order of the agent appointed by the captors, whose letter of instructions to insure for his account was sent in his general character of agent for the capturing ship, & permitted by the terms of it an insurance to be effected for the benefit of any who might ultimately appear to be interested: & none other but His Majesty having an interest in the vessel seized before the declaration of hostilities & order for reprisals.—*ROUTH v. THOMPSON* (1811), 13 East, 274; 104 E. R. 375; *previous proceedings* (1809), 11 East, 428.

*Annotation*:—*Apld.* Hagedorn v. Oliverson (1814), 2 M. & S. 485. *Distd.* Watson v. Swann (1862), 11 C. B. N. S. 756. *Apprvd.* Williams v. North China Insce. (1876), 1 C. P. D. 757. *Refd.* Bell v. Jutting (1817), 1 Moore, C. P. 155; Connecticut Fire Insce. v. Kavanagh, [1892] A. C. 473. *Mentd.* Jones v. Carter (1846), 10 Jur. 33.

**472.** — — —.]—Where pltf. effected an insurance on ship as well in his own name as for & in the name of all & every other person, etc., in the usual form, for the benefit of S. an alien enemy & procured a licence to legalise the voyage, & a loss happened & two years afterwards S. by letter to pltf. adopted the insurance:—*Held*: that the pltf. might recover against the underwriter averring the interest in S.—*HAGEDORN v. OLIVERSON* (1814), 2 M. & S. 485; 105 E. R. 461.

*Annotations*:—*Apld.* Cory v. Patton (1874), L. R. 9 Q. B. 577. *Apprvd.* Williams v. North China Insce. (1876), 1 C. P. D. 757. *Refd.* Hull v. Pickersgill (1819), 1 Brod. & Bing. 282; Watson v. Swann (1862), 11 C. B. N. S. 756; Bolton Partners v. Lambert (1889), 41 Ch. D. 295. *Mentd.* Re Portuguese Consolidated Copper Mines, Badman's & Bosanquets' Cases (1890), 39 W. R. 25.

**473.** — — —.]—(1) Where a policy of marine insurance is made by one person on behalf of another without authority, it may be ratified after the loss of the thing insured by the party on whose behalf it is made, though he know of the loss at the time of such ratification. Where there was a valued policy on "freight":—*Held*: the rule that the valuation in a valued policy is conclusive did not prevent the ct. from looking into the elements of which the valuation was made up to ascertain whether the freight intended to be so valued was the full freight, or the freight after

deducting certain advances made against freight by the charterers' agents to the captain, such question becoming material for the purpose of ascertaining whether the shipowner was interested in the whole of the subject matter of insurance, & whether to any extent the loss had been satisfied under another policy of insurance effected by the charterers on the said advances against freight.

(2) Under a valued policy it may be shown what it was that was intended to be valued, with a view to disputing interest in the whole subject of valuation, though the amount of the valuation can be disputed only on the ground of fraud.—*WILLIAMS v. NORTH CHINA INSURANCE CO.* (1876), 1 C. P. D. 757; 35 L. T. 884; 3 Asp. M. L. C. 342, C. A.

*Annotations*:—As to (1) *Distd.* Grover & Grover v. Mathews, [1910] 2 K. B. 401. *Refd.* The Main, [1894] P. 320.

**474.** — — — *Rule confined to marine insurance.*—*GROVER & GROVER, LTD. v. MATHEWS*, [1910] 2 K. B. 401; 79 L. J. K. B. 1025; 102 L. T. 650; 26 T. L. R. 411; 15 Com. Cas. 249.

**475.** — — — *Contract must be made on behalf of or for benefit of party ratifying.*—Deft. having, for securing a debt, taken an indorsement of the bills of lading of certain cargoes, which was void because made after an act of bkpcy. committed by the indorser, effected for his own account an insurance on the cargoes; & a loss happening, he recovered against the underwriters on a count averring interest in the assignees of the indorser, then a bkpt.:—*Held*: the assignees could not recover over this money, as had & received by deft. for their use.—*GRANT v. HILL* (1812), 4 Taunt. 380; 128 E. R. 377.

**476.** — — —.]—To entitle a person to sue upon a contract, it must be shown that he himself made it, or that it was made on his behalf by an agent authorised to act for him at the time, or whose act has been subsequently ratified & adopted by him: & the person for whom the agent professes to act must be capable of being ascertained at the time.

S., an insurance broker at Hull, being instructed to effect an open policy for £5,000 for pltf., against jettison only, "subject to declaration thereafter," & being unable to do so, declared certain deck cargo shipped for Ostend on board one of pltf's. vessels on the back of a general policy which he had previously effected for himself "upon any kind of goods & merchandise, as interest might appear," & got it initialed by the underwriters. A loss having happened:—*Held*: it was not competent to pltf. to maintain an action against the underwriters upon this policy, the contract not having been made by him or on his behalf at the time.—*WATSON v. SWANN* (1862), 11 C. B. N. S. 756; 31 L. J. C. P. 210; 142 E. R. 993.

*Annotations*:—*Consd.* Browning v. Provincial Insce. for Canada (1873), L. R. 5 P. C. 263. *Apld.* Byas v. Miller (1897), 3 Com. Cas. 39. *Refd.* Ebsworth v. Alliance Marine Insce. (1873), L. R. 8 C. P. 596; Keighley, Maxsted v. Durant, [1901] A. C. 240. *Mentd.* McCaul v. Strauss (1883), Cab. & El. 106.

**477.** — — —.]—An insurance broker at Lloyd's, having an order from his principal to effect a reinsurance on goods for a voyage at a certain premium, obtained a slip from deft., an underwriter, at a premium in excess of that authorised. Deft. was not told who the principal was. The broker issued a provisional cover note, but the principal repudiated the insurance. The broker, without informing deft., issued a fresh cover note, containing deft.'s name as underwriter, to pltf., who desired to reinsure an interest in the same goods. Deft. subsequently signed a policy in the ordinary Lloyd's form, bearing the same date



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as the slip:—*Held*: as pltf. was not the principal of the broker at the time when the broker obtained the slip from deft., pltf. could not ratify the contract made by the broker, & therefore could not maintain an action against deft. on the policy.—*BYAS v. MILLER* (1897), 3 Com. Cas. 39.

**478.** ———.] —Applts. chartered a ship from the owners. Brokers, instructed by the owners' agents, effected with resps. a policy of insurance on the ship, "as well in their own name as for & in the name & names of all & every other person or persons to whom the subject-matter of this policy does may or shall appertain in part or in all." The policy contained a collision clause. Applts., having been compelled to pay damages to the owners of another vessel for a collision between the two ships, sued resps. on the policy. There being no evidence of any intention by the owners to insure on behalf of applts.:—*Held*: applts. were not entitled to sue on the policy.

I agree that a policy may be made for the benefit of all such persons. But where it has been established that in fact the person claiming the benefit was not such a person as those who effected the policy had in contemplation, courts have disallowed his claim though he might be within the description (LORD LOREBURN, C.).—*BOSTON FRUIT CO. v. BRITISH & FOREIGN MARINE INSURANCE CO.*, [1906] A. C. 336; 75 L. J. K. B. 537; 94 L. T. 806; 54 W. R. 557; 22 T. L. R. 571; 10 Asp. M. L. C. 260; 11 Com. Cas. 196, II. L.

*Annotations*:—*Consd.* Samuel v. Dumas, Graham Joint Stock Shipping Co. v. Merchants Marine Insce. (No. 2), [1923] 1 K. B. 592. *Refd.* Kynance Sailing Ship Co. v. Young (1911), 104 L. T. 397; Reliance Marine Insce. v. Duder, [1913] 1 K. B. 265.

#### SUB-SECT. 4.—BY ASSIGNMENT.

See Marine Insurance Act, 1906 (c. 41), ss. 50, 51.

**479. Mode of assignment—By indorsement.**—*SPARKES v. MARSHALL*, No. 618, *post*.

**480.** ———. *After issue of writ.*—*BAKER v. ADAM* (1910), 102 L. T. 248; 11 Asp. M. L. C. 368; 15 Com. Cas. 227.

**481.** ———. *By delivery.*—*BAKER v. ADAM* (1910), 102 L. T. 248; 11 Asp. M. L. C. 368; 15 Com. Cas. 227.

**482. Right of assignor to sue—As trustee for assignees.**—A trustee suing as pltf. in a ct. of law must be treated in all respects as a party to the cause & any defence against him is a defence in that action against the *cestui que trust* who uses his name: & therefore, where a broker in whose name a policy of insurance under seal was effected brought covenant & debts. pleaded payment to pltf. according to the tenor & effect of the policy, & the proof was, that after the loss happened the assurers paid the amount to the broker by allowing him credit for premiums due from him to them:—*Held*: although that was no payment as between the assured & assurers, it was a good payment as between pltf. on the record & debts.; & therefore, an answer to the action.—*GIBSON v. WINTER* (1833), 5 B. & Ad. 96; 2 Nev. & M. K. B. 737; 2 L. J. K. B. 130; 110 E. R. 728.

*Annotations*:—*Consd.* De Pothonier v. De Mattos (1858), E. B. & E. 461. *Refd.* Wilkinson v. Lindo (1840), 7 M. & W. 81; Evans v. Edmonds (1853), 13 C. B. 777; Griffiths v. Perry (1859), 1 E. & E. 680.

**483.** ———.] —*SPARKES v. MARSHALL*, No. 618, *post*.

**484.** ———.] —A person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, & before the loss, cannot sue upon the policy; except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit.—*POWLES v. INNES* (1843), 11 M. & W. 10; 12 L. J. Ex. 163; 152 E. R. 695.

*Annotations*:—*Consd.* Watson v. Swann (1862), 11 C. B. N. S. 756; Rayner v. Preston (1881), 18 Ch. D. 1. *Refd.* Sutherland v. Pratt (1843), 12 L. J. Ex. 235; Doxford v. King (1846), 8 L. T. O. S. 190; Lloyd v. Fleming, Lloyd v. Spence (1872), L. R. 7 Q. B. 299; North of England Oil-Cake Co. v. Archangel Insce. (1875), L. R. 10 Q. B. 249.

**485.** ———.] —(1) A declaration on a policy of insurance of the ship Helen contained an averment of deft.'s subscription to the policy, & that pltf. were then, & continually afterwards, & at the time of the loss, interested in the ship to the amount of the moneys insured. Plea; pltf. were not before or at the time of the loss interested in the said ship, *modo et formâ*:—*Held*: the material part of the issue was not whether pltf. were interested at the time of the loss, but whether they were interested during the time covered by the policy, & if they were so interested, & the policy was intended to cover that interest, it was wholly immaterial whether the interest existed at the date of the policy, or at the time of the loss.

(2) On Sept. 30, 1845, a policy of insurance was effected on the ship for twelve months. In Jan. 1846, a written agreement was made between pltf. & H., by which it was agreed that H. should do certain repairs to some other vessels, & take the Helen in part payment, & should have the benefit of the policy. On Apr. 13, 1846, a bill of sale was executed by pltf. to H., transferring to him their entire interest in the ship, but making no allusion whatever to the policy. On Apr. 24, 1846, the vessel sailed, & was lost on Apr. 26:—*Held*: it was competent to pltf. to assign the benefit of the policy of insurance to H.; & in an action on the policy pltf. were the proper parties to sue as trustees for H., who was prevented from suing in his own name.—*DOXFORD v. KING* (1846), 8 L. T. O. S. 190.

**486.** ———. *After bankruptcy of assignor.*—*Assumpsit* on a policy of insurance on goods, alleging an average loss. By the policy a portion of the premium was to be returned if the risk ended in England. Fourth plea, set-off; demurrer. Sixth plea, bkpey. of pltf. Replication, that before the bkpey. pltf. transferred the goods & the policy & his right to recover for the loss to F., & that he sued as trustee for F. Rejoinder, that before the bkpey. the risk ended in England, whereby pltf. became entitled under the policy to a return of premiums. Demurrer:—*Held*: (1) the fourth plea was bad, as the action was for unliquidated damages; (2) the rejoinder was no answer to the replication to the sixth plea, because, although the beneficial interest under the policy, so far as related to the return of the premiums, passed to the assignees, & though there was only one contract, yet bkpt. was entitled to sue on the policy as trustee for F. to recover for the loss, as two separate actions on the policy were maintainable, one for the return of the premium & another for the loss.—*BODDINGTON v. CASTELL*

#### PART II. SECT. 6, SUB-SECT. 4.

**g. Mode of assignment—By draft on insurance company.**—*WOLFE v. HART* (1885), 40 N. S. R. 17.—*CAN.*



(1853), 1 E. & B. 879; 1 C. L. R. 281; 23 L. J. Q. B. 31; 21 L. T. O. S. 197; 17 Jur. 781; 1 W. R. 359; 118 E. R. 665, Ex. Ch.; *affg.* S. C. *sub nom.* CASTELLI v. BODDINGTON (1852), 1 E. & B. 66.

*Annotations* :—As to (1) *Refd.* Johnson v. Diamond (1855) 11 Exch. 73. As to (2) *Refd.* Westoby v. Day (1853), 2 E. & B. 605; Rose v. Buckett (1901), 84 L. T. 670.

487. ———— **Set off by underwriter.**—*DE MATTOS v. SAUNDERS*, No. 1943, *post*.

488. **Right of assignee to sue in own name—Assignment made after loss.**—A policy of marine insurance can be assigned, under Policies of Marine Assurance Act, 1868 (c. 86), s. 1, after loss, so as to entitle the assignee to sue upon it in his own name. In an action upon a policy of marine insurance by the exors. of E., deceased, against an underwriter, the declaration alleged that a policy of insurance on goods in a ship was underwritten by deft., that the goods were lost by the perils insured against, & that after the loss "the said policy of insurance, together with all rights accrued under & by virtue thereof, was, by the assured, for good consideration duly assigned to E. in his lifetime":—*Held*: although the assignment was made after loss of the goods, yet as the policy, together with all rights accrued under it, had been duly assigned to E., he became "entitled to the property thereby insured," within the above sect., & was entitled to sue upon the policy in his own name, & the declaration was good.—*LLOYD v. FLEMING*, *LLOYD v. SPENCE* (1872), L. R. 7 Q. B. 299; 41 L. J. Q. B. 93; 20 W. R. 296; *sub nom.* *LLOYD v. FLEMING*, *LLOYD v. SPENCE*, 25 L. T. 824; 1 Asp. M. L. C. 192.

*Annotation* :—*Consd.* Swan & Cleland's Graving Dock, & Slipway Co. v. Maritime Insee. & Croshaw, [1907] 1 K. B. 116.

489. ———— **Subject to all defences valid against assignor—Set-off.**—*PELLAS v. NEPTUNE MARINE INSURANCE CO.*, No. 2407, *post*.

490. ———— **Non-disclosure of material facts.**—By Marine Insurance Act, 1906 (c. 41), s. 50 (2), where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; & deft. is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

A firm of shipbuilders agreed to build a vessel for certain shipowners. As security for the purchase-money & in pursuance of a covenant to that effect the owners insured the vessel with certain underwriters & assigned the policy to the builders. Material facts known to the owners but unknown to the builders were not disclosed to the underwriters.

In an action on the policy by the builders as assignees of the policy against the underwriters, the latter pleaded the non-disclosure:—*Held*: the non-disclosure of material facts, being a breach of a condition precedent to the liability of underwriters on a marine policy, was a defence arising out of the contract within the above sub-sect., & available to the underwriters even against the claim of *bond fide* assignees for value of the policy who had no notice of the non-disclosure.—*PICKERSGILL (WILLIAM) & SONS, LTD. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., LTD.*, [1912] 3 K. B. 614; 82 L. J. K. B. 130; 107 L. T. 305; 28 T. L. R. 591; 57 Sol. Jo. 11; 12 Asp. M. L. C. 263; 18 Com. Cas. 1.

491. **Assignment of part of benefit of policy.**—A ship being chartered with grain from C. to E.

for orders, to discharge in a port of the United Kingdom, the owners effected an insurance on the cargo from G. to E., & thence to a port of discharge in the United Kingdom, with leave to call for orders & to naturalise the cargo, to return 20s. per cent. if risk end at the port of naturalisation. The cargo was sold afloat while on the voyage from G. to E. by brought & sold notes for 60s. per quarter, "including freight & insurance to E." The bill of lading, which was in conformity with the charterparty, & the policy of assurance were delivered to the purchaser:—*Held*: the purchaser was only entitled to the assurance to E., & consequently, that he could not recover from the underwriter for a loss between E. & the port of discharge in the United Kingdom.—*IONIDES v. HARFORD* (1859), 29 L. J. Ex. 36; 33 L. T. O. S. 186.

492. **Sale of goods with freight & insurance—Insurance for more than value of goods—Whether assignee entitled to excess.**—Pltfs. were owners of a cargo of wheat which they had insured at £7,000. The market having fallen they sold it for £5,700, "including freight & insurance. Payment in cash in exchange for bills of lading & policies of insurance effected with approved underwriters." The cargo was totally lost, & the insurance co. paid the £7,000:—*Held*: the purchaser was entitled to the whole £7,000 received from the co., & not merely to £5,700.—*RALLI v. UNIVERSAL MARINE INSURANCE CO.* (1862), 4 De G. F. & J. 1; 31 L. J. Ch. 313; 6 L. T. 34, 37; 8 Jur. N. S. 495; 10 W. R. 278, 327; 1 Mar. L. C. 194, 197; 45 E. R. 1082, L. J. J.

*Annotations* :—*Consd.* Landauer v. Asser, [1905] 2 K. B. 184; Strass v. Spillers & Bakers, [1911] 2 K. B. 759. *Refd.* Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198.

493. ———— **Increased value policy.**—A contract for the sale of goods at a price to cover cost, freight, & insurance contained the clause—"Insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers." Subsequently to the sale the sellers effected a policy for a larger amount than 5 per cent., over net invoice, & handed that policy together with the shipping documents to the buyers in exchange for the price.

A loss having occurred under the policy, the underwriters paid the buyers upon the whole amount insured:—*Held*: the buyers were not, to the extent to which the money received by them from the underwriters exceeded the amount of their loss, trustees for the sellers, but were entitled to retain it to their own use.—*LANDAUER v. ASSER*, [1905] 2 K. B. 184; 74 L. J. K. B. 659; 93 L. T. 20; 53 W. R. 534; 21 T. L. R. 429; 10 Com. Cas. 265, D. C.

*Annotations* :—*Consd.* Champsey Bhara v. Jivraj Balloo Spinning & Weaving Co., [1923] A. C. 480. *Refd.* Strass v. Spillers & Bakers, [1911] 2 K. B. 759; Kelantan Government v. Duff Development Co., [1923] A. C. 395.

494. ———— **"Increased value" policy.**—A contract for the sale of a cargo of wheat upon c.i.f. terms contained the following clause: "Seller to give policy of insurance for . . . 2 per cent. over the invoice amount, & any amount over this to be for seller's account, in case of total loss only." There were several dealings with the cargo, which was ultimately purchased by defts. Pltfs., who were originally interested in the cargo, in addition to the policies of insurance for 2 per cent. over the invoice amount which they handed over to the buyers, had taken out two "increased value" policies which they had not passed on to the buyers. A loss having occurred pltfs. sent defts. the two "increased value" policies in question, & asked them to hand them to the receiver of the

*Sect. 6.—Availability of policy : Sub-sect. 4. Sect. 7 : Sub-sect. 1, A. & B. (a) & (b) i.]*

cargo, to be handed by him to the adjusters for the purpose of making up the general average statement, & "thus establish the amount due to us." The underwriters in due course paid the amounts due under these two policies, which debts retained. In an action by pl'tfs. for money had & received to pl'tfs.' use:—*Held*: pl'tfs. were entitled to succeed as the benefit of the "increased value" policies did not pass under the contract of sale. *Semble*: this form of insurance is common not as a mode of insuring cargoes but ancillary to the trade in grain; it is a mode of insurance which is treated as binding & definitive, & as soon as it is made, the value once insured is final, & cannot be reduced if there is a shortage shipped, & the premium is due whether the whole amount of the cargo reaches the sum which the increased value fixes or whether it does not, & finally it is the class of insurance upon which in business underwriters pay as a matter of course to the party holding the policy, although for the purpose of proof they expect to have a particular average statement produced to them to verify that there has been a loss of the cargo referred to.

Such a policy as this is not the kind of policy that the seller could have tendered to the buyer in discharge of his obligations to insure, nor is it in accordance with the transaction, to regard this policy as within the category of those that are intended to be attached to the documents & to satisfy a contract of sale c.i.f. This is the original seller's own private speculation. Whether or not the underwriters choose to pay is a matter for them, but it is a speculation of his own entered into for a perfectly intelligible reason, but not intended to be part of the contract of purchase & sale.—*STRASS v. SPILLERS & BAKERS, LTD.*, [1911] 2 K. B. 759; 80 L. J. K. B. 1218; 104 L. T. 284; 11 Asp. M. L. C. 590; 16 Com. Cas. 166.

**495. Transfer of insured property—Without assignment of policy.]**—On Nov. 24, 1871, V. Brothers insured with debts in London a cargo of linseed, belonging to them, then on board a brig at Constantinople, for a voyage thence to a port of call & discharge in the United Kingdom to be named, including all risks of craft or lighters to & from the brig, each lighter to be considered as if separately insured, the policy expressing the agreement to be with V. Brothers & their assigns. The linseed was shipped under a bill of lading whereby it was to be delivered at a safe port in United Kingdom to V. Brothers or assigns. Whilst the brig was on the voyage the agents of V. Brothers, on Feb. 17, 1872, sold in London to pl'tfs. the cargo of linseed; by the sold note the seed was to be delivered at destined port in sound merchantable condition, & paid for in fourteen days from being ready for delivery by cash less 2½ per cent. discount, or at seller's option on handing shipping documents, less interest at 5 per cent. The vessel to go to any safe floating port in United Kingdom. The bill of lading was indorsed to pl'tfs. On Feb. 21, pl'tfs. named a safe floating port, & on the arrival of the brig at the port the cargo was landed by public lighters employed by pl'tfs.; on Feb. 28, one of the lighters was sunk off pl'tfs.' wharf, being a loss within the terms of debts' policy. The loss occurred when part only of the cargo had been discharged, & before pl'tfs. had paid the price of the cargo. In June, 1872, the policy was handed by V. Brothers to pl'tfs.; & on Oct. 17, V. Brothers indorsed an action upon it to recover for the loss of the seed in the lighter:—*Held*:

pl'tfs. could not recover. The policy was not expressly agreed to be assigned to pl'tfs. by the sold note; & no such intention could be inferred from the terms of the note, inasmuch as it was necessary that V. Brothers should keep the policy for their own protection until right delivery of the cargo. When the seed was put on board the lighter employed by pl'tfs., the seed was delivered to pl'tfs., & V. Brothers' interest ceased, & the policy lapsed; the subsequent assignment by V. Brothers to fs. was, therefore, of no avail under Policies of Marine Assurance Act, 1868 (c. 86), s. 1.—*NORTH OF ENGLAND OIL-CAKE CO. v. ARCHANGEL INSURANCE CO.* (1875), L. R. 10 Q. B. 249; 44 L. J. Q. B. 121; 32 L. T. 561; 24 W. R. 162; 2 Asp. M. L. C. 571, D. C.

*Annotation*:—*Consd. Rayner v. Preston* (1881), 18 Ch. D. 1.

**496. Condition in policy forbidding assignment—Without consent of insurer.]**—A policy of marine insurance issued by a mutual indemnity assocn. contained a condition that no assignment by the assured of his interest in any insurance should, as against the assocn., give any right to an assignee to receive the sum due, unless the assignment was made with the licence of the assocn. The assured by deed under seal assigned to pl'tf. money due to the assured under the policy, & notice in writing of the assignment was given to the assocn., but the licence of the assocn. was not obtained. The assured subsequently became bkpt. His trustee in bkpcy. made no claim to the money & the bkpcy. was closed, & the trustee was discharged. Pl'tf. brought an action against the assocn. to recover the money assigned, & applied to the official receiver in bkpcy., as the representative of the assured, for permission to join him as pl'tf. Permission was not given, & the official receiver was made deft.:—*Held*: the condition in the policy prevented pl'tf. from acquiring by the assignment a right to recover from the assocn. the money due under the policy, & pl'tf. was in no better position by reason of the representative of the assured having been made a party to the action.—*LAURIE v. WEST HARTLEPOOL STEAMSHIP THIRDS INDEMNITY ASSOCN. & DAVID* (1899), 15 T. L. R. 486; 4 Com. Cas. 322.

**497. Assignment of claim under policy—Without assignment of policy.]**—(1) The owner of a ship mortgaged her "together with the policies of insurance effected thereon" to secure advances. The ship, while insured, suffered a particular average loss within the policy, & the owner had her repaired. The owner being in default under the mtge., the mtge. debt by the terms of the deed became immediately payable:—*Held*: the policy of insurance was to be treated as a substantive & independent security for the mtge. debt, & the mtgee. was entitled to recover from the underwriters for his own use the amount of the particular average loss without being under any obligation to apply the money in payment of the cost of the repairs.

(2) Where a ship is insured under a time policy & a particular average loss occurs, an assignment of the assured's claim against the underwriters in respect of that loss may be valid, notwithstanding that it is not expressed to assign the policy itself, if at the date of the assignment the policy has expired so that nothing remains to be done under it but to pay the claim.—*SWAN & CLELAND'S GRAVING DOCK & SLIPWAY CO. v. MARITIME INSURANCE CO. & CROSHAW*, [1907] 1 K. B. 116; 76 L. J. K. B. 160; 96 L. T. 839; 23 T. L. R. 101; 12 Com. Cas. 73; 10 Asp. M. L. C. 450.

*Annotation*:—*As to* (2) *Refd.* *British Union & National Insce. v. Rawson*, [1916] 2 Ch. 476.



## SECT. 7.—SUBJECT-MATTER INSURED AND ITS DESCRIPTION IN POLICY.

## SUB-SECT. 1.—WHAT MAY BE INSURED.

## A. In General.

See Marine Insurance Act, 1906 (c. 41), ss. 2, 3, 26.

**498. Goods placed temporarily on land—Deposited in warehouse.]—**PELLEY v. ROYAL EXCHANGE ASSURANCE CO., No. 291, *ante*.

**499. — On quay for delivery to export vessel.]—**IDE & CHRISTIE v. CHALMERS & WHITE, No. 855, *post*.

**500. Debt for repairs & disbursements.]—**STAINBANK v. FENNING, No. 706, *post*.

**501. Goods sent partly by sea & partly by land—Usage known to underwriters.]—**RODOCANACHI v. ELLIOTT, No. 1747, *post*.

**502. — Under clause in policy.]—**SIMON, ISRAEL & CO. v. SEDGWICK, No. 971, *post*.

**503. — —.]—**HYDERABAD (DECCAN) CO. v. WILLOUGHBY, No. 1048, *post*.

**504. — —.]—**ROBINSON GOLD MINING CO. v. ALLIANCE INSURANCE CO., No. 1734, *post*.

**505. — —.]—**SCHLOSS BROTHERS v. STEVENS, No. 1832, *post*.

## B. Subject-Matter—How Specified.

## (a) In General.

See Marine Insurance Act, 1906 (c. 41), s. 26.

**506. Necessity for concise specification.]—**An underwriter who has subscribed an insurance "on goods" may re-insure by the same description, & the policy need not be expressed to be a re-insurance.

A description of the subject-matter of the insurance is required both from the nature of the contract & from the universal practice of insurers. It is generally described very concisely as being so much "on ship," "on goods," "on freight," "on profits on goods," "on advances on coolies," "on emigrant money," & several other examples might be given; & if no property which answers the description in the policy is at risk, the policy will not attach though the assured may have the property at risk of equal or greater value, the reason being, that the assurers have not entered into a contract to indemnify the assured for any loss on that other property (BLACKBURN, J.).

*Lucena v. Craufurd*, No. 555, *post*, has always been treated as deciding that though profits may be insured, they must be described as such (BLACKBURN, J.).—*MACKENZIE v. WHITWORTH* (1875), 1 Ex. D. 36; 45 L. J. Q. B. 233; 33 L. T. 655; 24 W. R. 287; 3 Asp. M. L. C. 81, C. A.

*Annotations:—*Consd. *Nelson v. Empress Assee. Corp.* (1905), 74 L. J. K. B. 699; *British Dominions General Insce. v. Duder*, [1915] 2 K. B. 394. *Reid. Dixon v. Whitworth*, *Dixon v. Sea Insce.* (1879), 4 C. P. D. 371; *Norwich Union Fire Insce. Soc. v. Colonial Mutual Fire Insce.*, [1922] 2 K. B. 461; *A.-G. Forsikringsakt. National (of Copenhagen)* (1924), 93 L. J. K. B. 679.

**507. Control of general terms—By marginal note.]—**ROBERTSON v. FRENCH, No. 806, *post*.

## (b) The Ship.

## i. In General.

See Marine Insurance Act, 1906 (c. 41), s. 26.

**508. What included in "Ship"—Hull & outfit.]—**FORBES v. ASPINALL, No. 2035, *post*.

**509. — Fishing stores.]—**In the case of insurance these [fishing] stores are not considered as covered by an ordinary policy on the ship. But construction of the contract depends in many cases upon usage (*ABBOTT, C.J.*).—*GALE v. LAURIE*

(1826), 5 B. & C. 156; 7 Dow. & Ry. K. B. 711; 4 L. J. O. S. K. B. 149; 108 E. R. 58.

*Annotations:—*Reid. *Hoggarth v. Walker* (1900), 69 L. J. Q. B. 634; *Re Margetts & Ocean Accident & Guarantee Corp.*, [1901] 2 K. B. 792. *Mentd. Dobree v. Schroder* (1837), 2 My. & Cr. 489; *Stuart v. Isenmenger*, *The Diana* (1842), 4 Moo. P. C. C. 12; *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795; *Coltman v. Chamberlain* (1890), 25 Q. B. D. 328; *Bennet S.S. Co. v. Hull Mutual Steamship Protecting Soc.* (1913), 58 Sol. Jo. 14; *The City of Edinburgh*, [1921] P. 70.

**510. — Ballast—Belonging to ship-owner.]—**THE FORFARSHIRE, *INGRAM v. HARRISON* (1856), 7 L. T. 102.

**511. What included in "ship & furniture"—Boats, rigging & stores.]—**HOSKINS v. PICKERSGILL, No. 272, *ante*.

**512. — —.]—**The question is whether the word appurtenances is properly applicable to fishing stores on board a fishing vessel. It is a word of wider extent than furniture, & may be properly applied to many things that could not be so described in a contract of insurance (*LORD STOWELL*).—*THE DUNDEE* (1823), 1 Hag. Adm. 109; 106 E. R. 39.

*Annotations:—*Reid. *Langton v. Horton* (1842), 5 Beav. 9; *The Milan* (1861), Lush. 388; *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795; *Re Salmon & Woods, Ex p. Gould* (1885), 2 Morr. 137. *Mentd. The Girolamo* (1834), 3 Hag. Adm. 169; *Dobree v. Schroder* (1837), 2 My. & Cr. 489; *The John Dunn* (1841), 1 Wm. Rob. 159; *Cope v. Doherty* (1858), 31 L. T. O. S. 173; *The Duna* (1861), 5 L. T. 217; *The Wild Ranger* (1862), Lush. 553; *Coltman v. Chamberlain* (1890), 25 Q. B. D. 328; *The Dictator*, [1892] P. 304.

**513. — —.]—**In the case of insurance these [fishing] stores are not considered as covered by an ordinary policy on the ship (*ABBOTT, C.J.*).—*GALE v. LAURIE* (1826), 5 B. & C. 156; 7 Dow. & Ry. K. B. 711; 4 L. J. O. S. K. B. 149; 108 E. R. 58.

*Annotations:—*Reid. *Langton v. Horton* (1842), 5 Beav. 9; *Stuart v. Isenmenger*, *The Diana* (1842), 4 Moo. P. C. C. 12; *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795; *Coltman v. Chamberlain* (1890), 25 Q. B. D. 328; *Hoggarth v. Walker* (1900), 69 L. J. Q. B. 634. *Mentd. Dobree v. Schroder* (1837), 2 My. & Cr. 489; *Re Margetts & Ocean Accident & Guarantee Corp.*, [1901] 2 K. B. 792; *Bennet S.S. Co. v. Hull Mutual Steamship Protecting Soc.* (1913), 58 Sol. Jo. 14; *The City of Edinburgh*, [1921] P. 70.

**514. — Fishing stores—Trade usage.]—**HOSKINS v. PICKERSGILL, No. 272, *ante*.

**515. — —.]—**Provisions sent out in a ship for the use of the crew, are protected by a policy of assurance on the ship & furniture.

A policy of assurance has at all times been considered in cts. of law as an absurd & inchoate instrument: but it is founded on usage, & must be governed & construed by usage (*BULLER, J.*).—*BROUGH v. WHITMORE* (1791), 4 Term Rep. 206; 100 E. R. 976.

*Annotations:—*Consd. *Roddick v. Indemnity Mutual Marine Insce.*, [1895] 2 Q. B. 380. *Reid. Hill v. Patten* (1807), 8 East, 373; *Rodocanachi v. Elliott* (1873), L. R. 8 C. P. 649; *Hoggarth v. Walker* (1900), 69 L. J. Q. B. 634.

**516. — Separation cloths & mats—Covered though not in use—Ship employed in grain trade.]—**Where a ship was usually employed in the Black Sea grain trade, & it was necessary under the circumstances of that trade that she should be provided with separation cloths & dunnage mats for the proper carriage of her cargo:—*Held*: a time policy upon the ship & her furniture covered a loss of such cloths & mats, although at the time when the loss occurred the vessel was not engaged in the before mentioned trade, & the cloths & mats were

*Sect. 7.—Subject-matter insured and its description in policy: Sub-sect. 1, B. (b) i., ii., & (c).]*

not in use but stowed away in the forepeak.—*HOGARTH v. WALKER*, [1900] 2 Q. B. 283; 82 L. T. 744; 48 W. R. 545; 16 T. L. R. 410; 44 Sol. Jo. 500; 9 Asp. M. L. C. 84; 5 Com. Cas. 292; *sub nom.* *HOGARTH & Co. v. WALKER*, 69 L. J. Q. B. 634, C. A.

*Annotation*:—*Mentd.* *Elder, Dempster v. Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. v. Paterson, Zochonis*, [1924] A. C. 522.

**517. What included in “ship & outfit”—Fishing stores.**—*HILL v. PATTEN*, No. 254, *ante*.

**518. What included in “hull & machinery”—Bunker coal.**—*RODDICK v. INDEMNITY MUTUAL MARINE INSURANCE CO.*, No. 566, *post*.

**519. — Disbursements.**—*RODDICK v. INDEMNITY MUTUAL MARINE INSURANCE CO.*, No. 566, *post*.

ii. *Description of the Ship.*

*See, generally, Marine Insurance Act, 1906 (c. 41), s. 26.*

**520. Error in name—Ship otherwise identifiable.**—*HALL v. MOLLINEAUX* (1744), cited in 6 East, 385; 102 E. R. 1334.

*Annotations*:—*Folld.* *Le Mesurier v. Vaughan* (1805), 6 East, 382. *Refd.* *Ionides v. Pacific Fire & Marine Insce.* (1872), L. R. 7 Q. B. 517.

**521. —**—Where a policy described the insurance to be on goods on board the ship called, *The American ship President*, this was taken to be all name of the ship, & not a warranty of her being an American ship called *The President*; & where the policy after such name had the words, “or by whatever other name the same ship should be called,” it was holden to be no variance that the real name of the ship was *The President*, the identity of the ship meant to be insured with that name being proved.—*LE MESURIER v. VAUGHAN* (1805), 6 East, 382; 2 Smith, K. B. 492; 102 E. R. 1333.

*Annotation*:—*Refd.* *Ionides v. Pacific Fire & Marine Insce.* (1872), L. R. 7 Q. B. 517.

**522. —**—(1) Insuring a ship by an English name does not amount to a warranty, or a representation, that she is an English ship.

Suppose a ship were insured by the name of *The Mark Antony*, if there was no representation of her country, it would be too much to say that the policy would be void should she turn out to be an Italian called *Il Marco Antonio* (*LORD ELLENBOROUGH, C.J.*).

(2) A policy “at & from A. & B.” is not vitiated by inserting, without the consent of the underwriters, the words “both” or “either.”—*CLAPHAM v. COLOGAN* (1813), 3 Camp. 382.

*Annotations*:—*As to (1) Consd.* *Dent v. Smith* (1869), 10 B. & S. 249. *Generally, Mentd.* *Isaacs v. McAllum*, [1921] 3 K. B. 377.

**523. — Intention of parties.**—The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description in the policy to which the assured elects to apply the policy; the object of the declaration of the vessel’s name is to identify the particular adventure, & the assent of the underwriter is not required to the declaration, for he has no option to reject any vessel which the assured may select.

If a representation be made by the assured to an underwriter, however honestly & innocently, that a ship is new, when in fact she is old, a policy of insurance of goods on board of her made by him will be vitiated, for the age of the vessel must be material in considering the premium.

If the description in a policy of insurance designates the subject with sufficient certainty, or suggests the means of doing it, a mistake as to the name of the ship or as to other particulars, will not annul the contract, & a mistake in the name of the vessel, which does not prejudice the underwriter, does not defeat the policy.

30 Vict. c. 23, s. 7, enacts that no contract or agreement for sea insurance shall be valid unless expressed in a policy, & thereby renders an underwriter’s slip incapable of being enforced either at law or in equity; but notwithstanding that statute, a slip may be given in evidence wherever it is, though not valid, material.

Pltfs., brokers in London, received from G., at Hamburg, instructions to effect a policy for £121 upon hides on board the *Socrates*, Captain Jean Card. In the *Veritas*, issued by Lloyd’s, was registered the *Socrates*, Captain Albertson, a new Norwegian vessel, & next to it the *Socrate*, Captain Jean Card, an old French vessel. On Jan. 24, 1870, L., a clerk of pltfs., went by their orders to defts.’ office, & asked D., their manager, to grant a policy for £121 on hides on board the *Socrates*. D. looked at the *Veritas*, & seeing the entry as to the *Socrates*, asked if that was the ship; L. replied that he thought so; the policy for £121 was thereupon granted by defts. to pltfs. for the *Socrates*. The hides were really shipped on board the *Socrate*, & were totally lost. Pltfs., by orders of K., at Hamburg, had opened with defts. a policy on hides by ship or ships to be declared for £5,000: the slip was signed, but the policy had not been prepared. On Feb. 4, 1870, one of pltfs., at defts.’ office, wrote out a slip for a policy for £2,455 on hides per *Socrates*, & another slip for a policy for £2,500 on hides by another vessel; he stated to defts.’ clerk that, instead of drawing up an open policy for £5,000, & then declaring on it for £4,955, which would leave so small a balance as £45, it would be more convenient for all parties to have two ship policies; the clerk assented; & two policies were afterwards executed. The hides insured by the policy for £2,455 were shipped on board the *Socrate* & totally lost. Defts. had no reason to believe that pltfs.’ principals, on Jan. 24, & Feb. 4, were the same; & in fact they were not. At the trial the jury found that the parties, in entering into the contracts, both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, & that defts. did not mean only to insure hides on board the *Socrates*:—*Held*: (1) as to the policy for £121 that there was a mistake & a misrepresentation as to the vessel on board of which the hides were shipped, & the defts., being under no obligation to subscribe any policy for that £121, were not liable for goods on board the *Socrate*; (2) as to the policy for £2,455, defts. being bound on Feb. 4, to insure hides on board any ship selected by pltfs., the misnomer was of no consequence, & defts. were liable.

(3) The slip is, in practice, & according to the understanding of those engaged in marine insurance, the complete & final contract between the

**PART II. SECT. 7, SUB-SECT. 1.—B. (b) ii.**

**k. Omission of port & name of master—Proof of identification to under-**

**writer.**—A policy of insurance on a ship of which the name but neither the port, nor the master is mentioned, is not good unless the insured prove that the broker certified the under-

writer at the time he made the insurance which particular ship was meant.—*LISTER v. SCOTT* (1809), 15 Fac. Coll. 483.—**SCOT.**



parties, fixing the terms of the insurance & the premium & neither party can without the assent of the other deviate from the terms thus agreed on without a breach of faith (BLACKBURN, J.).

(4) It is not necessary that the declaration should do more than identify the adventure, & so prevent the possible dishonesty of a party insured, who might intend to apply the policy to particular goods, so that they should be at the risk of the assurers, & he could come on them if there was a loss; & then, when those goods had arrived safely, to pretend that he intended to apply the policy to another set of goods still subject to risks (BLACKBURN, J.).—*IONIDES v. PACIFIC INSURANCE CO.* (1871), L. R. 6 Q. B. 674; 41 L. J. Q. B. 33; 25 L. T. 490; 1 Asp. M. L. C. 141; *affd.* (1872), L. R. 7 Q. B. 517, Ex. Ch.

*Annotations*:—*As to* (1) *Consd.* *Anderson v. Pacific Fire & Marine Insce.* (1872), L. R. 7 C. P. 65. *As to* (3) *Fold.* *Cory v. Patton* (1872), L. R. 7 Q. B. 304. *Refd.* *Fisher v. Liverpool Marine Insce.* (1873), L. R. 8 Q. B. 469. *As to* (4) *Apprvd.* *Davies v. National Fire & Marine Insce. of New Zealand*, [1891] A. C. 485. *Generally, Refd.* *Stephens v. Australasian Insce.* (1872), L. R. 8 C. P. 18; *Lishman v. Northern Maritime Insce.* (1875), L. R. 10 C. P. 179; *Citizens Insce. of Canada v. Parsons, Queen Insce. v. Parsons* (1881), 7 App. Cas. 96; *Home Marine Insce. v. Smith*, [1898] 1 Q. B. 829; *Nagorenull v. Triton Insce.*, 41 T. L. R. 168. *Mentd.* *Ashling v. Boon*, [1891] 1 Ch. 568.

#### (c) Goods.

Marine Insurance Act, 1906 (c. 41), sched. I., r. 17.

524. “Goods” generally—What will be included—Deck cargo.]—*BACKHOUSE v. RIPLEY* (1802), cited 1 Park’s Marine Insurances, 7th ed. p. 26.

*Annotations*:—*Refd.* *Gould v. Oliver* (1837), 4 Bing. N. C. 134; *Milward v. Hibbert* (1842), 3 Q. B. 120; *Myers v. Sarl* (1860), 3 E. & E. 306; *Miller v. Tetherington* (1861), 7 Jur. N. S. 214; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41.

525. ——— Usage.]—*ROSS v. THWAITE* (1776), 1 Park’s Marine Insurances, 8th ed. p. 23.

*Annotations*:—*Consd.* *Milward v. Hibbert* (1842), 3 Q. B. 120; *Miller v. Tetherington* (1861), 6 H. & N. 278; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41. *Refd.* *Gould v. Oliver* (1837), 4 Bing. N. C. 134; *Myers v. Sarl* (1860), 3 E. & E. 306.

526. ———.]—Pltfs. insured goods with defts. against all risks during transit from London to Neuenahr on the Rhine via Amsterdam. The goods on arrival at Amsterdam were transhipped on to a Rhine steamer & there stowed on deck for carriage up the river to Neuenahr. While the goods were so stowed on deck a fire broke out on the steamer, & the goods were burnt. There was evidence that it was a common practice for Rhine steamers to carry goods on deck:—*Held*: the general rule, which exempts underwriters on cargo from liability for loss of goods carried on deck during a voyage by sea, does not apply to an inland voyage upon a particular river contemplated by the policy upon which river there is a usage to carry cargoes on deck. *Qu.*: whether the above general rule applies in any case to an inland voyage upon a river.—*APOLLINARIS CO. v. NORD DEUTSCHE INSURANCE CO.*, [1904] 1 K. B. 252; 73 L. J. K. B. 62; 89 L. T. 670; 52 W. R. 174; 20 T. L. R. 79; 9 Asp. M. L. C. 526; 9 Com. Cas. 91.

*Annotation*:—*Consd.* *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41.

527. ———.]—(1) Pltf. who sues in respect of a loss under an “all risks” policy must prove that the loss was due to an accident or casualty, but is not bound to prove the exact nature of the accident or casualty which occasioned his loss. The provision in r. 17 of the Rules for the Construction of Policies, Marine Insurance Act,

1906 (c. 41), Sched. I., that “in the absence of any usage to the contrary” deck cargo must be insured specifically & not under the general denomination of goods, does not alter the common law on the subject. Accordingly the usage referred to is a usage of the carrying trade to which the insurance relates, & not of the insurance market, & if there is established a usage of the carrying trade to carry any particular class of goods on deck the underwriters are deemed to be acquainted with such usage & are liable for the loss of deck cargo, though unspecified.

As both the MASTER OF THE ROLLS, & ATKIN, L.J., point out, there was abundant evidence of a usage that in this trade bales of wool should be carried on deck (VISCOUNT FINLAY).

(2) There are, of course, limits to “all risks.” They are risks, & risks insured against. Accordingly the expression does not cover inherent vice or mere wear & tear, or British capture. It covers a risk, not a certainty; it is something which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for there he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally the description “all risks” does not alter the general law; only risks are covered which it is lawful to cover, & the onus of proof remains where it would have been on a policy against ordinary sea perils (LORD SUMNER).—*BRITISH & FOREIGN MARINE INSURANCE CO. v. GAUNT*, [1921] 2 A. C. 41; 90 L. J. K. B. 801; 125 L. T. 491; 37 T. L. R. 632; 65 Sol. Jo. 551; 15 Asp. M. L. C. 305; 26 Com. Cas. 247, H. L.; *affg.* *S. C. sub nom. GAUNT v. BRITISH & FOREIGN INSURANCE CO., LTD. & STANDARD MARINE INSURANCE CO., LTD.*, [1920] 1 K. B. 903, C. A.

See Marine Insurance Act, 1906 (c. 41), sched. I., r. 17.

528. ——— Ship’s provisions.]—*ROSS v. THWAITE* (1776), 1 Park’s Marine Insurances, 8th ed. p. 23.

*Annotations*:—*Consd.* *Milward v. Hibbert* (1842), 3 Q. B. 120. *Refd.* *Gould v. Oliver* (1837), 4 Bing. N. C. 134; *Myers v. Sarl* (1860), 3 E. & E. 306; *Miller v. Tetherington* (1861), 6 H. & N. 278; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41.

529. ——— Master’s clothes.]—*ROSS v. THWAITE* (1776), 1 Park’s Marine Insurances, 8th ed. p. 23.

*Annotations*:—*Consd.* *Milward v. Hibbert* (1842), 3 Q. B. 120; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41. *Refd.* *Gould v. Oliver* (1837), 4 Bing. N. C. 134; *Myers v. Sarl* (1860), 3 E. & E. 306; *Miller v. Tetherington* (1861), 6 H. & N. 278.

530. ——— Successive cargoes.]—*HILL v. PATTEN*, No. 254, *ante*.

531. ———.]—A policy was effected for twelve months on ship & goods from Liverpool to the coast of Africa & back, on a barter-voyage. The policy contained a stipulation that “outward cargo should be considered homeward interest twenty-four hours after arrival at first port or place of trade:” & by a memorandum the insurance was stated to be “upon ship valued at £2,000, & cargo £8,000 with liberty to increase the valuation of the homeward cargo.” The ship sailed to Kinsembo, on the African coast, & there discharged a third of her cargo, & after a stay there of more than twenty-four hours, proceeded towards other ports in order to take in homeward cargo, & was totally lost, together with the two-thirds of the outward cargo which remained on board:—*Held*: the valuation applied to what was sub-

*Sect. 7.—Subject-matter insured and its description in policy: Sub-sect. 1, B. (c), (d), (e) & (f).]*

stantially a full cargo, & not to any quantity of goods substantially less than a full cargo, & entitled the assured to £8,000 in the event of the total loss of a substantially full cargo, or to an indemnity in case of any partial loss, not in any case exceeding £8,000; & the principle for the valuation of a partial loss was this, if the value of the whole was a datum, the partial

which the part lost bore to the whole could not be known, & the mode of estimating a partial loss under a valued policy could not be adopted; & consequently, under the circumstances, the assured would be entitled to the ordinary indemnity as under an open policy underwritten for £8,000.

It is clear that the policy covers merchandise on board in all or any of the ship's movements, & throughout every variation of loading, unloading

32 L. J. C. P. 134; 8 L. T. 21; 9 JUP. N. S. 392; 11 W. R. 436; 1 Mar. L. C. 297; 143 E. R. 312; *affd.* (1864), 17 C. B. N. S. 528, Ex. Ch.

*Annotations:—Apld.* Denoon v. Home & Colonial Assee. (1872), L. R. 7 C. P. 341. *Refd.* Carr v. Montefiore (1864), 5 B. & S. 408.

532. — *Fishing stores.*] — HILL v. PATTEN, No. 254, *ante*.

533. — *Fish caught & carried on homeward journey.*] — HILL v. PATTEN, No. 254, *ante*.

534. *Nature of goods specified in policy—Insurance confined to goods of that nature.*] — HUNTER v. PRINSEP (1806), Marshall on Marine

v. Whitworth (1875), 1 Ex. D.

—.] — MACKENZIE v. WHITWORTH, No. 506, *ante*.

536. *“Master’s effects.”*] — DUFF v. MACKENZIE, No. 2075, *post*.

537. —.] — ANSTEY v. OCEAN MARINE INSURANCE Co., No. 1986, *post*.

*(d) Freight.*

See Marine Insurance Act, 1906 (c. 41), ss. 3 (2) b, 90.

538. *What included — “Hull.”*] — FORBES v. ASPINALL, No. 2035, *post*.

539. — *“Outfit.”*] — FORBES v. ASPINALL, No. 2035, *post*.

540. — *Profit to be earned.*] — FORBES v. ASPINALL, No. 2035, *post*.

541. — *On shipowner’s own goods.*] — FLINT v. FLEMYNG, No. 947, *post*.

542. — —.] — DEVAUX v. J’ANSON, No. 2085, *post*.

543. — *On goods of another party.*] — FLINT v. FLEMYNG, No. 947, *post*.

544. — *Sums paid for port charges.*] — A policy of insurance was effected at & from the River Plate to Canton & back, on specie, etc., shipped in the River Plate, & on the returns thereof, in any description of merchandise, with liberty to declare & value thereafter. The assured chartered a vessel on a voyage from Buenos Ayres, to Canton & back, & they were to pay for the voyage 10,000 dollars in manner following: viz. “In China, all the sums that might be necessary for the payment of the port charges & other incidental expenses, the latter not exceeding 2,000 dollars, & the balance at thirty days after the vessel’s return to Buenos Ayres.” The underwriters had no

notice of the terms of the charterparty. The assured shipped on board this vessel at Buenos Ayres a quantity of specie, consigned to an agent at Canton, who, on the ship’s arrival there, advanced to the captain a sum of money, being the amount of the port charges, & a further sum for incidental expenses; & he shipped other goods on board the vessel, on account of his principals, for the homeward voyage. No valuation was ever made in pursuance of the liberty reserved by the policy. The vessel on her return voyage was lost:

—*Held*: the assured were not entitled to recover the two sums paid by their agent at Canton, for port charges & other incidental expenses, as part of the value of the merchandise shipped at Canton, & insured by the policy, inasmuch as the money agreed to be paid there was not properly freight, & had no distinct relation to the goods shipped. *Qu.*: whether, upon an open policy, a payment made on the shipment of goods, can, in the event of loss, be added to their price, so as to form part of their value.—WINTER v. HALDIMAND (1831), 2 B. & Ad. 649; 9 L. J. O. S. K. B. 313; 100 R. R. 126.

*Annotation:—Refd.* Hall v. Janson (1855), 24 L. T. O. S. 289.

545. — *Passage-money of coolies.*] — DENNOON v. HOME & COLONIAL ASSURANCE Co., No. 2037, *post*.

546. — *Freight partly prepared — Remainder payable abroad.*] — Shipowner & charterer may agree, by the terms of a charterparty, that a portion of the stipulated freight shall be prepaid; & that such prepayment will not affect its legal character of freight; the remainder may be the subject of insurance by the owner. A ship was chartered to sail from Greenock to Bombay, to carry a cargo of coals. Freight was to be paid on unloading & right delivery of the cargo at & after the rate of 42s. per ton of 20 cwts. on the quantity delivered. It was provided that “such freight is to be paid, say one half in cash on signing bills of lading less four months’ interest at Bank rate, but not less than 5 per cent. *per annum*, 5 per cent. for insurance, & 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, & the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on London at six months’ sight. Half of the estimated amount of the freight was paid in London. The shipowner effected two insurances, one for £500 “on freight valued at £2,000,” the other for £700 on “freight payable abroad valued at £2,000.” The ship was lost before entering Bombay harbour, but one half of the cargo was saved & delivered. The master, in the belief that the prepayment had satisfied the freight on this half so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight:—*Held*: on the proper construction of the policy the whole sum agreed upon constituted freight; half of the whole sum of that freight had been paid in England; it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; half of the whole remained to be paid abroad on right delivery of the cargo; that half had been lost through perils of the sea, & the shipowner was entitled on his policies on freight to recover as for the total loss of that half.

It has always been held that a stipulation, which shows that the merchant is to insure the amount, is almost conclusive to show that it is not a loan on the security of freight to be earned but an advance of freight (BLACKBURN, J.).

There can be no doubt that the sum paid by [the charterer] was a prepayment of freight & as such, according to settled authorities, could not be recovered back again. That portion of the freight received by pltf. was therefore never at risk on the voyage insured (LORD CHELMSFORD).—*ALLISON v. BRISTOL MARINE INSURANCE CO.* (1876), 1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039; 3 Asp. M. L. C. 178, H. L.

*Annotations*:—*Reid. Anderson v. Morice* (1876), 1 App. Cas. 713; *Smith, Hill v. Pyman, Bell*, [1891] 1 Q. B. 742; *Weir v. Girvan*, [1900] 1 Q. B. 45; *Reliance Marine Insce. v. Duder*, [1913] 1 K. B. 265.

**547. — Policy effected under open cover—Under special clause in cover.**—By an open cover pltf. insured cargo for twelve months from the River Plate to the United Kingdom or Continent, the cover containing the following clause: "Invoice cost plus freight & insurance & 10 per cent. (in the event of loss before declaration), including contingency freight if required at half premium, but in the event of total loss making the freight unclaimable the insurance to be cancelled & premium returned." The course of business was that upon a declaration being made a policy was issued. Part of the cargo by a particular ship was lost before declaration:—*Held*: in assessing the sum payable under the policy, the word "freight" in the above clause meant freight which at the time of the loss the assured had paid or had become liable to pay, & not the freight which would have become payable at destination on the whole cargo if the whole had been delivered.—*KUNG v. METHUEN* (1907), 24 T. L. R. 145, C. A.; *affg. S. C. sub nom. KING v. METHUEN* (1906), 23 T. L. R. 69.

**548. — "Freight chartered &/or as if chartered"—"On board or not on board."**—*THE BEDOUIN*, No. 1687, *post*.

**549. — — — — —**—*WILLIAMS & CO. v. CANTON INSURANCE OFFICE, LTD.*, No. 1688, *post*.

**550. — — — — —**—*SCOTTISH SHIRE LINE, LTD. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., LTD.*, No. 1300, *post*.

**551. Reference to charterparty—Whether sufficient description.**—Pltfs., shipowners, entered into a charterparty which provided for payment of freight at a specific rate, & that "If any portion of the cargo be delivered sea-damaged the freight on such sea-damaged portion to be two-thirds of the above rate." They effected an insurance with underwriters, "To cover only the one-third loss of freight in consequence of sea-damage as per charter-party." Sea damage happened, & one-third of the freight on the sea-damaged portion of the cargo was deducted by the charterers from the total amount of freight:—*Held*: the subject-matter of insurance was "the one-third loss of freight in consequence of sea-damage, & pltfs. were entitled to recover from each underwriter such proportion of the amount of the loss as the amount of his subscription bore to the total sum for which the underwriters subscribed the policy.—*GRIFFITHS v. BRAMLEY-MOORE* (1878), 4 Q. B. D. 70; 48 L. J. Q. B. 201; 40 L. T. 149; 27 W. R. 480; 4 Asp. M. L. C. 66, C. A.

Insurable interest in freight, *see* Sect. 8, sub-sect. 3, F., *post*.

#### (e) Advance Freight.

*See* Marine Insurance Act, 1906 (c. 41), s. 12.

**552. Insured specifically—As "advances on account of freight."**—*ELLIS v. LAFONE*, No. 964, *post*.

**553. — — — — —**—*HALL v. JANSON*, No. 300, *ante*.

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**554. — — — — —**—*WILSON v. MARTIN*, No. 631, *post*.

**Whether included in insurance on disbursements.**—*See* No. 569, *post*.

**Included in valued policy—Policy treated as on valued goods.**—*See* No. 1935, *post*.

Insurable interest in advance freight, *see* Sect. 8, sub-sect. 3, G., *post*.

#### (f) Profits.

**555. Must be insured eo nomine.**—On an appeal from the Ct. of Exchequer Chamber (*see* No. 630, *post*) to the House of Lords the House referred certain questions to the judges when the following observations (*inter alia*) were made & the considered judgment of the House was delivered by LORD ELDON.

(1) A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; & whom it imports, that its condition as to safety or other quality should continue; interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily & exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; & where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing & the interest devisable from it may be very different; of the first the price is generally the measure, but by interest in a thing every benefit & advantage arising out of or depending on such thing may be considered as being comprehended (LAWRENCE, J.).

(2) The policy in question cannot be considered as a policy on profits. . . . If it had been intended as a policy on profits it should have been so stated (*per* CUR.).

(3) If the *Omoa* case [*Le Cras v. Hughes*, No. 694, *post*] was decided upon the expectation of a grant from the Crown I never can give my assent to such a doctrine. That expectation, though founded upon the highest probability, was not interest, & it was equally not interest, whatever might have been the chances in favour of the expectation (LORD ELDON).

(4) There are different sorts of consignees; some have a power to sell, manage & dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal.

(5) A trustee has a legal interest in the thing & may therefore insure (LORD ELDON).—*LUCENA v. CRAUFURD* (1806), 2 Bos. & P. N. R. 269; 127 E. R. 630, H. L.; *subsequent proceedings* (1808), 1 Taunt. 325, H. L.

*Annotations*:—As to (1) *Consd.* *Wilson v. Jones* (1867), L. R. 2 Exch. 139; *Moran, Galloway v. Uzielli*, [1905] 2 K. B. 555; *Macaura v. Northern Assce.*, [1925] A. C. 619. *Reid.* *Hodgson v. Glover* (1805), 6 East, 316; *Robertson v. Hamilton* (1811), 14 East, 522; *M'Swincay v. Royal Exchange Assce.* (1849), 14 Q. B. 634; *Lloyd v. Fleming* (1872), L. R. 7 Q. B. 299; *Mackenzie v. Whitworth* (1875), 1 Ex. D. 36; *Anderson v. Morice* (1876), 1 App. Cas. 713. As to (3) *Consd.* *Routh v. Thompson* (1809), 11 East, 428; *Stirling v. Vaughan* (1809), 11 East, 619. *Routh v.*



*Sect. 7.—Subject-matter insured and its description in policy: Sub-sect. 1, B. (f), (g) & (h); sub-sect. 2.]*

Thompson (1811), 13 East, 274; Devaux v. Steele (1840), 6 Bing. N. C. 358. *As to (4) Consd.* Bell v. Jutting (1817), 1 Moore, C. P. 155. *Refd.* Hagedorn v. Oliverson (1814), 2 M. & S. 485; Ebsworth v. Alliance Marine Insee. (1873), L. R. 8 C. P. 596. *Generally, Refd.* Cousins v. Nantes (1811), 3 Taunt. 513; Taylor v. Wilson (1812), 15 East, 324; Cohen v. Hannam (1813), 5 Taunt. 101; Dalby v. India & London Life Assee. (1854), 15 C. B. 365; Allkins v. Jupe (1877), 2 C. P. D. 375. *Mentd.* Hull v. Pickersgill (1819), 1 Bred. & Bing. 282; Clement v. Lewis (1822), 10 Price, 181.

556. —.]—MACKENZIE v. WHITWORTH, No. 506, ante.

557. —.]—The subject-matter of this insurance is on "rice" & though that is to be construed liberally as covering any interest in the rice, it cannot be construed as covering an interest in profits that might arise collaterally from a contract relating to the rice (BLACKBURN, J.).—ANDERSON v. MORICE (1875), L. R. 10 C. P. 609; 44 L. J. C. P. 341; 33 L. T. 355; 24 W. R. 30; 3 Asp. M. L. C. 31, Ex. Ch.; *affd.* (1876), 1 App. Cas. 713, H. L.

*Annotations:—Refd.* Stock v. Inglis (1884), 12 Q. B. D. 564; Inglis v. Stock (1885), 10 App. Cas. 263; Colonial Insee. of New Zealand v. Adelaide Marine Insee. (1886), 12 App. Cas. 128; Ajum Goolam Hossen v. Union Marine Insee., Hajee Cassim Joosub v. Ajum Goolam Hossen, [1901] A. C. 362; Reliance Marine Insee. v. Duder, [1913] 1 K. B. 265; The Parchin, [1918] A. C. 157. *Mentd.* Pryce v. Monmouth Canal & Ry. Cos. (1879), 4 App. Cas. 197.

558. What profits insurable — Profit on goods shipped—Policy beginning adventure from loading of goods.]—Pltf. in London contracted to buy of D. six thousand bags of rice, to arrive from Madras by the ship *E. B.* before the end of May: & he contracted with W. to sell him the same rice, to arrive as above, at an advanced price. Pltf. then effected an insurance at & from Madras to London on profit on rice, laden or to be laden, & also upon the body, tackle, etc., of the ship *E. B.* beginning the adventure upon the goods from & immediately after the loading thereof aboard the ship at Madras. The ordinary perils were insured against. Premium £21 10s. per cent. The rice was all ready to be shipped on board the *E. B.* & conveyed to London for pltf.'s vendors, & twelve hundred bags were actually on board, when, by perils of the sea, the ship was disabled, & prevented from performing the voyage, & the rice on board spoiled; & pltf.'s contracts both of purchase & sale became inoperative. In an action by pltf. on the policy, for a total loss in respect of four thousand, eight hundred bags, the insurers having settled for the twelve hundred:—*Held*: pltf.'s interest in profit was insurable, but it was not properly insured by a policy in this form, except as to the rice actually put on board, & if the rice on shore could have been considered a subject-matter of the insurance under this policy, the loss in respect of such rice was not occasioned by peril of the sea, within the meaning of the policy, but was only consequential upon other loss occasioned by such peril.—ROYAL EXCHANGE ASSURANCE v. M'SWINEY (1850), 14 Q. B. 646; 19 L. J. Q. B. 222; 16 L. T. O. S. 22; 14 Jur. 998; 117 E. R. 250, Ex. Ch.; *reversg.* S. C. *sub nom.* M'SWINEY v. ROYAL EXCHANGE ASSURANCE (1849), 14 Q. B. 634.

*Annotations:—Folld.* Halhead v. Young (1856), 6 E. & B. 312; Chope v. Reynolds (1859), 5 C. B. N. S. 642. *Apld.* Wilson v. Jones (1867), L. R. 2 Exch. 139. *Consd.* Mackenzie v. Whitworth (1875), 1 Ex. D. 36; Stock v. Inglis (1882), 9 Q. B. D. 708. *Refd.* Wilson v. Martin (1856), 11 Exch. 684; Anderson v. Morice (1875), L. R. 10 C. P. 609; Inman S.S. Co. v. Bischoff (1882), 7 App. Cas. 670; The Alps, [1893] P. 109; Reliance Marine Insee. v. Duder, [1913] 1 K. B. 265.

559. —.]—HALHEAD v. YOUNG, No. 644, post.

560. — Profit on goods before loading — Policy specially adapted thereto.]—ROYAL EXCHANGE ASSURANCE v. M'SWINEY, No. 558, ante.

561. —.]—HALHEAD v. YOUNG, No. 644, post.

Whether covered by policy on disbursements.]—See No. 603, post.

Insurable interest in profits, see Sect. 8, sub-sect. 3, H., post.

(g) Loans on Bottomry and Respondentia.

See Marine Insurance Act, 1906 (c. 41), s. 10.

562. Specific description in policy — Necessity for.]—Respondentia & bottomry interest must be expressly mentioned & specified in the policy; but special interest in goods may be given in evidence, if the circumstances of the case shall admit of it.—GLOVER v. BLACK (1763), 3 Burr. 1394; 1 Wm. Bl. 422; 97 E. R. 891.

*Annotations:—Consd.* Gregory v. Christie (1784), 3 Doug. K. B. 419; Simonds v. Hodgson (1829), 6 Bing. 114. *Refd.* Mackenzie v. Whitworth (1875), 1 Ex. D. 36.

563. — Unless special usage of trade proved.]—Policy "on goods, specie, & effects," at & from London to Madras & China, with liberty to touch, stay, & trade at any ports, etc. until the vessel shall arrive at her last loading port in the East Indies or China:—*Held*: by the usage of the East India trade, this policy covers an intermediate voyage from Madras to Bengal, the vessel arriving at Madras too late to proceed that season to China. The words "goods, specie, & effects," by the usage of trade, cover a sum of money advanced by the captain for the benefit of the ship, & for which he charges respondentia interest.—GREGORY v. CHRISTIE (1784), 3 Doug. K. B. 419; 99 E. R. 727.

*Annotations:—Consd.* Mackenzie v. Whitworth (1875), L. R. 10 Exch. 142. *Refd.* Grant v. Paxton (1809), 1 Taunt. 463; Urquhart v. Barnard (1809), 1 Taunt. 450; Palmer v. Pratt (1824), 2 Bing. 185.

564. Interest misdescribed as "bottomry" — Whether recoverable.]—SIMONDS v. HODGSON, No. 705, post.

565. —.]—The report of the registrar & merchants—disallowing, as irregular & unusual where there is a bottomry premium, a charge of insurance on money advanced to the master on bottomry, & forming part of the amount of the bond—confirmed; bottomry bonds, given by the master, binding the owners only for sums necessary for repairs, & for the furtherance of the voyage, & maritime interest being only allowed as a compensation for maritime risk.

A master of the ship, has no power to bind the ship or the owner by the law of England, except within special limits—for repairs & supplies becoming necessary from the exigencies of the voyage. This is an essential principle of this species of bottomry, & the ct. has hitherto acted with great strictness in not extending the privilege of bottomry against the ship beyond these limits, confining it to sums necessary for repairs, & for the furtherance of the voyage.

Another essential principle of all bottomry is, that maritime interest is allowed only as a compensation for maritime risk which usually attends advances of this kind (SIR CHRISTOPHER ROBINSON).

Lenders on bottomry, if not restrained by special regulations, may insure their advances in a distinct contract on their own account, but it would be contrary to the essential character of bottomry to make it a part & condition of the bond; & after hypothecating the ship in maritime interest for maritime risk, to hypothecate it also, in the same bond with the same interest, to take off that



risk by other collateral engagements. This is contradictory in form, at least, & in principle (SIR CHRISTOPHER ROBINSON).

If this article of expenditure is not properly a subject of bottomry, it cannot be made so, by the mere agreement of the master (SIR CHRISTOPHER ROBINSON).—BODDINGTON'S (1832), 2 Hag. Adm. 422.

Insurable interest in bottomry & respondentia, see Sect. 8, sub-sect. 3, Q., *post*.

(h) *Disbursements.*

**566. What included—Hull & machinery.]—**Pltf. effected a time policy with defts. on the hull & machinery of a steamship which were valued at £10,000. The policy contained the proviso, "£5,000 warranted uninsured." The total policies effected by pltf. on the hull & machinery amounted to £5,000. He had, however, further effected, by means of "honour" policies, insurances on disbursements to the extent of £2,600. The ship having been lost within the period covered by defts. policy, they refused payment on the ground that the "honour" policies constituted a breach of the warranty:—*Held*: since the "honour" policies were effected upon "disbursements" only, they did not cover any part of the subject-matter insured by the policy on "hull & machinery" giving to those words their ordinary meaning, & therefore pltf., by effecting the "honour" policies, had not committed a breach of the warranty.

The words "hull & machinery" must be construed according to their ordinary meaning. Which of those words in its ordinary meaning would include coal? Which would include provisions? These items are in point of fact neither "hull" nor "machinery." It was next suggested for applts. that "hull & machinery" are merely an equivalent expression to "ship." I am not satisfied that the word "ship" would cover these things (A. L. SMITH, L.J.).—RODDICK v. INDEMNITY MUTUAL MARINE INSURANCE CO., [1895] 2 Q. B. 380; 64 L. J. Q. B. 733; 72 L. T. 860; 44 W. R. 27; 11 T. L. R. 480; 39 Sol. Jo. 620; 8 Asp. M. L. C. 24; 14 R. 516, C. A.

*Annotations*:—*Refd.* General Insee. of Trieste v. Cory (1896), 66 L. J. Q. B. 313; Thames & Mersey Marine Insee. v. Gunford Ship Co., Southern Marine Mutual Insee. Assocn. v. Gunford Ship Co., [1911] A. C. 529.

**567. — Any interest outside ordinary interests.]—**BUCHANAN & CO. v. FABER, No. 603, *post*.

**568. — Advance of freight for ship's purposes.]—**CURRIE & CO. v. BOMBAY NATIVE INSURANCE CO., No. 1914, *post*.

**569. — —.]—**The captain of an Italian ship, in consideration of advances made by bankers for ship's disbursements at the port of loading, signed & indorsed to the bankers a document in the following terms. "Ten days after arrival at port of destination of the steel barque *Cinque*, of which I am master, now lying at Pensacola, & ready to sail for Southampton, I promise to pay to the order of myself the sum of £760 12s. 9d. British sterling in approved bankers' demand bills on London, value received for necessary disbursements of my vessel at this port, for the payment of which I hereby pledge my vessel & freight; & my consignees at the port of destina-

tion are here directed to pay the amount of the obligation from the first amount of freight received for account of my vessel." The bankers effected an insurance of the advances so made against perils of the sea by a policy warranted free of all average. The ship never arrived at the port of destination but became a constructive total loss on the voyage. Part, however, of the cargo was salvaged upon which by Italian law distance freight became payable. In an action by the assured upon the policy as for a total loss:—*Held*: the pledge of freight took effect, although the ship did not arrive at the port of destination, & there was therefore not a total loss of the subject-matter of insurance, & consequently the action on the policy was not maintainable.—PRICE v. MARITIME INSURANCE CO., [1901] 2 K. B. 412; 70 L. J. K. B. 780; 85 L. T. 101; 49 W. R. 645; 17 T. L. R. 559; 45 Sol. Jo. 575; 9 Asp. M. L. C. 213; 6 Com. Cas. 168, C. A.

**570. — Outlay on stores, etc.—Ship not a total loss.]—**LAWTHER v. BLACK, No. 571, *post*.

**571. — Expectation of freight.]—**Pltf.'s ship was chartered to take a cargo to the west coast of South America. It was the intention of pltf. to obtain a cargo there for the homeward voyage. Pltf. effected policies on hull, chartered freight, & "disbursements &/or advances, warranted free from all average, valued at £3,000." On the outward voyage fire broke out in the cargo, & some damage was done to the ship & to part of the cargo, but the ship was not a total loss, actual or constructive. Pltf., acting reasonably, abandoned the voyage, & brought the ship home to be repaired. The disbursements included outlay, before the ship started, on provisions, stores, outfit, port dues, & insurance:—*Held*: pltf. was not entitled to recover a total loss under the policy on disbursements.

Pltf. contended that this was an insurance on disbursements made for the purpose of earning freight on the homeward voyage back from South America. I cannot put that construction on the policy, nor do I think as a matter of fact that pltf. has proved that it was his intention to effect the policy with that purpose (A. L. SMITH, M.R.).—LAWTHER v. BLACK (1901), 17 T. L. R. 597; 6 Com. Cas. 5, 196, C. A.

**572. — Advances for necessaries for ship.]—**MORAN, GALLOWAY & CO. v. UZIELLI, No. 57, *ante*.

**573. — Maintenance of passengers on shore.]—**NEW ZEALAND SHIPPING CO., LTD. v. DUKE, No. 616, *post*.

SUB-SECT. 2.—FLOATING POLICIES.

See, now, Marine Insurance Act, 1906 (c. 41), s. 29.

**574. Subsequent declarations—How made—Declaration before magistrate.]—**HENCHMAN v. OFFLEY, No. 576, *post*.

**575. — — Writing not necessary.]—**ROBINSON v. TOURAY, No. 580, *post*.

**576. — Order of making.]—**An insurance was effected on goods on board any ship or ships from B. to L., sailing within certain dates; & another insurance was effected in the same terms, on the same voyage, within certain other dates.

PART II. SECT. 7, SUB-SECT. 1.— N. S. R. 409.—CAN.  
B. (h).

1. *What included—Expenditure on repairs.]—*CUNARD v. NOVA SCOTIA MARINE INSURANCE CO. (1897), 29

m. *Covered by insurance on ship.]—*In an action to recover on a time policy of marine insurance:—*Held*: the policy, though in terms an insur-

ance on the vessel, was really an insurance on disbursements, & so understood to be when effected.—MCLEOD v. UNIVERSAL MARINE INSURANCE CO. (1896), 33 N. B. R. 447.—CAN.

**Sect. 7.—Subject-matter insured and its description in policy: Sub-sects. 2, 3 & 4.]**

The insurer shipped goods on board two vessels; & not having the policies, made a declaration before a magistrate, that he had shipped goods to the amount of £4,889, on board vessel A., under the first policy. Both vessels sailed within the time mentioned in the first policy, & A. was lost:—*Held*: this was a sufficient appropriation of the first policy to the goods on board of A.—*HENCHMAN v. OFFLEY* (1782), 3 Doug. K. B. 135; 2 Hy. Bl. 345, n.; 99 E. R. 577.

—*Refd.* *Kewley v. Ryan* (1794), 2 Hy. Bl. 343.

**577.** ———.]—A policy of insurance was effected on certain goods on board a certain ship on a voyage, at & from A. to B., & another policy was also made on any kind of goods as interest should appear on board ship or ships, on the same voyage, warranted to sail within a limited time, but no circumstances relating to the first policy were communicated to the underwriters of the second, nor did they know that the first was made. Goods to the full amount of the sum insured in the first policy were put on board the specified ship, which arrived in safety. Goods also to the full amount of the sum insured in the second policy were put on board another ship, which sailed within the time limited from A. with an intention to touch at C. in her course to B., but was lost before she arrived at the deviating point. The underwriters of the second policy were answerable for the loss.—*KEWLEY v. RYAN* (1794), 2 Hy. Bl. 343; 126 E. R. 586.

*Annotations*:—*Refd.* *Hesilton v. Allnutt* (1813), 1 M. & S. 46; *Harc v. Travis* (1827), 7 B. & C. 14.

**578.** ———.]—*IONIDES v. PACIFIC INSURANCE CO.*, No. 523, *ante*.

**579.** ———.]—Pltfs., who were the agents for the sale in this country of the goods of certain firms in the East, effected a floating policy at Lloyd's, the interest intended by pltfs. to be covered being their interest as consignees of the goods in respect of selling commission & advances made by them against the goods shipped. The subject-matter insured was described as "produce &/or merchandise," & the insurance was against war risks only. Pltfs. made declaration under the floating policy of all consignments of goods within the terms of the policy, but made no declaration with regard to such consignments as they were instructed by their shippers to insure against war risks under the Govt. scheme of war risks insurance & not under the floating policy. Certain goods were lost by war perils in regard to which pltfs. made a declaration under the policy. If, however, pltfs. were bound to make declarations of all the goods consigned to them without regard to the instructions of the shippers the floating policy had previously run off:—*Held*: (1) as the subject-matter insured was designated in the policy in general terms, the interest of pltfs. which was covered by the policy was under Marine Insurance Act, 1906 (c. 41), s. 26 (3), the interest which was originally intended by pltfs. to be covered & it was not affected or limited by the instruction of the shippers with regard to insurance; (2) as the consignments which pltfs. were instructed not to insure under the policy were consignments within the terms of the policy, pltfs. were bound under s. 29 (3) of the above Act, to make declarations of such goods, & accordingly the policy had run off; (3) as the terms "subject-matter" & "interest" were used together in s. 26 (3), the word "interest" must be construed in its stricter sense as meaning the nature of the

interest which the assured has in the subject-matter of the insurance, & not in its looser sense as indicating the subject-matter of the insurance.—*DUNLOP BROTHERS & CO. v. TOWNEND*, [1919] 2 K. B. 127; 88 L. J. K. B. 1129; 121 L. T. 159; 14 Asp. M. L. C. 517; 24 Com. Cas. 201.

**580.** ——— **Power to rectify—Without assent of underwriter.**]—Where there is a policy on goods by ship or ships to be thereafter declared, if the broker by mistake makes a written declaration upon goods by a wrong ship; to which the underwriters put their initials: he may afterwards in compliance with the orders of the assured, declare upon goods by another ship, without the assent of the underwriters, & without a fresh stamp.

The declaration of interest is the mere exercise of a power conferred upon the assured. It is generally put upon the policy for convenience; but this is not necessary, nor is there any necessity for its being in writing (*LORD ELLENBOROUGH, C.J.*).—*ROBINSON v. TOURAY* (1811), 3 Camp. 158, N. P.; *subsequent proceedings* (1813), 1 M. & S. 217.

*Annotations*:—*Apprvd.* *Gledstanes v. Royal Exchange Assce.* (1864), 5 B. & S. 797. *Refd.* *Robinson v. Cheesewright* (1813), 1 M. & S. 220; *Ionides v. Pacific Insce.* (1871), L. R. 6 Q. B. 674. *Mentd.* *Flindt v. Scott, Flindt v. Crockatt* (1814), 5 Taunt. 674; *Hullman v. Whitmore, Hullman v. Scott* (1815), 3 M. & S. 337; *Rucker v. Ansley* (1816), 5 M. & S. 25.

**581.** ——— **After loss—In absence of fraud.**]—*STEPHENS v. AUSTRALASIAN INSURANCE CO.*, No. 617, *post*.

**582.** ———.]—Defts., a fire insurance corpn., agreed to reinsure pltfs., a marine insurance co., against loss by fire up to £1,000 by any one vessel upon all coal laden ships insured by pltfs. at & from certain ports to others. A policy was accordingly subscribed by defts. whereby in consideration of £250 they undertook to reinsure pltfs. against loss or damage by fire to the extent of £50,000 by the ships as might be declared at & from certain ports to others, the policy to be subject to the same clauses & conditions (as far as they related to fire risk only) as the original policy or policies, & would pay as might be paid thereon. The policy provided that the arrangement was to be in force for a year, & include only coal laden vessels, & the policy was to be supplemented by further policies on like terms should the amount of it not prove sufficient for the year's transactions. This & a second policy being exhausted by declarations of risk made under them, a third policy was applied for by pltfs. & issued to them. A risk, incurred prior to the date of the second policy, was not included in those declarations & was followed by a loss of cargo from fire known to pltfs. when the third policy issued, but, through mere neglect on the part of their manager, was not declared until afterwards. Taken in chronological order this risk came under the third policy, if any. In an action to recover for the loss, the ct., empowered to decide all questions in the case:—*Held*: although defts. had reinsured against fire only, their agreement was in respect of a marine risk & subject to the usage of underwriters stated in *Stephens v. Australasian Insurance Co.*, No. 617, *post*, & therefore, the policies attached to the goods in order of shipment, & the declarations must be rectified to make them correspond with it, & this might be done even after loss; the negligence of pltfs.' manager did not deprive them of their right to do it, & consequently they were entitled to recover.—*IMPERIAL MARINE INSURANCE CO. v. FIRE INSURANCE CORPN., LTD.* (1879), 4 C. P. D. 166; 48 L. J. Q. B. 424; 27 W. R. 680; *sub nom.* *MARITIME MARINE INSURANCE CO., LTD.*



*v. FIRE RE-INSURANCE CORPN., LTD.*, 40 L. T. 166; 4 Asp. M. L. C. 71.

**583. — Before knowledge of loss.]**—Where there is a policy on goods as may be thereafter declared & valued, the declaration of interest, to be available, must be communicated to the underwriters, or some one on their behalf, before intelligence is received of the loss. But the declaration of interest is not a condition precedent, & if none is made the policy is then open instead of being valued, & upon proof of interest at the trial, the assured will be entitled to recover.

In an action on a policy of assurance, it is no defence under the general issue, that the persons interested who were neutrals, when the policy was effected, & the loss happened had become alien enemies before the action brought. To prove that a person was an alien enemy at the time of action brought, it is not enough to show that he was some time before domiciled in a territory, which has become hostile, without showing that he was a native of that territory.—*HARMAN v. KINGSTON* (1811), 3 Camp. 150, N. P.

*Annotations:—*Refd. *Gledstanes v. Royal Exchange Assce.* (1864), 5 B. & S. 797; *Ionides v. Pacific Insce.* (1871), L. R. 6 Q. B. 674. *Mentd.* *Tingley v. Müller*, [1917] 2 Ch. 144; *Central India Mining Co. v. Soc. Coloniale Anversoise*, [1920] 1 K. B. 753.

**584. — —.]**—An insurance co., by their agents at C. were in the habit of underwriting policies on goods in ships sailing from C. to a port in the United Kingdom, the names of the ships being usually not known till afterwards. Pltfs., as agents of the co. in London, were in the habit of effecting open policies with defts. to cover the amounts, if any, which the co. might take in excess of £5,000, upon any one ship. The first of these policies was “lost or not lost,” & expressed to be on goods in the “first class ship or ships, as may be declared.” When one policy was exhausted another was effected, & each succeeding one was expressed “to follow & succeed” the preceding. From time to time, as pltfs. received advices from the co., stating the names of the ships to which the co. had appropriated the risks over £5,000, & the amounts of excess, pltfs. made declarations thereto to defts. On Mar. 16, it was known to both pltfs. & defts. that a ship, the *R. G.*, was burnt, but neither party then knew that the co. had any risks on goods in her. On Mar. 17, the existing policy was filled up. On Mar. 19, a similar policy was effected, expressed “to follow & succeed” the preceding one. Pltfs. afterwards received instructions, dispatched from C., in Feb. previous, to declare on the *R. G.* in respect of £4,738, the amount of the co.’s risk in excess of £5,000 on her cargo, & thereupon so declared to defts., who disputed their liability to pay:—*Held*: (1) the knowledge of the loss of the *R. G.* at the time of making the policy of Mar. 19, was not such as to vitiate the policy; & to vitiate the policy there must be a knowledge of the loss of risk insured against; (2) the risk attached to the ship when the appropriation was made at C., so as to cover the ship from the time of her starting; & the appropriation having been made *bond fide*, & so as not to be revocable, & declared to defts. without delay, pltfs. were entitled to recover from defts. in respect of their loss.—*GLEDSTANES v. ROYAL EXCHANGE ASSURANCE* (1864), 5 B. & S. 797; 5 New Rep. 40; 34 L. J. Q. B. 30; 11 L. T. 305; 11 Jur. N. S. 108; 13 W. R. 71; 2 Mar. L. C. 142; 122 E. R. 1026.

*Annotation:—*As to (1) *Distd.* *Stephens v. Australasian Insce.* (1872), L. R. 8 C. P. 18.

**585. — Effect of fraud.]**—The concealment by the assured at the time of effecting a marine

policy of insurance of a fact which is material to enable a rational underwriter, governing himself by the principles on which underwriters in practice act, to judge whether he shall accept the risk at all, or at what rate, will vitiate the policy, although the fact may not be material with regard to the risk incurred.

Defts. effected with pltf., a Lloyd’s underwriter, a series of open policies for certain specified sums to cover shipments to be declared & valued as interest might appear. The policies were effected at different dates, & were to succeed each other in the order of date. The value of the shipments was declared at considerably less than their real value, so that when the later policies were effected the earlier policies were in fact more exhausted than they would appear to be from the declarations. The undervaluation of the shipments was systematically & fraudulently made by defts., & the fact that they had been so undervalued was concealed from pltf. when he underwrote the later policies:—*Held*: under these circumstances, a jury would be justified in finding that the concealment was of a fact of which it was material that pltf. should have been informed, in order to guide him in deciding whether he would underwrite these later policies or not, or at what rate; & on the jury so finding pltf. was entitled to have such later policies set aside & cancelled.

Being therefore fraudulent, it seems to me there should be no return of premium & the verdict & judgment are both right (*BRETT, L.J.*).—*RIVAZ v. GERUSSI* (1880), 6 Q. B. D. 222; 50 L. J. Q. B. 176; 44 L. T. 79; 4 Asp. M. L. C. 377, C. A.

*Annotation:—*Refd. *Gedge v. Royal Exchange Assce. Corpn.*, [1900] 2 Q. B. 214.

**586. — Risk not intended to be covered by policy.]**—A shipowner, who ordinarily carried goods on terms excluding liability for negligence, was in the habit, when requested to do so by the shippers, of insuring the goods on their behalf. From time to time he made declarations on the policies which he effected, but only in respect of goods which he had been requested to insure on behalf of the shippers. Certain goods, which he had not been instructed to insure, were lost through negligence. No notice that the shipowner was exempt from liability for negligence had been given to the shippers, & it was held that he was liable as a common carrier for the loss. The shipowner sought to declare on the policies for this loss:—*Held*: the personal risk of the shipowner was not intended to be covered by the policies & he could not declare on the policies for the loss.—*SCOTT v. GLOBE MARINE INSURANCE CO., LTD.* (1896), 1 Com. Cas. 370.

*Annotation:—*Consd. *Dunlop v. Townend*, [1919] 2 K. B. 127.

#### SUB-SECT. 3.—TRANSHIPMENT OF GOODS.

See Marine Insurance Act, 1906 (c. 41), s. 59.

**Effect of clause permitting transhipment.]**—See Sect. 12, sub-sect. 3, B. (c), *post*.

#### SUB-SECT. 4.—SPECIFICATION OF INTEREST IN POLICY.

See Marine Insurance Act, 1906 (c. 41), s. 26.

**587. Assured with several interests in cargo—All covered by one policy.]**—A person who has several interests in a cargo, viz. as partner in 7-16ths, as consignee of the whole, & as having a lien on the whole for advances, may protect them all by one insurance, without expressing in the

*Sect. 7.—Subject-matter insured and its description in policy: Sub-sect. 4. Sect. 8: Sub-sects. 1, 2 & 3, A., B., C. & D.]*

policy the number or nature of his interests. D. & W. being general partners under the firm of D. & Co., & D. & Co. taking a share with three others in a particular adventure which D. & Co. manage & insure for the account of D. & Co., it is a latent ambiguity to be explained by evidence, whether the D. & Co. for whose account the insurance is made means D. & W. only, or all who are partners of D. in that particular adventure.—*CARRUTHERS v. SHEDDON* (1815), 6 Taunt. 14; 1 Marsh. 416; 128 E. R. 937.

*Annotation:—Consd. Ebsworth v. Alliance Marine Insce.* (1873), L. R. 8 C. P. 596.

**588. Insurance “on goods” — Covers carrier’s interest—If subject-matter rightly described.]—***CROWLEY v. COHEN*, No. 609, *post*.

**589. — Covers re-insurance — Without so expressing it.]—MACKENZIE v. WHITWORTH, No. 506, *ante*.**

*Compare Nos. 1912, 2041, post.*

## SECT. 8.—INSURABLE INTEREST.

### SUB-SECT. 1.—IN GENERAL.

*See, generally, Part I., Sect. 4, ante, & Marine Insurance Act, 1906 (c. 41), ss. 4 (2), (a), (b), 5.*

**590. Defined.]—LUCENA v. CRAUFURD, No. 555, *ante*.**

**591. Necessity for.]—**If a ship insured be taken by the enemy, & after a possession of nine days, but before she is carried *infra præsidia* be retaken by an English man of war, the property is not changed; but if it be found that *pltf.* in the policy is not concerned in point of interest, he cannot recover against the underwriters.—*ASSIEVEDO v. CAMBRIDGE* (1712), 10 Mod. Rep. 77; 88 E. R. 634.

*Annotations:—Refd. Goss v. Withers* (1758), 2 Burr. 683. *Mentd. R. v. Majaval, Serva, Alves, Ribeiro, Francisco, Martins, Joaquim, Santos, Antonio, Antonio* (1845), 6 L. T. O. S. 188.

### SUB-SECT. 2.—WHEN INTEREST MUST ATTACH.

*See Marine Insurance Act, 1906 (c. 41), s. 6.*

**592. Commencement of risk.]—**(1) An averment of interest at the time of effecting the policy is immaterial, & need not be proved; it is sufficient if *pltf.* be interested at the commencement of the risk.

(2) An American, who is owner of a ship only as trustee, & would not thereby be entitled to the privileges of the American flag under the laws of his own country, has a sufficient interest to maintain an action on a policy.—*RHIND v. WILKINSON* (1810), 2 Taunt. 237; 127 E. R. 1068.

*Annotations:—As to (1) Consd. Abitbol v. Bristow* (1816), 6 Taunt. 464; *Williams v. Baltic Insce. Assocn. of London*, [1924] 2 K. B. 282. *Refd. Doxford v. King* (1846), 8 L. T. O. S. 190.

**593. During currency of risk.]—DOXFORD v. KING, No. 485, *ante*.**

**594. At time of loss — Interest cannot be acquired by election.]—ANDERSON v. MORICE, MORICE v. ANDERSON, No. 650, *post*.**

**595. Date of re-insurance — Voyage already completed.]—BRADFORD v. SYMONDSON, No. 346, *ante*.**

**596. “Lost or not lost” policy—Executed after loss known to all parties—Previous agreement to insure.]—MEAD v. DAVISON, No. 451, *ante*.**

**597. — Interest acquired after partial loss—Damage not known at time.]—A party may make**

an insurance on goods, lost or not lost, though he have acquired his interest in them after a partial loss, unless he bought them with a knowledge of the damage.—*SUTHERLAND v. PRATT* (1843), 11 M. & W. 296; 2 Dowl. N. S. 813; 12 L. J. Ex. 235; 7 Jur. 261; 152 E. R. 815.

*Annotations:—Refd. Redmond v. Smith* (1844), 7 Man. & G. 457; *Doxford v. King* (1846), 8 L. T. O. S. 190; *Small v. Gibson* (1846), 11 Q. B. 311; *Hartley v. Century* (1853), 9 Exch. Mutual worth v. *Insurance Marine Insce. Co. v. London & Lancashire Insce. Co.* (1853), 13 Q. B. 470; *Thomas v. Watkins* (1852), 7 Exch. 630.

### SUB-SECT. 3.—NATURE AND EXTENT OF INTEREST.

#### A. In General.

*See, generally, Part I., Sect. 4, ante.*

**598. Interest liable to loss or detriment.]—**The profits of a cargo employed in trade on the coast of Africa are an insurable interest.

As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses & disadvantages which, but for the perils insured against, the assured would not suffer; & in every maritime adventure the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port. If they do not arrive, his loss in such case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain, without more risk than the capital itself would be liable to; & if, when the capital is subject to all risks of maritime commerce, it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? (*LAWRENCE, J.*)—*BARCLAY v. COUSINS* (1802), 2 East, 544; 102 E. R. 478.

*Annotations:—Consd. Hodgson v. Glover* (1805), 6 East, 316; *Wilson v. Jones* (1867), L. R. 2 Exch. 139. *Refd. Lucena v. Craufurd* (1806), 2 Bos. & P. N. R. 269.

#### B. Expectation of Gain.

**599. General rule — Expectancy insufficient.]—***MORAN, GALLOWAY & Co. v. UZIELLI*, No. 57, *ante*.

**600. By purchaser of goods.]—STOCKDALE v. DUNLOP, No. 641, *post*.**

**601. By person not interested in ship freight or cargo.]—***Pltfs.* advanced money for disbursements to the captain of an Italian ship at Pensacola, & took from him a document reading:—“Ten days after arrival at . . . Southampton . . . I promise to pay £760 . . . for the payment of which I hereby pledge my vessel & freight, & my consignees at port of destination are hereby directed to pay this amount from . . . freight received.” *Pltfs.* effected an insurance with *defts.* upon “advances valued at £775” from Pensacola to Southampton, & expressed to be “free of all average.” Through perils of the seas the ship became a total loss at the Azores, but cargo was salvaged, upon which the master received £790 distance freight:—*Held: pltfs.* could not recover a total loss under the policy.

I doubt whether a man can create in himself an insurable interest by merely agreeing with his debtor that the debt due to him shall only be payable on the arrival of a ship. He must have



some interest in the ship, her freight, or her cargo—some interest in the property in peril. A man may be largely interested in the arrival of a ship & yet have no insurable interest in her, as where the ship is bringing goods to a market where the man deals, which, when they arrive, he can buy & so fulfil his contracts & thereby save himself from loss (BIGHAM, J.).—PRICE *v.* MARITIME INSURANCE Co. (1900), 16 T. L. R. 481; 5 Com. Cas. 332; *affd.*, [1901] 2 K. B. 412, C. A.

**602. Bounty usually granted by foreign government.]**—A French law, provides that “the vessel which shall have fished, either in the Pacific by doubling Cape Horn, or by passing through the Straits of Magellan, or to the south of Cape Horn, at 62 degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back in the produce of its fishery one half at least of its burden, or if it can prove a navigation of sixteen months at least”:—*Held*: the practice of the French govt. to allow the bounty under such circumstances was a mere matter of expectation, & did not constitute a vested interest which could be the subject of insurance.

It is undoubtedly true that in the case of *Le Cras v. Hughes*, No. 639, *post*, the ct. expressed a decided opinion that the expectation of future benefit, founded on the contingency of a future grant from the Crown, but warranted by universal practice, did amount to an insurable interest. But after the observations made on that case by LORD ELDON, C., in giving judgment in the House of Lords in *Lucena v. Craufurd*, No. 555, *ante*, & by LORD ELLENBOROUGH in *Routh v. Thompson*, No. 471, *ante*, the doctrine laid down in *Le Cras v. Hughes*, No. 639, *post*, if still to be treated as a binding authority must be considered incapable of being extended & as confined to cases falling strictly within the same circumstances (TINDAL, C.J.).—DEVAUX *v.* STEELE (1840), 6 Bing. N. C. 358; 8 Scott, 637; 133 E. R. 138.

**603. Commission & brokerage—Expected to be earned—Insurance effected after damage to ship.]**—A ship while on a voyage to Algoa Bay, grounded on a reef outside the bay, & sustained damage. She was taken into the harbour, the intention being to repair her sufficiently for a voyage to Cape Town where she would be properly repaired. Before the temporary repairs were executed, she became a total loss in the harbour, the loss not being due to perils of the sea, but to the injuries the ship had previously sustained. Pltfs., after the ship grounded, effected an insurance of “disbursements” per the ship at & from Algoa Bay to Cape Town. The interests intended to be conveyed were the commission & brokerage which the managing owners of the ship, & pltfs., as insurance brokers for the managing owners, respectively, expected that they would continue to earn:—*Held*: (1) the ship was never seaworthy for any stage of the insured voyage, & the risk on the policy never attached; (2) pltfs. & the managing owners had no insurable interest.

(3) *Seem*: the term “disbursements” is properly used in a policy of marine insurance to describe any interest which is outside the ordinary interests of hull, machinery, cargo, & freight.

(4) A vessel whether new or old, must, before entering on any stage of an insured voyage, be reasonably fit to encounter the perils of that stage

(BIGHAM, J.).—BUCHANAN & Co. *v.* FABER (1899), 15 T. L. R. 383; 4 Com. Cas. 223.

*Annotations*:—As to (2) *Reid*. Gedge *v.* Royal Exchange Assce. Corp., [1900] 2 Q. B. 214. *Generally*, *Mentd.* Royal Exchange Assce. Corp. *v.* Sjöforsakrings Akt. Vega (1901), 70 L. J. K. B. 874.

*See, further*, Sub-sect. 3, O., *post*.

### C. Partial Interest.

*See* Marine Insurance Act, 1906 (c. 41), s. 8.

**604. General rule.]**—CASTELLAIN *v.* PRESTON, No. 156, *ante*.

**605. In ship.]**—ROBERTSON *v.* HAMILTON, No. 674, *post*.

**606. In goods.]**—If a British subject has an interest in any part of a cargo, on a valued policy, he may recover to the extent of the policy on a count averring interest in himself, if he proves some interest, although alien enemies may be interested in other parts of the cargo—FEISE *v.* AGUILAR (1811), 3 Taunt. 506; 128 E. R. 201.

**607.** ———.]—INGLIS *v.* STOCK, No. 651, *post*.

**608. In freight.]**—GRIFFITHS *v.* BRAMLEY-MOORE, No. 551, *ante*.

### D. Defeasible or Contingent Interest.

*See* Marine Insurance Act, 1906 (c. 41), s. 7 (1), (2).

**609. Liability as common carrier—To third persons.]**—Carriers on a canal effected an insurance for twelve months upon goods on board of thirty boats named, between London, Birmingham, etc., backwards & forwards, with leave to take in & discharge goods at all places on the line of navigation. The insurance was agreed to be £12,000 on goods, as interest might appear thereafter; the claim on the policy warranted not to exceed £100 per cent.: & £3,000 only were to be covered by the policy in any one boat on any one trip. The premium was 30s. per cent.:—*Held*: (1) an insurance “on goods” was sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject-matter of insurance be rightly described, the particular interest in it need not be specified; (2) the policy was not exhausted when once goods to the value of £12,000 had been carried by all the boats, or by each of them, but that it continued, throughout the year, to protect all the goods afloat at any one time, up to the amount insured; (3) upon the loss of goods on board one of the boats, the assured was entitled to recover that proportion of such loss which £12,000 bore to the whole value of the goods afloat at the time; & not the proportion of £12,000 to the whole amount carried during the year.—CROWLEY *v.* COHEN (1832), 3 B. & Ad. 478; 1 L. J. K. B. 158; 110 E. R. 172.

*Annotations*:—As to (1) *Distd.* Joyce *v.* Kennard (1871), 41 L. J. Q. B. 17. *Reid*. L. & N. W. Ry. *v.* Glyn (1859), 28 L. J. Q. B. 188; Seagrave *v.* Union Marine Insce. (1866), L. R. 1 C. P. 305; Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596; Mackenzie *v.* Whitworth (1875), 1 Ex. D. 36; Cunard E.S. Co. *v.* Marten, [1902] 2 K. B. 624.

**610.** ———.]—JOYCE *v.* KENNARD, No. 2041, *post*.

**611.** ———.]—Pltf., a wool merchant at Bradford, bought wool in London & handed a delivery order to deft., who shipped the wool on board his steamer in London, carried it by sea to Goole, & forwarded it by rail to Bradford, charging pltf. a through rate of £1 7s. 6d. per ton, which

### PART II. SECT. 8, SUB-SECT. 3.—C.

**605 i. In ship.]**—The part owner of a vessel may insure the shares of other owners with his own, without disclosing the interest really insured under

a policy issued to himself insuring the vessel “for whom it may concern.”—MERCHANTS MARINE INSURANCE Co. *v.* BARRS (1888), 15 S. C. R. 185.—CAN.

**606 i. In goods.]**—MERCHANTS MA-

RINE INSURANCE Co. *v.* RUMSEY (1884), 4 S. C. R. 577.—CAN.

**606 ii.** ———.]—JIVANJI NOORBOY *v.* COORJI LILLADHAR (1879), 1 L. R. 4 Bom. 305.—IND.

*Sect. 8.—Insurable interest: Sub-sect. 3, D., E. & F.]*

covered all expenses of the transit from London to Bradford, including insurance. The insurance was effected by deft., who selected the underwriters & paid the premium, after receiving directions from pltf. as to the amount per bale for which he was to insure. Pltf. did not receive possession of the policy; & on previous occasions, when losses had occurred, deft. had received payment from the underwriters, & had settled with pltf. The wool was shipped without a bill of lading. In cases where pltf. imported wool from Australia, he insured it for the whole transit, & deft. charged only £1 5s. 9d. per ton for its conveyance from London to Bradford. In an action to recover damages for injury by sea water to pltf.'s wool, bought in London & shipped by deft.'s steamer:—*Held*: deft. had insured the wool, not as agent for pltf., but to cover his own liability as carrier, & had undertaken a liability equal to that of a common carrier, & had not, either expressly or impliedly, stipulated for any limitation of his liability, & therefore was liable without proof of negligence.—*HILL v. SCOTT*, [1895] 2 Q. B. 713; 65 L. J. Q. B. 87; 73 L. T. 458; 12 T. L. R. 58; 8 Asp. M. L. C. 109; 1 Com. Cas. 200, C. A.

*Annotations*:—*Mentd.* Consolidated Tea & Lands Co. v. Oliver's Wharf, [1910] 2 K. B. 395; *Lynch v. Edwards & Fane* (1921), 90 L. J. K. B. 506.

—*See* CARRIERS, Vol. VIII., pp. 17 *et seq.*

**612. Liability for salvage expenses—Lien on cargo.**—A vessel, the *J. A.*, with cargo on board, abandoned by her crew at sea, was brought into harbour by salvors. Pltf., who was owner of the *J. A.*, applied to the Ct. of Admlty., & obtained possession of the ship & cargo on entering into recognisance as a security for the whole salvage: & he effected an insurance intended to cover the proportion of the salvage he might have to pay under the recognisance. In the policy the subject-matter of insurance was described as average expenses per *J. A.* The vessel then sailed & was totally lost with the cargo on board. Pltf. was obliged to pay the amount of his recognisance:—*Held*: (1) the cargo was liable to contribute a ratable portion of the salvage & pltf., who had become liable to pay the whole salvage, had a lien on the cargo for that ratable portion, & had consequently an insurable interest in the cargo; (2) in the policy, the description of the subject-matter as average expenses was sufficient.—*BRIGGS v. MERCHANT TRADERS' ASSOCN.* (1849), 13 Q. B. 167; 18 L. J. Q. B. 178; 13 L. T. O. S. 68; 13 Jur. 787; 116 E. R. 1227.

*Annotations*:—*Generally, Mentd.* King v. Accumulative, etc. (1857), 30 L. T. O. S. 119; *Kemp v. Halliday* (1866), 1 D. & S. 723.

**613. Liability for carriage of passengers—Passengers Act, 1852 (c. 44), ss. 46–51.**—Policy of insurance on "passage money, against all costs, charges & liabilities to which the owner or charterer might be subject under" above sects. The ship was lost by perils of the sea; the passengers were saved in a British colony, not being their place of destination; the master within six weeks forwarded them to their place of destination:—*Held*: the expenses so incurred were charges to which the owner was subject under sects. 49 & 50, & might be recovered under the policy.—*GIBSON v. BRADFORD* (1855), 4 E. & B. 586; 3 C. L. R. 1192; 24 L. J. Q. B. 159; 7 L. T. 533; 1 Jur. N. S. 520; 3 W. R. 183; 119 E. R. 215.

*Annotation*:—*Refd.* Willis v. Cooke (1855), 5 E. & B. 641.

**614.** ———.]—A policy of insurance was made at & from Liverpool to Boston on passage

money valued at £700. The policy was in the usual printed form, with this memorandum: "On passage money of emigrants, subject to pay a loss *pro rata*, & subject to the clauses & conditions made under sects. 47 to 51 of Passengers Act, 1852, compensation clause excepted, & against these risks only." The ship being a passenger ship within the Act, sailed, & by a peril of the sea was driven into F., a foreign port, where she necessarily remained repairing damages for more than six weeks, after which she proceeded with the passengers to Boston & arrived there. During the detention at F., the passengers were maintained by the insured at a cost exceeding the passage money:—*Held*: this was a loss incurred under the enumerated sects. & the underwriters were not liable to make it good.—*WILLIS v. COOKE* (1855), 5 E. & B. 641; 25 L. J. Q. B. 16; 26 L. T. O. S. 121; 1 Jur. N. S. 1164; 4 W. R. 54; 119 E. R. 619.

**615.** ———.]—Pltfs., shipowners, effected with defts. a policy "against all costs, charges & liabilities to which the owners or charterers of the ship *M. P.* might be subject under above sects. The ship struck on a bank about sixty miles from her port of discharge on the voyage insured; & the captain incurred a large expense in hiring steamers, into which, after vain endeavours to haul the vessel off the bank, he transferred her passengers, who were taken on board such steamers to their destination:—*Held*: assuming the expense was within the policy, in estimating it such part of the expenditure as had reference to the attempts to get the vessel off, so that she might prosecute her voyage, ought not to be taken into account, but only so much of the hire of the steamers as was paid for the carrying the passengers to the place where the voyage ought to have terminated. *Qu.*: whether pltfs. were entitled to recover anything.—*BAINES v. ROYAL EXCHANGE ASSURANCE ASSOCN.* (1858), 30 L. T. O. S. 277; 6 W. R. 247.

**616.** ——— *Merchant Shipping Act, 1894 (c. 60), ss. 328–331.*—Pltfs., the owners of a ship, effected an insurance by a Lloyd's policy on passage money of a specified amount plus 50 per cent. to Australia & New Zealand "against passenger Act . . . to cover any disbursements that may be made by the assured arising from accident or loss on account of passengers for conveyance to intended destination." The ship, after starting on the voyage with a number of emigrant passengers on board who had paid the passage money referred to in the policy, met with an accident, & in consequence the passengers were transferred to other ships, in accordance with the provisions of above Act, in which they were conveyed at pltf.'s expense to their destination. Pltf.'s ship was repaired & subsequently proceeded on the voyage with a fresh lot of passengers on board. Pltfs. claimed to recover as a loss under the policy the money paid by them for the conveyance of the passengers on the other ships:—*Held*: (1) the policy was an insurance of disbursements which might be made in respect of the passengers whose passage money was referred to in the policy; (2) the passage money paid by the second lot of passengers could not be treated as salvage; & pltfs. were entitled to recover the sum claimed as a loss under the policy.—*NEW ZEALAND SHIPPING CO., LTD. v. DUKE*, [1914] 2 K. B. 682; 83 L. J. K. B. 1300; 111 L. T. 37; 30 T. L. R. 385; 12 Asp. M. L. C. 507; 19 Com. Cas. 223.

**617. Liability for loss caused by jettison.**—C. & co., shipowners, were in the habit of receiving shipments of cotton to be carried on deck, some-



times at the shipper's request & at his risk, in which case the bill of lading expressed it to be so shipped, & sometimes for their own convenience, in which case it was at their own risk, & a clean bill of lading was given. To protect themselves against probable loss by jettison in the case of cotton shipped as last mentioned, C. & co., through pltf., their insurance broker, had effected with defts., on Mar. 29, 1864, an open policy to a certain specified amount, to be subsequently declared on. A parcel of cotton consisting of one hundred & two bales was shipped on Dec. 20, 1864, at Alexandria, on board a ship belonging to C. & co. This cotton was intended to be shipped on deck at shipper's risk, but by mistake C. & co.'s agent gave a clean bill of lading in respect of it. Being supposed to be at shipper's risk, it was not declared under the policy, but other shipments of cotton on various vessels, some of them subsequent in date to the shipment of Dec. 20, were declared to the full amount of the policy. The one hundred & two bales were lost by jettison, & the holders of the bill of lading claimed payment of the value of the cotton. Pltf. thereupon altered the declarations on the policy by declaring the one hundred & two bales, in substitution for a portion of the cotton subsequently shipped. According to the usage of the insurance business, as found in a special case stated between pltf. & defts. in an action to recover the value of the one hundred & two bales on the policy of Mar. 29, in the case of policies on ships to be declared the policy attaches to the goods as soon as & in the order in which they are shipped, in which order the assured is bound to declare them. In case of mistake as to the order of shipment, he is bound to rectify the declarations, which is sometimes done even after loss:—*Held*: (1) C. & co. had an insurable interest in the one hundred & two bales of cotton, inasmuch as by the terms of the bill of lading, signed by their agent, & by which they were bound, the cotton was at their risk; (2) the usage, as stated in the case, was binding, since it was not unreasonable, & by virtue of it the declaration on the policy could be rectified even after the loss was known; even apart from the usage as stated, the doctrine to be deduced from the authorities is that, according to the usage of merchants & underwriters recognised by the cts. without parol proof in each case, a declaration may be altered even after the loss is known, if such alteration be made without fraud, of which there was no evidence in the present case; & pltf. was, on these grounds, entitled to recover the value of the one hundred & two bales on the policy of Mar. 29.—*STEPHENS v. AUSTRALASIAN INSURANCE CO.* (1872), L. R. 8 C. P. 18; 42 L. J. C. P. 12; 27 L. T. 585; 21 W. R. 228; 1 Asp. M. L. C. 458.

*Annotations*:—As to (1) *Folld.* Allison v. Bristol Marine Insce. (1876), 1 App. Cas. 209. *Refd.* Ebsworth v. Alliance Marine Insce. (1873), L. R. 8 C. P. 596; Reliance Marine Insce. v. Duder (1912), 81 L. J. K. B. 870; Union Insce. Soc. of Canton v. Wills, [1916] 1 A. C. 281; Dunlop v. Townend, [1919] 2 K. B. 127. As to (2) *Refd.* Imperial Marine Insce. v. Fire Insce. Corp'n. (1879), 4 C. P. D. 166. *Generally, Mentd.* Parsons v. New Zealand Shipping Co., [1901] 1 K. B. 548.

**618. Defeasible Interest—Buyer of goods with right to reject.**—B. sold to pltf., to be delivered at Portsmouth, from five hundred to seven hundred barrels of oats, to be shipped by J. from Youghall;

four days afterwards B. advised pltf. that J. had engaged room in the packet to take about six hundred barrels of oats on pltf.'s account; on the following day pltf. insured £400 on oats per the packet; the oats were shipped; but the packet being bound for Southampton & refusing to touch at Portsmouth, B. sold the oats again, & delivered the bill of lading to O. at Southampton; pltf. insisting that he was entitled to the oats, & would assert his right by action; in the meantime the packet was lost, & after a long dispute, pltf., in consideration of £60 by indorsement on the policy vested the interest in the insurance in B.:—*Held*: pltf. had a sufficient interest to sue deft., the underwriter, on this policy.

If pltf. had an insurable interest at the time the policy was effected, whatever change may have taken place in the property in the oats since, can have no effect in relieving the underwriters from their liability, as pltf. may sue on the policy for the benefit of the party, to whom such property has passed (*TINDAL, C.J.*).—*SPARKES v. MARSHALL* (1836), 2 Bing. N. C. 761; 2 Hodg. 44; 3 Scott, 172; 5 L. J. C. P. 286; 132 E. R. 293.

*Annotations*:—*Distd.* Anderson v. Morice (1876), 1 App. Cas. 713. *Refd.* Powles v. Innes (1843), 11 M. & W. 10; Duxford v. King (1846), 8 L. T. O. S. 190; Inglis v. Stock (1885), 10 App. Cas. 263.

**619.** ———.] — *ANDERSON v. MORICE, MORICE v. ANDERSON*, No. 650, *post*.

**620.** ———.] — *COLONIAL INSURANCE CO. OF NEW ZEALAND v. ADELAIDE MARINE INSURANCE CO.*, No. 652, *post*.

See Marine Insurance Act, 1906 (c. 41), s. 7 (2).

#### *E. Interest in Ship.*

See Marine Insurance Act, 1906 (c. 41), s. 14 (3).

**621. Shipowner's interest—In use of ship.**—*MANCHESTER LINERS, LTD. v. BRITISH & FOREIGN MARINE INSURANCE CO., LTD.*, No. 1685, *post*.

**622.** ——— *Covenant by charterers to pay full value in event of loss.*—Where it is stipulated by a charterparty that in case the ship is lost during the voyage, the charterer shall pay the owner a sum of money, which is estimated as the value of the ship, the owner has still an insurable interest in the ship during the voyage.

If a chartered ship be lost by means of the captain engaging in an illegal trade in obedience to the orders of the charterers, this is not a loss by barratry, for which the owner of the ship can recover against the underwriters.—*HOBBS v. HANNAM* (1811), 3 Camp. 93, N. P.

*Annotation*:—*Refd.* Small v. United Kingdom Marine Mutual Insce. Asscn. (1897), 66 L. J. Q. B. 736.

#### *F. Interest in Freight.*

See Marine Insurance Act, 1906 (c. 41), s. 90, sched. I., r. 16.

**Freight as designation of subject-matter.**—See Sect. 7, sub-sect. 1, B. (d), *ante*.

**623. General rule.**—*LUCENA v. CRAUFURD*, No. 639, *post*.

**624. Interest of shipowner—Results from ownership of ship.**—Two partners purchased a ship, under a bill of sale conformable to 26 Geo. 3, c. 60; afterwards they took in two other partners, but there was no transfer of the ship to them jointly with the others:—*Held*: the four partners had

#### **PART II. SECT. 8, SUB-SECT. 3.—E.**

**621 i. Shipowner's interest—In use of ship.**—*SMITH v. FLEMING & Co.* (1849), 12 Dunl. (Ct. of Sess.) 138; 22 Sc. Jur. 7.—*SCOT*.

#### **PART II. SECT. 8, SUB-SECT. 3.—F.**

**624 i. Interest of shipowner—Results**

*from ownership of ship.*—Freight as a subject matter of insurance means the benefit derived by the shipowner from the employment of the ship; & the contract of insurance against loss of freight is that the ship shall not be prevented from earning it by the perils insured against.—*DRISCOLL v. MILL-*

*VILLE MARINE INSURANCE CO.* (1883), 23 N. B. R. 160; *on appeal*, 2 S. C. R. 183.—*CAN.*

*n. Interest of charterer—Freight in excess of hire.*—*SOLOMON v. MILLER* (1865), 2 W. W. & A'B. 135.—*AUS.*

*o. Interest of stranger—Advancing*

## INSURANCE.

### *Sect. 8.—Insurable interest: Sub-sect. 3, F., G. & H.]*

not any insurable interest in the freight of the ship. The right to freight resulted from the right of ownership; & these four partners had neither a legal or an equitable title to the ship.—*CAMDEN v. ANDERSON* (1794), 5 Term Rep. 709; 101 E. R. 394.

*Annotations:—Consd.* *Curtis v. Perry* (1802), 6 Ves. 739. *Appl. Ex p. Houghton, Ex p. Gribble* (1810), 17 Ves. 251. *Refd.* *Marsh v. Robinson* (1802), 4 Esp. 98; *Mestaer v. Gillespie* (1805), 11 Ves. 621; *Ex p. Yallop* (1808), 15 Ves. 60; *Moss v. Smith* (1850), 9 C. B. 94. *Mentd.* *Keith v. Burrows* (1877), 37 L. T. 291.

**625. — Contracts not in writing.]**—A ship-owner who has entered into contracts for freight has an insurable interest in the freight though the contracts are not in writing.—*MILLER v. WARRE* (1824), 1 C. & P. 237, N. P.; *subsequent proceedings, sub nom. WARRE v. MILLER* (1825), 4 B. & C. 538.

**626. — Freight partly prepaid.]**—*ALLISON v. BRISTOL MARINE INSURANCE CO.*, No. 546, *ante*.

**627. Interest of charterer — Liability for dead freight.]**—Freighters chartered a foreign ship to take a cargo from London to St. P., & to load a cargo there & immediately return to London, paying so much freight per ton: & it was covenanted that if political or other circumstances should prevent the shipping a return cargo, or discharging the outward cargo, the freighters might detain the ship at St. P. for forty running days; & if that time elapsed without the outward cargo being delivered, & consequently without the return cargo being put on board, the master should be at liberty to return to London, & the freighters should pay him £2,500 immediately upon the arrival of the ship at London. The freighters then procured a policy of insurance, whereby the underwriters agreed to pay a total loss in case the ship was not allowed by the Russian Govt. to load a cargo at St. P. on the chartered voyage. In fact the Russian Govt., when the ship arrived at St. P. presuming that the outward cargo was British, refused permission to unload her, & consequently she could not take in a Russian cargo: on which the master, judging for the best, proceeded immediately to Stockholm, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo to London, & earned freight thereon:—*Held*: (1) the insurance was legal in the terms of it; (2) the refusal of the Russian Govt. to permit the ship to unload her outward cargo, was, in effect & within the meaning of the contracting parties, a refusal to allow her to load a cargo at St. P.; & consequently a total loss within the policy was incurred; (3) the proceeding directly from St. P. to London was not a condition precedent to the master's right to recover from the freighters the dead freight of £2,500; but that he was entitled to the same notwithstanding the intermediate voyage to Stockholm, under the circumstances; & consequently the freighters were entitled to recover the same from the underwriters. But, as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from Stockholm to London, though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency, therefore the underwriters were entitled to make the same deduction from the total loss

*freight spontaneously.]*—A party, being a stranger to the property in both a vessel & her cargo, cannot create an

insurable interest in the freight by spontaneously advancing the amount of such freight to the master or owner

stipulated for by the policy in the event which had happened; every contract of insurance being in its nature a contract of indemnity.—*PULLER v. STANFORTH* (1809), 11 East, 232; 103 E. R. 993. *Annotations:—Distd.* *Bell v. Puller* (1810), 12 East, 496, n.; *Puller v. Halliday* (1810), 12 East, 494.

### *G. Interest in Advance Freight.*

See Marine Insurance Act, 1906 (c. 41), s. 12; SHIPPING.

**628. General rule — Advance must not be mere loan.]**—Where the memorandum for charter stated one half of the freight to be paid in cash on unloading & right delivery, & the remainder by bill on London at four months' date; & then, after containing stipulations for unloading, discharging, demurrage, etc., added, "the captain to be supplied with cash for the ship's use"; & in pursuance of the last stipulation, the master drew a bill on the freighters, which was duly accepted & paid:—*Held*: this was not to be considered as a payment of freight in advance, but as a loan to the owner of the ship, & the ship having been lost on her homeward voyage, the freighters had no insurable interest in such bill.

If the memorandum of charterparty had clearly expressed that the money advanced should be in part payment of the freight, then it would follow, that the loss of the ship would produce a loss of the money advanced to the freighter, & he would have an insurable interest in it. But, if that be not so, & it be only a loan by the freighter, he would have no insurable interest, having a remedy against the owner for the debt (*BAYLEY, J.*).—*MANFIELD v. MAITLAND* (1821), 4 B. & Ald. 582; 106 E. R. 1049.

*Annotations:—Consd.* *The Salacia* (1862), Lush. 578; *Allison v. Bristol Marine Insee.* (1876), 1 App. Cas. 209. *Refd.* *The Karnak* (1868), L. R. 2 A. & E. 289.

**629. — —.]**—The only question is whether this was a mere loan or an advance of freight. . . . A sum of £300 is to be advanced, subject to certain conditions, one of which is for insurance. If it is to be insured, it must be for freight in advance; for a mere loan could not be insured; & if it is not a mere loan but advance of freight, *pltf.* cannot recover it back (*LORD CAMPBELL, C.J.*).—*HICKS v. SHIELD* (1857), 7 E. & B. 633; 26 L. J. Q. B. 205; 29 L. T. O. S. 106; 3 Jur. N. S. 715; 5 W. R. 536; 119 E. R. 1380.

*Annotations:—Consd.* *Byrne v. Schiller* (1870), L. R. 6 Exch. 20; *Allison v. Bristol Marine Insee.* (1876), 1 App. Cas. 209. *Refd.* *Frayes v. Worms* (1865), 19 C. B. N. S. 159; *Droege v. Stuart, The Karnak* (1869), L. R. 2 P. C. 505; *Dufourcet v. Bishop* (1886), 18 Q. B. D. 373; *Rodoconachi v. Milburn* (1886), 17 Q. B. D. 316. *Mentd.* *The Newport* (1858), Sw. 335.

**630. — —.]**—If they are advances of freight the lender has an insurable interest in an advance which is to be lost if freight is not earned; but he has no such interest in an absolute debt (*SIR WILLIAM ERLE*).—*DROEGE v. SUART, THE KARNAK* (1869), L. R. 2 P. C. 505; 6 Moo. P. C. C. N. S. 136; 38 L. J. Adm. 57; 21 L. T. 159; 17 W. R. 1028; 3 Mar. L. C. 276; 16 E. R. 677, P. C.

*Annotations:—Refd.* *Currie v. Bombay Native Insee.* (1869), L. R. 3 P. C. 72. *Mentd.* *The Empire of Peace* (1869), 39 L. J. Adm. 12; *The Staffordshire* (1871), 25 L. T. 137; *The Ida* (1872), L. R. 3 A. & E. 542; *Miedbrodt v. Fitzsimon, The Energie* (1875), 32 L. T. 579; *The Dora Forster*, [1900] P. 241.

**631. Advances for disbursements — Against freight—By agreement.]**—C. & co. the owners of a brig, wrote to *pltf.*, merchants at New Orleans, to procure a freight for the vessel, stating that if

of the vessel.—*ORCHARD v. INSURANCE CO.* (1856), 5 C. P. 445. CAN.



pltf's. accepted a charter for Great Britain they preferred the captain drawing against freight. In this letter was inclosed a letter from C. & co. to the captain, in which they referred him to pltf's. to procure a charter for the vessel. The captain showed his letter to pltf's., & asked them if they would draw on account of freight, & they said they would. The vessel was loaded as a general ship for Liverpool, & was intended to be consigned to M. & co. ; pltf's. wrote to C. & co., informing them that the vessel was being loaded as a general ship, & stating that they would draw upon the freight for the amount of disbursements. The captain accordingly drew on M. & co., requesting them to charge the same to account of freight. M. & co. refused to accept the draft, & it was indorsed to G. & co. pltf's.' agents, who effected an insurance on the freight. The vessel was lost by perils of the seas on her voyage from New Orleans to Liverpool. In an action by pltf's. on the policy :—*Held* : pltf's. had an insurable interest, & it was correctly described as "advance on account of freight."—*WILSON v. MARTIN* (1856), 11 Exch. 684 ; 25 L. J. Ex. 217 ; 156 E. R. 1005.

*Annotation* :—*Reid*. *Seagrave v. Union Marine Insee.* (1866), L. R. 1 C. P. 305.

**632. Construction of charterparty—Effect of stipulation to insure.]—**ALLISON *v.* BRISTOL MARINE INSURANCE CO., No. 546, *ante*.

—See SHIPPING.

633. Shipowner's Interest.]—ALLISON v. BRISTOL MARINE INSURANCE CO., No. 546, *ante*.

**634.** —.] — From the moment when it becomes payable advanced freight cannot be insured by the shipowner. The freight according to the contract, is then due to him by virtue of the contract at that time & at that moment. That does not depend upon whether the ship arrives or not; it is payable at that moment. It is money payable on contract, & on contract not depending upon any vicissitude of the voyage at all. In that case the shipowner cannot insure it; but the person who has paid it, or become liable to pay it, can insure it (LORD ESHER, M.R.). —*ORIENTAL S.S. Co. v. TYLOR*, [1893] 2 Q. B. 518; 63 L. J. Q. B. 128; 69 L. T. 577; 42 W. R. 89; 9 T. L. R. 591; 7 Asp. M. L. C. 377; 4 R. 554, C. A.

**Annotations:—Mentd.** *Hawes v. Scott* (No. 2) (1896), 40 Sol. Jo. 373; *Holford v. Acton U. C.*, [1898] 2 Ch. 240; *Foster & Dicksee v. Hastings Corpn.* (1903), 87 L. T. 736; *Moel Tryvan Ship Co. v. Kruger*, [1907] 1 K. B. 809; *Nollisment v. Bunge & Born*, [1917] 1 K. B. 160.

635. ———.]—THE RED SEA, No. 2352, *post.*

**636. Charterer's Interest.]**—Until he becomes liable to pay the advance freight, he [the charterer] has no insurable interest in it; he has no insurable interest in any freight except that which he is actually liable to pay (LORD ESHER, M.R.).—SMITH, HILL & Co. v. PYMAN, BELL & Co., [1891] 1 Q. B. 742; 60 L. J. Q. B. 621; 64 L. T. 436; 39 W. R. 466; 7 T. L. R. 417; 7 Asp. M. L. C. 7, C. A.

*Annotation*:—**Reid**. *Oriental S.S. Co. v. Tylor*, [1893] 2 Q. B. 518.

637. —.]—ORIENTAL S.S. CO. v. TYLOR, No. 634, ante.

638. ———.]—THE RED SEA, No. 2352, *post.*

### *H. Interest in Profits.*

**689. What interest insurable—Not speculation in profits.]**—It would be a strange thing if freight could not be the subject of protection by an instrument which had its origin from commerce & was introduced for the very purpose of giving security to mercantile transactions. It is a solid substantial interest ascertained by contract, &

arising from labour & capital employed for the purposes of commerce (CHAMBRE, J.).

The insurance of profits ascertained by positive contract may be equally just & reasonable, & is hardly to be distinguished in principle from the case of freight. . . . A mere speculation on profit is not insurable (CHAMBRE, J.).—LUCENA v. CRAUFURD (1802), 3 Bos. & P. 75; 127 E. R. 42, Ex. Ch.; *on appeal* (1806), 2 Bos. & P. N. R. 269, H. L.

**Annotations:—***Refd.* Hodgson v. Glover (1805), 6 East, 316; Routh v. Thompson (1809), 11 East, 428; Stirling v. Vaughan (1809), 11 East, 619; Cousins v. Nantes (1811), 3 Taunt. 513; Robertson v. Hamilton (1811), 14 East, 522; Routh v. Thompson (1811), 13 East, 274; Taylor v. Wilson (1812), 15 East, 324; Cohen v. Hannam (1813), 5 Taunt. 101; Hagedorn v. Oliverson (1814), 2 M. & S. 485; Bell v. Jutting (1817), 1 Moore, C. P. 155; Devaux v. Steele (1840), 6 Bing. N. C. 358; M'Swiney v. Royal Exchange Assee. (1849), 14 Q. B. 634; Dalby v. India & London Life Assee. (1854), 15 C. B. 365; Wilson v. Jones (1867), L. R. 2 Exch. 139; Lloyd v. Fleming, Lloyd v. Spence (1872), L. R. 7 Q. B. 299; Ebsworth v. Alliance Marine Insee. (1873), L. R. 8 C. P. 596; Mackenzie v. Whitworth (1875), 1 Ex. D. 36; Anderson v. Morice (1876), 1 App. Cas. 713; Alkins v. Jupe (1877), 2 C. P. D. 375; Moran, Galloway v. Uzielli, [1905] 2 K. B. 555; Macaura v. Northern Assee., [1925] A. C. 619. **Mentd.** Hull v. Pickersgill (1819), 1 Brod. & Bing. 282; Clement v. Lewis (1822), 10 Price, 181.

640. — Cargo employed in trade.]—BARCLAY  
v. COUSINS, No. 598, *ante*.

641. — Present interest in cargo.] — H. & co., being the owners of two ships, called the *Antelope* & the *Maria*, trading to the coast of Africa, & which were then expected to arrive in Liverpool with cargoes of palm oil, agreed verbally to sell to pltfs. 200 tons of oil, 100 tons to arrive by the *Antelope*, & 100 tons to arrive by the *Maria*. The *Antelope* did afterwards arrive with 100 tons of oil on board, which were delivered by H. & Co. to pltfs. The *Maria* having 50 tons of palm oil on board was lost by perils of the sea. Pltfs. having insured the oil on board the *Maria*, together with their respective profits thereon:—*Held*: they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.

At the time of the insurance & of the loss there was merely an expectation of possession on the part of pltfs. founded on the mere promise of the vendors, but there was a total absence of interest in the subject-matter of the insurance (PARKE, B.).

I admit that profits may be insured, but that is on the ground that they form an additional part of the value of the goods, in which the party has already an interest. Thus, the owner of goods on board a vessel may insure the profits to arise from them. So may a consignee, or a factor in respect of his commission. So may captors, because they have a lawful possession, coupled with a well-founded expectation that their claim to retain the goods will be allowed. So may the owners of shares, or a captain in respect of his commission. In these cases there is either an absolute or a special property in possession. Then the profits are insured as an additional value upon the goods, in which the insurer has a present interest. Here, however, the assured are not interested at the time of the goods being put on board, but only upon their arrival (PARKE, B.). —*STOCKDALE v. DUNLOP* (1840), 6 M. & W. 224; 9 L. J. Ex. 83; 7 L. T. 804; 4 Jur. 681; 151 E. R. 391.

**Annotations:—***Consd. Stock v. Inglis* (1882), 9 Q. B. D. 708. *Reid. Sutherland v. Pratt* (1843), 11 M. & W. 296; *Royal Exchange Assce. v. M'Swiney* (1850), 19 L. J. Q. B. 222. *Mentd. Johnson v. Macdonald* (1842), 9 M. & W. 600; *Meredith v. Melgh* (1853), 17 Jur. 649; *Felthouse v. Bindley* (1862), 11 C. B. N. S. 869.

642. — — —.] — Policy upon any kind of goods, etc., valued at £1,000, being on profits

*Sect. 8.—Insurable interest: Sub-sect. 3, H., I. & J.]*

expected to arise on the cargo of the ship in the event of her safe arrival at Quebec, & in case of loss the insurers agree to pay the same without any other voucher than the policy:—*Held*: this policy was not void within 19 Geo. 2, c. 37, but the insured were entitled to recover.—*GRANT v. PARKINSON* (1781), 3 Doug. K. B. 16; 99 E. R. 515.

*Annotations*:—*Consd.* *Barclay v. Cousins* (1802), 2 East, 544; *Lucena v. Craufurd* (1806), 2 Bos. & P. N. R. 269. *Reid.* *Le Cras v. Hughes* (1782), 3 Doug. K. B. 81; *Thompson v. Taylor* (1795), 6 Term Rep. 483; *Hodgson v. Glover* (1805), 6 East, 316; *Truscott v. Christie* (1820), 5 Moore, C. P. 33; *Murphy v. Bell* (1828), 4 Bing. 567; *Devaux v. Steele* (1840), 6 Bing. N. C. 358.

**643.** ———.]—*ROYAL EXCHANGE ASSURANCE v. M'SWINEY*, No. 558, *ante*.

**644.** ———.]—(1) Declaration alleged pltf. had chartered a ship, then on her way to New York, to proceed to Quebec after discharging at New York, & to load at Quebec from pltf.'s factor a cargo of timber, & therewith proceed to Liverpool. That, at the time of such chartering, the ship was on her voyage to New York. That pltf. contracted with R. of Quebec for the purchase of a cargo of timber. That the ship proceeded from New York to Quebec, for the purpose of loading the cargo, & if she had not been lost, would have arrived at Quebec & loaded the cargo. That pltf. directed his broker to effect a policy of insurance on the profits on such cargo. That the broker effected a policy, which deft. underwrote, "lost or not lost, at & from," then followed the written words "New York to Quebec, during the ship's stay there for any purpose, & back to Liverpool"; & then, in print, "beginning the adventure upon the said goods & merchandises from the loading thereof on board the said ship"; the ship, goods & merchandises "shall be valued," then, in written words, "£1,000, on profit on cargo." That the ship, on her voyage from New York, & before reaching Quebec, was lost by the perils of the seas; that the cargo was awaiting her arrival at Quebec, & in consequence of her loss, could not be shipped during the shipping season; & the profits were lost by the perils of the seas. On demurrer:—*Held*: the cargo never having been on board the ship, the policy never attached, & pltf. could not recover from deft. in an action thereon.

(2) The declaration set forth a correspondence between pltf. & his broker, which was alleged to have been made known to deft. at the time of the effecting the policy, & from which it was contended it appeared that the intention had been to insure against the profits being lost by reason of a loss of the ship between New York & Quebec. It was further alleged that the premium was larger than the premium would have been for an insurance not covering such loss:—*Held*: these circumstances could not be taken into consideration in interpreting the policy.—*HALHEAD v. YOUNG* (1856), 6 E. & B. 312; 25 L. J. Q. B. 290; 2 Jur. N. S. 970; 4 W. R. 530; 119 E. R. 880; *sub nom.* *HALLHEAD v. YOUNG*, 27 L. T. O. S. 100.

*Annotation*:—*As to* (1) *Reid.* *Chope v. Reynolds* (1859), 5 C. B. N. S. 642.

**645.** ——— *Profit on adventure—Laying Atlantic cable.*]—*WILSON v. JONES*, No. 709, *post*.

**646.** *Valued policy—Necessity for proof that some profit would have been made.*]—Upon an insurance on profits, valued at £400, where pltf.

declared as for a total loss, & it appeared that after a shipwreck by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the market, & were there sold; & it did not appear what profit was made of them, or whether if all had arrived any profit would have been made; though it was found that the produce of those who were sold did not give a profit upon the whole adventure:—*Held*: pltf. was not entitled to recover.—*HODGSON v. GLOVER* (1805), 6 East, 316; 102 E. R. 1308.

**647.** *Open policy—Amount of profit must be shown.*]—*EYRE v. GLOVER*, No. 2484, *post*.

*I. Charges of Insurance.*

*See* Marine Insurance Act, 1906 (c. 41), s. 13.

*J. Vendor and Vendee.*

*See, generally*, SALE OF GOODS.

**648.** *Insurable interest in vendee—When property in goods passes.*]—*SPARKES v. MARSHALL*, No. 618, *ante*.

**649.** ——— *Price not settled.*]—There may be a complete contract so as to pass the property in goods from the seller to the buyer, although the price has not been definitely agreed on between them.

A., who had been in the habit of buying largely of guano from B. & co., of Liverpool, at prices which were settled at the beginning of each year, wrote to them on Feb. 14, ordering a shipment of 100 tons, provided freight did not exceed 6s. 6d. On Feb. 26, B. & co. wrote in answer: "We have succeeded in fixing the schooner *Anne & Isabella* to carry about 115 tons at your limit of 6s. 6d. per ton. We presume we may value upon you at six months from the date of shipment at £10 per ton," etc.; adding in a postscript, "Please say if you purpose effecting insurance at your end." On Mar. 3, A. wrote: "I am favoured with yours of Feb. 6. You say we presume we charge you £10 per ton net cash, etc. I really cannot understand this, when I know that Mr. L. supplies your guano in Scotland at £9 15s. net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions; & now that you are making some changes, it may be as well that I should know how we are to get on for the future." He concluded with a request that some flowering shrubs should be sent to him "in charge of the captain." On the same day, A. effected an insurance on the guano per *Anne & Isabella*.

The guano was shipped at Liverpool on Mar. 4, under a bill of lading making it deliverable to B. & co. or their assigns. The bill of lading, unindorsed, was sent from Liverpool to one of the members of the firm of B. & co., then at Belfast, who was about to pay A. a friendly visit at Londonderry. That gentleman arrived at A.'s house on the evening of Saturday, Mar. 7, when he told A. that he had received the bill of lading & invoice of the guano & a draft for A.'s acceptance for the amount; & on the morning of Mar. 9 they went together to A.'s office & there the bill of lading was indorsed & handed over with the invoice to A., who thereupon accepted the bill. In the course of the same day they heard for the first time that the *Anne & Isabella* with the guano on board had been wrecked on the coast near Londonderry:—*Held*: the property in the guano passed to A. by the contract from the time of its shipment, A.'s letter

PART II. SECT. 8, SUB-SECT. 3.—J.

**648 i.** *Insurable interest in vendee—When property in goods passes.*]—*PUGH v. WYLDE* (1876), 11 N. S. R. (2 R. & C.) 177.—*CAN.*



of Mar. 3 not being a repudiation, though expressing some dissatisfaction at the price; & A. had an insurable interest in the cargo at the time of the loss.

*Semble*: A. would have had an insurable interest, even though the property in the guano had not absolutely passed to him by the contract.—*JOYCE v. SWANN* (1864), 17 C. B. N. S. 84; 144 E. R. 34.

*Annotations*:—*Consd.* *Seagrave v. Union Marine Insee.* (1866), L. R. 1 C. P. 305. *Apprvd.* *Anderson v. Morice* (1876), 1 App. Cas. 713. *Refd.* *Moakes v. Nicolson* (1865), 19 C. B. N. S. 290; *Williams v. Cohen* (1871), 25 L. T. 300; *The Parchim*, [1918] A. C. 157.

**650.** ——— **Loss of goods before risk attaches.**—(1) Applt. contracted for the purchase of rice in the following terms: "Bought for account of A., of B. & Co., the cargo of new crop Rangoon rice per Sunbeam." The day after making the contract applt. insured the rice at & from Rangoon to the United Kingdom, "as interest may appear." The ship proceeded to Rangoon, & after the greater part of the cargo had been shipped, she suddenly sank at her anchors, in fine weather, & the rice already shipped was wholly lost. In an action on the policy:—*Held*: applt. had no insurable interest in the rice, it not being at his risk till the cargo was completed.

(2) The evidence tended to show that the ship was seaworthy & in good repair on the voyage to the port where she was lost, & no direct evidence was, or could be, given why she sank:—*Held*: there was evidence of a loss by the perils insured against.

(3) It was argued, that if a purchaser of goods has an option to accept delivery of them, he might exercise such option after the goods had been lost. He might certainly if the property in the goods had been in him, for then the right would have been not a right to accept what had already become his, but to refuse them as not fulfilling the contract. That was the case of *Sparkes v. Marshall*, No. 618, *ante*, where it was held that a purchaser having a right of option to accept or reject goods might exercise that option against the underwriters after the loss of the goods *in transitu* (LORD CHELMSFORD).

(4) I agree that if pltf. had no insurable interest in the rice at the time of the loss he could not acquire such an interest by an act or election afterwards (LORD SELBORNE).—*ANDERSON v. MORICE*, *MORICE v. ANDERSON* (1876), 1 App. Cas. 713; 46 L. J. Q. B. 11; 35 L. T. 566; 25 W. R. 14; 3 Asp. M. L. C. 290, II. L.

*Annotations*:—*As to* (1) *Distd.* *Colonial Insee. of New Zealand v. Adelaide Marine Insee.* (1886), 12 App. Cas. 128. *Consd.* *The Parchim*, [1918] A. C. 157. *Refd.* *Stock v. Inglis* (1884), 12 Q. B. D. 564; *Reliance Marine Insee. v. Duder*, [1913] 1 K. B. 265. *As to* (2) *Refd.* *Ajum Goolam Hossen v. Union Marine Insee.*, *Hajee Cassim Joosub v. Ajum Goolam Hossen*, [1901] A. C. 362. *As to* (3) *Refd.* *Inglis v. Stock* (1885), 10 App. Cas. 263. *Generally, Mntd.* *Pryce v. Monmouth Canal & Ry. Cos.* (1879), 4 App. Cas. 197.

**651.** ——— **Goods not appropriated at time of loss.**—D. sold to B. 200 tons of German sugar "f.o.b. Hamburg; payment by cash in London in exchange for bill of lading"; the price to be variable according to the percentage of saccharine matter which was not to exceed or fall short of certain limits. B. resold to resp. the same quantity at an increased price, but otherwise upon similar terms. D. also sold to resp. 200 tons upon similar terms. To fulfil these contracts 390 tons, being ten tons short, were shipped in bags on one vessel at Hamburg for Bristol, no bags being set apart

for one contract more than the other. Each bag was marked with its percentage of saccharine matter, & bills of lading with marks corresponding to the bags were sent to D. to be retained till payment in accordance with the contracts. Resp. was insured in floating policies upon "any kind of goods & merchandises" between Hamburg & Bristol, & duly declared in respect of this cargo. The ship sailed from Hamburg for Bristol & was lost. After receiving news of the loss D. allocated 2,000 bags or 200 tons to B.'s contract, & 1,900 bags or 190 tons to the other contract. In an action upon the policies:—*Held*: the sales being "f.o.b. Hamburg" the sugar was at resp.'s risk after shipment, he had an insurable interest in it, & the underwriters were liable.

I am quite unable to perceive why an undivided interest in a parcel of goods on board a ship may not be described as an interest in goods just as much as if it were an interest in every portion of the goods (LORD BLACKBURN).—*INGLIS v. STOCK* (1885), 10 App. Cas. 263; 54 L. J. Q. B. 582; 52 L. T. 821; 33 W. R. 877; 5 Asp. M. L. C. 422, II. L.; *affg.* *S. C. sub nom. STOCK v. INGLIS* (1884), 12 Q. B. D. 564, C. A.

*Annotations*:—*Expld. & Distd.* *Healy v. Howlett*, [1917] 1 K. B. 337. *Consd.* *Sterne v. Vickers*, [1923] 1 K. B. 78. *Refd.* *Wimble v. Rosenberg*, [1913] 3 K. B. 743; *Colley v. Overseas Exporters*, [1921] 3 K. B. 302; *Re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67.

**652.** ———.] — (1) Where pltf. proposed to insure a wheat cargo "at & from" port, & defts., "in accordance with your written request," granted an insurance "from" port:—*Held*: there was a complete contract to insure "at & from" port.

(2) Where a contract of insurance related to wheat cargo then on board or to be shipped in the D. of S.:—*Held*: the risk commenced as soon as any portion thereof was on board.

(3) Where the charterers of a vessel were also the purchasers of a cargo of wheat to be shipped on board, & the master of the vessel from time to time received delivery from the vendors:—*Held*: such delivery from time to time was a delivery to the purchasers, it vested in them a right of possession & property, & consequently, they had an insurable interest in such wheat as had been so delivered.

The delivery of the wheat from time to time was a delivery to the purchasers, it vested in them the right of possession as well as the right of property, & at the time of the loss it was at their risk. The right which they had to return the wheat which had been delivered, in the event of the sellers neglecting, without lawful excuse, to complete the supply, did not prevent them from having an insurable interest. The interest in this case was defeasible (*per CUR.*).—*COLONIAL INSURANCE CO. OF NEW ZEALAND v. ADELAIDE MARINE INSURANCE CO.* (1886), 12 App. Cas. 128; 56 L. J. P. C. 19; 56 L. T. 173; 35 W. R. 636; 3 T. L. R. 252; 6 Asp. M. L. C. 94, P. C.

**653.** ——— **Verbal contract of sale.**—*STOCK-DALE v. DUNLOP*, No. 641, *ante*.

**654.** **Insurable interest of vendor—Ceases on property in goods passing.**—A., who had been in the habit of buying largely of guano from B. & co., of Liverpool, who sold as agents or brokers for D. & co., of the same place, at prices which were settled at the beginning of each year, wrote to them on Feb. 14, ordering a shipment of 100 tons, provided freight did not exceed 6s. 6d. On Feb. 26,

**654 i.** **Insurable interest of vendor—Ceases on property in goods passing.**—*OUTRAM v. SMITH* (1876), 11 N. S. R. (2 R. & C.) 187.—CAN.

*Sect. 8.—Insurable interest: Sub-sect. 3, J. & K.]*

B. & Co. wrote in answer: "We have succeeded in fixing the schooner *Anne & Isabella* to carry about 115 tons at your limit of 6s. 6d. per ton. We presume we value upon you at six months from the date of shipment at £10 per ton," etc.; adding in a postscript, "Please say if you purpose effecting insurance at your end." On Mar. 3 A. wrote: "I am favoured with yours of Feb. 26. You say we presume we charge you £10 per ton net cash, etc. I really cannot understand this, when I know that Mr. L. supplies your guano in Scotland at £9 15s. net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions; & now that you are making some changes, it may be as well that I should know how we are to get on for the future"; & he concluded with a request that some flowering shrubs might be sent to him "in charge of the captain." On the same day, A., through Joyce, a broker, effected an insurance on the guano per *Anne & Isabella* for £1,200. On Mar. 4 plffs. B. & Co., having received A.'s letter Mar. 3, effected with the present defts. the policy now sued upon. The guano was shipped at Liverpool on Mar. 4, under a bill of lading making it deliverable "to B. & Co. or their assigns." The bill of lading, unindorsed, was sent from Liverpool to one of the members of the firm of B. & Co., then at Belfast, who was about to pay A. a friendly visit at Londonderry. That gentleman arrived at A.'s house on the evening of Saturday, Mar. 7, & informed him verbally of the shipment, to which he made no objection; & on the morning of Monday, Mar. 9, they went together to A.'s office, & there the bill of lading was indorsed & handed over with the invoice to A., who thereupon accepted a draft for the amount, which was afterwards satisfied. In the course of the Monday they heard for the first time that the *Anne & Isabella*, with the guano on board, had been lost on the Saturday night. A. sued the underwriters on the policy effected by him, & recovered the sum insured, less £50, which he failed to receive in consequence of the insolvency of one of the underwriters, this ct. holding upon that occasion, in conformity with the verdict, that the letters of Feb. 14 & 26 & Mar. 3 constituted a complete contract so as to pass the property in the guano to A. on its shipment. An action was afterwards brought in the name of B. on the second policy, avowedly for the benefit of A., for the purpose of recovering the £50, & also certain expenses which he had been put to for extra costs, interest of money, etc., & which, it was agreed, should be together assessed at £200, if the underwriters on that policy were liable for anything. In this second action A. & B. both swore that the contract of sale was not complete until Monday, Mar. 9. The learned judge told the jury, that, in his opinion, & in this the jury agreed with him, the letters did not constitute a contract, & that there was no complete contract so as to pass the property until after the loss; & he ruled, as matter of law, that B. had an insurable interest "as an unpaid vendor, & with a bill of lading making the goods deliverable at Londonderry to him or assigns":—*Held*:

a misdirection; there being no insurable interest in B. & the ct. refused, under the circumstances, to allow an amendment, by alleging the interest to be in D. & co., B.'s principals.

We are not aware that it has ever been held that a mere agent, without possession or lien, has an insurable interest to the extent of the value of the goods, simply because his name appears in the bill of lading instead of that of his principal; & the general rule is clear, that, to constitute interest insurable against a peril, it must be an interest such that the peril would by its proximate effect cause damage to the assured (WILLES, J.).—*SEAGRAVE v. UNION MARINE INSURANCE CO.* (1866), L. R. 1 C. P. 305; Har. & Ruth. 302; 35 L. J. C. P. 172; 14 L. T. 479; 12 Jur. N. S. 358; 14 W. R. 690; 2 Mar. L. C. 331.

*Annotation*:—*Refd.* *Anderson v. Morice* (1874), L. R. 10 C. P. 58.

**655. Effect of stoppage in transitu.]**—A., in England, contracted with B. at Petersburg to send him a cargo of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, & A. effected an insurance. The ship was stranded on the voyage, near Elsinore, & the deals were saved, but so much injured as not to be worth sending for. A., on hearing of the accident, gave the underwriters notice of abandonment the day before the bill became due, which they refused to accept. B.'s agent stopped the goods in transitu at Elsinore. A. having become insolvent:—*Held*: his assignee, under a commission of bkpt. afterwards issued against him, could not recover on the policy, inasmuch as A., after the stoppage in transitu, had not any insurable interest.—*CLAY v. HARRISON* (1829), 10 B. & C. 99; 5 Man. & Ry. K. B. 17; L. & Welsb. 104; 8 L. J. O. S. K. B. 90; 109 E. R. 388.

*Annotations*:—*Refd.* *Stephens v. Wilkinson* (1831), 2 B. & Ad. 320; *Edwards v. Brewer* (1837), 2 M. & W. 375; *James v. Griffin* (1837), 2 M. & W. 623; *Stockdale v. Dunlop* (1840), 9 L. J. Ex. 83; *Wentworth v. Outhwaite* (1842), 10 M. & W. 436.

*See, further, SHIPPING.*

*K. Mortgagor and Mortgagee.*

*See* Marine Insurance Act, 1906 (c. 41), s. 14 (1), (2).

**656. General rule.]**—Upon an advance of money to enable the borrower to carry out an arrangement by which he was to become part owner of a ship, & to be appointed her captain, which arrangement was afterwards carried out, it was agreed that the advance should be secured by a mtge. of his shares in the ship, & that he should cause an insurance to be effected on the ship to cover the mtgee.'s interest. An insurance was effected, upon the instructions of the mtgor. & the co-owners of the ship, by the ship's husbands as well in their own names as for & in the name or names of all & every person or persons to whom the same should appertain in part, or in all, against, among other things, perils of the sea & barratry of the master & mariners. It being alleged by way of defence to an action upon the policy of insurance by the exors. of the mtgee. that the ship had been wilfully cast away by her captain, the mtgor.:—*Held*: as-

**PART II. SECT. 8, SUB-SECT. 3.—K.**

*p. Interest of mortgagor—Of non-registered vessel.]*—In an action for insurance upon a vessel under the usual interim receipt:—*Held*: the mtgor. of a non-registered vessel had not an interest saleable under a *fl. fa.*—*SCATCHERD v. EQUITABLE FIRE INSUR.*

*Co.* (1858), 8 C. P. 415.—*CAN.*

*q. Interest of mortgagee—Extent of.]*—A. having with B., though B. was not named in the mtge., a mtge. upon a vessel insured her for £600. The vessel was wrecked & abandoned by the mtgor., & the insurers sent their agent to take charge of her. The loss

was proved to be equal to the amount of insurance:—*Held*: A. had an interest in the vessel to the amount of the mtge.—*CRAWFORD v. ST. LAWRENCE INSURANCE CO.* (1851), 8 U. C. R. 135.—*CAN.*

*r. — Insuring mortgagor's interest also.]*—A mtgee. of a vessel who is



suming the ship to have been so cast away, the mtgee. was nevertheless entitled to recover upon the policy of insurance in respect of a loss by perils of the sea, if he had nothing to do with the appointment of the mtgor. as captain; or in respect of a loss by barratry of the master, if he had taken part in his appointment.

The interests of a mtgor. & mtgee. of shares in a ship are distinct & antagonistic interests. The mtgee. does not claim his interest in the ship through the mtgor., but has a distinct interest of his own. If the mtgee. is never in possession of the ship & the captain & the crew are bound to obey the mtgor.'s orders, & the ship goes to the bottom, the mtgee. can sue on the policy made on his behalf. The acts of a captain, who is not the mtgee.'s captain, are so far as the mtgee. is concerned, the acts of a stranger. If a stranger does some wrongful act in consequence of which the ship is lost, the proximate cause of the loss is a peril of the sea. The wrongful act of the stranger is the *causa causans*, but the peril of the sea is the *causa proxima*; & if therefore, a captain, who is a stranger to the mtgee., is guilty of some criminal act, which brings about the loss of the ship, the mtgee.'s right to recover is not affected. Such a captain cannot be guilty of barratry against the mtgee.

If the captain, being the captain of the mtgee., is guilty of some misconduct which causes the loss of the vessel, then, the misconduct being towards the person who employed him as captain, he is guilty of barratry (LORD ESHER, M.R.).—SMALL v. UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCN., [1897] 2 Q. B. 311; 66 L. J. Q. B. 736; 76 L. T. 828; 46 W. R. 24; 13 T. L. R. 514; 8 Asp. M. L. C. 293; 2 Com. Cas. 267, C. A.

*Annotations*:—**Consd.** Graham Joint Stock Shipping Co. v. Merchants' Marine Insee. (1922), 92 L. J. K. B. 509; Samuel v. Dumas, [1924] A. C. 431.

**657. Interest of mortgagor—Ship assigned by way of mortgage—Transfer absolute in form.**—A. having insured £800 upon his own ship, & being greatly indebted to B. deposits several securities in his hands, & also makes an absolute assignment to him of this ship. The ship was afterwards lost. On an action brought against the underwriters to recover the insurance, they insisted that the policy was void for want of interest, under 19 Geo. 2, c. 37. A. having sold the ship previous to the loss:—*Held*: he had a sufficient interest in the ship at the time of the loss; the real transaction being no more than a pledge or security for the debt due to B.—ALSTON v. CAMPBELL (1779), 4 Bro. Parl. Cas. 476; 2 E. R. 325, H. L.

**658.** ————.]—The part owner of a vessel insured his interest in the vessel in a mutual insurance society. One of the rules of the society provided that no vessel which was in mtge. should be insured unless the mtgee. gave a written guarantee, to the satisfaction of the committee, for payment of all demands on the vessel. After the date of the insurance the part owner mortgaged his interest in the vessel to his co-owner, but the vessel was transferred in the registry to the mtgee. absolutely, the understanding between the parties being that the transaction was to be considered merely as a mtge. No guarantee for payment

was given by the mtgee. The vessel being afterwards lost:—*Held*: (1) the provision in the rules applied only to vessels in mtge. at the time of the transaction; (2) the mtgor. had a sufficient interest in the vessel to enable him to recover the amount of the policy.—HUTCHINSON v. WRIGHT (1858), 25 Beav. 444; 27 L. J. Ch. 834; 31 L. T. O. S. 375; 4 Jur. N. S. 749; 6 W. R. 475; 53 E. R. 706.

*Annotations*:—*As to* (2) **Refd.** Liverpool Borough Bank v. Turner (1860), 1 John. & H. 159. **Generally, Mentd.** Bromley v. Williams (1863), 8 L. T. 78.

**659.** ————.]—M. S. Act, s. 66, does not preclude the owner of a ship who has executed an absolute transfer of his interest therein from showing that the real intention of it was to give the transferee only a security by way of mtge. for an advance of money.—WARD v. BECK (1863), 13 C. B. N. S. 668; 1 New Rep. 362; 32 L. J. C. P. 113; 9 Jur. N. S. 912; 143 E. R. 265.

*Annotation*:—**Refd.** The Innisfallen (1866), L. R. 1 A. & E. 72.

**660.** ——— **Retaining possession.**—PROVINCIAL INSURANCE CO. OF CANADA v. LEDUC, No. 1435, *post*.

**661. Interest of mortgagee—Extent of—Intention when effecting insurance.**—A mtgee. effected policies at two offices on a ship, valued in each policy at £3,000, & the ship being lost, he received on the two insurances £3,700. An action being brought against him by one set of underwriters to recover back their proportion of the sum paid, above £3,000, & the question being, whether deft. had received more than the actual value of the ship, insurable & insured by him:—*Held*: it was properly submitted to the jury, whether, in effecting the policies, deft. meant to insure his own interest only, or that of the mtgor. also, a mtgee., at least since 6 Geo. 4, c. 110, not being an owner to any greater extent than that of the value mortgaged, & the mtgor. continuing an owner.—IRVING v. RICHARDSON (1831), 2 B. & Ad. 193; 1 Mood. & R. 153; 9 L. J. O. S. K. B. 225; 109 E. R. 1115.

*Annotations*:—**Consd.** Ebsworth v. Alliance Marine Insee. (1873), L. R. 8 C. P. 596. **Refd.** European & Australian Royal Mail Co. v. Royal Mail Steam Packet Co. (1858), 4 K. & J. 676; Allison v. Bristol Marine Insee. (1876), 1 App. Cas. 209; Small v. United Kingdom Marine Mutual Insee. Assocn., [1897] 2 Q. B. 42; Samuel v. Dumas, Graham Joint Stock Shipping Co. v. Merchants' Marine Insee. (No. 2), [1923] 1 K. B. 592. **Mentd.** Smith, Hill v. Pyman, Bell (1891), 64 L. T. 436.

**662.** ——— **Interest at time of loss.**—Where the owners & master of a ship have agreed to lose a vessel & have succeeded in doing so, the innocent mtgees. of the ship are entitled to recover from the marine underwriters only the amount of the mtgees.' interest at the time of the loss & are not entitled to recover the whole sum that would be found to be due as between them & the mtgors. on an account taken down to the date when all matters are wound up between the parties.—CHARTERED TRUST & EXECUTOR CO. v. LONDON SCOTTISH ASSURANCE CORPN., LTD. (1923), 39 T. L. R. 608.

**663.** ——— **Mortgage paid off before action.**—The mtgees. of a ship agreed with the mtgors. to effect an insurance on the ship at the mtgors.' expense, the policy to be held by them as part of their security. After the ship had sailed, the

alone named in the policy as the assured, without any general words, or other indication of interest in any other, but who has, in fact, insured the mtgor.'s interest also, as disclosed to the insurers at the time, can recover the whole amount so insured on *parol* evidence of that fact.—RICHARDSON v. HOME INSURANCE CO.

(1871), 21 C. P. 291.—CAN.

**t.** ——— **Claim to retain surplus as trustee for mortgagor.**—ARCHBOLD v. MERCHANTS MARINE INSURANCE CO. (1883), 16 N. S. R. (4 R. & G.) 98.—CAN.

**a.** ——— **After assignment by way of collateral security.**—ANCHOR MARINE INSURANCE CO. v. KEITH (1884), 9

S. C. R. 483.—CAN.

**b.** ——— **Covered by prior insurance—Policy "for benefit of all concerned"—Ratification by owners.**—WEST v. SEAMAN (1885), Cass. Dig. 2nd ed. 388.—CAN.

**c.** **Interest of transferor—Bill of sale absolute in form.**—Where a bill of

*Sect. 8.—Insurable interest: Sub-sect. 3, K. & L.]*

mtgees. effected an insurance against absolute total loss only. On the voyage the ship was driven ashore in a gale, & having become a constructive total loss, notice of abandonment was given by the mtgees. to the underwriters. The mtgors. immediately gave notice that they would look to the mtgees. as if they were their underwriters for a full insurance, & recovered from them the full value of the ship. The ship remained for two months exposed to the perils of the sea, when she became a complete wreck, & was then sold without prejudice to the rights of the parties. After the sale, but before this action, the mtge. was paid off. In an action by the mtgees. against the underwriters claiming for an absolute total loss:—*Held*: (1) the mtgees., though their mtge. had been paid off, had an insurable interest in the ship, the mtgors. having ceded to them their rights under the policy when they were paid the full value of the ship; (2) as the ship when sold had become an absolute total loss from perils which were continuous, pltfs. were entitled to recover.—*LEVY & Co. v. MERCHANTS MARINE INSURANCE CO.* (1885), 52 L. T. 263; 1 T. L. R. 228; 1 Cab. & El. 474; 5 Asp. M. L. C. 407.

**664. — Policy effected by mortgagor.]**—The owner of six ships, by a deed to which he & two trustees alone were parties, & which was duly registered, assigned the ships to two trustees for securing sums of money expressed to be lent to him by them, but which had been in fact lent by pltfs., & covenanted to insure each vessel in the sum of £1,500 at the least, & on request, to assign the policies to the trustees. He did insure the ships in his own name, through the agency & in the name of a broker who had notice of the mtge., but who had been informed by the owner that insurances had been effected by the trustees in respect of their interest, & who trusted him, in the belief that the insurances were on the owner's own account, in respect of his interest as mtgor. One of the ships insured in £1,000 was lost. The owner subsequently became bkpt. The broker was a creditor of the owner for premiums on the insurance policies, & for £100 cash advanced after the policies had been effected; & he brought an action against the underwriters for the moneys secured by the policies. In a suit by pltfs., who had really lent the money on the mtge. security against the broker, the underwriters & the trustees for pltfs., asking a declaration that the proceeds of the policies belonged to pltfs., & for an account & injunction:—*Held*: (1) the provisions of Ship Registry Acts afforded no defence to the suit; (2) the broker was not entitled to a general lien for the whole balance due to him from bkpt., but only on each policy for the sums paid in respect of that policy; (3) the assignees had no title under the order & disposition clause in Bkpcy. Act.—*LADBROKE v. LEE* (1850), 4 De G. & Sm. 106; 64 E. R. 755.

**665. — — —.]**—*SWAN & CLELAND'S GRAVING DOCK & SLIPWAY CO. v. MARITIME INSURANCE CO. & CROSHAW*, No. 497, *ante*.

**666. — — — Loss by fraud of mortgagor — Interest of mortgagee original.]**—A Greek subject purchased a ship, which was thereupon removed from the British register & received a provisional certificate of Greek nationality, & for the purpose of the purchase he obtained an advance from his

banker to be secured by a mtge. on the ship. The mtge. consisted of two documents: first, a mtge. of the ship in British statutory form to secure the whole of the owner's current account; secondly, a deed of covenant & mtge. agreement, which recited an agreement by the owner to deliver to the mtgee. a formal first mtge. of the ship duly executed & registered in Greece. By this deed the owner assigned the ship & all policies effected or to be effected thereon as security for the sum advanced & all moneys due or to become due from him, & covenanted to effect the complete registration of the ship as a Greek ship & to insure the ship & her freight as the mtgee. should approve. No mtge. of the ship was ever registered in Greece. In pursuance of the covenant to insure, a time policy on the ship was taken out by pltfs., ship-brokers, "&/or as agents, as well in their own name, as for & in the name & names of all & every other person or persons to whom the same does, may, or shall appertain, in part or in all," against perils of the sea & other specified contingencies including barratry of the master & mariners, "& of all other perils, losses, & misfortunes that . . . shall come to the hurt, detriment, or damage of the said . . . ship, etc., or any part thereof." The policy contained the usual f.c. & s. clause & it also contained a warranty that "the amount insured for account of assured" on (*inter alia*) freight (p.p.i) should not exceed a certain limit. A separate insurance was effected by pltfs. against loss of freight by war risks only in a sum exceeding the amount allowed by the warranty. Deft. underwrote both policies. During the currency of the marine policy the ship was scuttled by the master & crew, or some of them, with the connivance of the owner, but without any connivance or complicity on the part of the mtgee.

In an action on the policy by pltfs. on behalf of the mtgee.:—*Held*: (1) the mtgee. had an incurable interest in the ship; (2) on the facts, there was evidence upon which the trial judge could find that the interest of the mtgee. in the policy was not by way of assignment from the owner, but was original, & consequently, the mtgee. was not affected by the fraud of the owner; (3) the over-insurance of the freight against war risks was a breach of the warranty in the marine policy; (4) deft., by being a party to the issue of the policy on the freight against war risks, was precluded by waiver or acquiescence from treating the marine policy as void for breach of the warranty; (5) the loss of the ship by scuttling was not a loss by a peril of the sea & was not included in the general words of the policy; it was accordingly not covered by the policy & therefore the action failed.—*SAMUEL (P.) & Co. v. DUMAS*, [1924] A. C. 431; 93 L. J. K. B. 415; 130 L. T. 771; 40 T. L. R. 375; 68 Sol. Jo. 439; 16 Asp. M. L. C. 305; 29 Com. Cas. 239, H. L.; *affg. sub nom.* *SAMUEL (P.) & Co. v. DUMAS*, *GRAHAM JOINT STOCK SHIPPING CO. v. MERCHANTS MARINE INSURANCE CO.* (No. 2), [1923] 1 K. B. 592, C. A.

*Annotations*:—*As to* (1) *Reid*. *Graham Joint Stock Shipping Co. v. Merchants Marine Insee.* (1922), 92 L. J. K. B. 509. *As to* (5) *Reid*. *The Christel Vinnen*, [1924] P. 208; *La Compania Martiartu v. Royal Exchange Assco. Corpn.* (1924), 131 L. T. 741; *Banco de Barcelona v. Union Marine Insee.* (1925), 30 Com. Cas. 313.

**667. — — — Interest of mortgagee derivative.]**—*GRAHAM JOINT STOCK SHIPPING CO. v. MERCHANTS MARINE INSURANCE CO.*, No. 1664, *post*.

sale of a ship has been executed, in the form prescribed by Merchant Shipping Act, it may be shown that the transfer

though absolute in its terms, was intended only as a security; & therefore that the transferor has an in-

surable interest.—*MILLIDGE v. STYMEST* (1864), 11 N. B. R. (6 All.) 164.—**CAN.**



*L. Consignee, Indorsee, etc.*

See, now, Marine Insurance Act, 1906 (c. 41), s. 14 (2).

**668. Interest of consignee — Commission on cargo.]**—*FLINT v. LE MESURIER* (1796), 2 Park on Marine Insurances, 7th ed., p. 403.

*Annotations*:—*Appld.* *M'Swiney v. Royal Exchange Assce.*, (1849), 14 Q. B. 634. *Refd.* *Lucena v. Craufurd* (1806), 2 Bos. & P. N. R. 269.

**669. ———.]**—A., residing in Dublin, having agreed with B. & C. at Jamaica to send out two ships annually, for which they were to provide cargoes to be consigned to him, chartered a ship which was to proceed from Bristol to St. Thomas's, where she was to deliver an outward cargo, the property of another person, & from thence to Jamaica, where she was to take in a cargo from B. & C. for Dublin; & by the terms of the charterparty A. in consideration of guaranteeing the homeward cargo was to receive a commission of 2½ per cent. upon the homeward freight. The ship was captured on her passage from St. Thomas's to Jamaica:—*Held*: A. had not then an insurable interest either in the commission on the freight, or in the commission on the sale of the homeward cargo.—*KNOX v. WOOD* (1808), 1 Camp. 543, N. P.

*Annotation*:—*Distd.* *M'Swiney v. Royal Exchange Assce.* (1849), 14 Q. B. 634.

**670. ———.]**—*STOCKDALE v. DUNLOP*, No. 641, *ante*.

**671. Consignee with bare right of possession — Interest alleged in principal.]**—*LUCENA v. CRAUFURD*, No. 555, *ante*.

**672. ———.]**—*SEAGRAVE v. UNION MARINE INSURANCE CO.*, No. 654, *ante*.

**673. Consignee with lien on cargo — Advances on goods — Policy in consignee's name.]**—*CONWAY v. GRAY*, No. 2242, *post*.

**674. ———.]**—*Interest laid in consignor & consignee.]*—The ship *Ross*, belonging to pl'tfs., & the ship *Atlantic*, on which this question arose to Fisher & co., & the cargoes to other persons, were insured on a former voyage, & captured by the Spaniards & carried into Spain; & the underwriters upon the *Atlantic*, of whom deft. was one, paid as for a total loss. But while proceedings for condemnation were pending in the Prize Ct. in Spain, C. residing there having been severally empowered by the different owners to claim restitution, & to enter into compromise with the captors for giving up part of the cargoes on the restitution of the remainder & of the ships, & to defray all costs & charges thereon, & to forward the ships & goods restored to London, & to pay all demands on the ships & goods, agreed with the captors, subsequent to the cessation of hostilities, that upon giving up to them part of each cargo, the rest & the ships should be restored for the common benefit of the original owners of both ships & cargoes, in the lump. On which C. advised pl'tfs. that he should consign the *Atlantic* to them, with their own ship, the *Ross*, & draw bills on them, which were afterwards accepted & paid, for the general expenses of effecting the arrangement with the captors, & for the outfit of both ships; & referred to this information to guide them with respect to insurance: on which pl'tfs. insured the *Atlantic* by a policy "on ship, or on salvage charges, or on any interest as may be hereafter declared by the assured:" & after a subsequent capture of her by the French, declared against deft., who had also underwritten this second policy & averred the interest to be, (a) in themselves, & (b) in Fisher & co., the original owners of the ship *Atlantic*:—*Held*: pl'tfs. had an insurable interest; as well on account of the

whole property captured, of which they owned the other ship *Ross* having been restored at the sacrifice of part of the cargoes, for the common benefit of all; which created in them a hotchpot interest in the ship *Atlantic*, & also as representing C., who was empowered to act as attorney for all the original owners, & to whom such restitution in hotchpot was made for their common benefit, & who had incurred charges & drawn bills on pl'tfs. on account of the common concern, which had been accepted & paid by them; & C. having had authority to insure from Fisher & co., the original owners, under their order, on obtaining restitution, to forward the ship to London, & to pay all claims & demands on her. Though pl'tfs. would be amenable out of the money recovered to the several persons interested, in proportion to their several claims on the property in hotchpot, & amongst others to deft. himself, as an underwriter on the first policy, upon which he had paid as for a total loss to Fisher & co.—*ROBERTSON v. HAMILTON* (1811), 14 East, 522; 104 E. R. 701.

*Annotations*:—*Consd.* *Ebsworth v. Alliance Marine Insee.* (1873), L. R. 8 C. P. 596. *Refd.* *Cleary v. M'Andrew* (1863), 2 Moo. P. C. C. N. S. 216.

**675. ———.]**—*CARRUTHERS v. SHEDDON*, No. 587, *ante*.

**676. ———.]**—Pl'tfs., merchants in London, were in the habit of receiving consignments of cotton from correspondents abroad, & amongst others from Bell & co., of Bombay, making advances thereon by acceptances against the consignments. For the purpose of covering these consignments & their advances, pl'tfs. effected open floating policies with defts., an insurance co., expressing that the insurances were made by them "as well in their own names as for & in the name or names of all & every person & persons to whom the same doth, may, or shall appertain, in part or in all." Each of the policies so effected was for £5,000 "on cotton, etc., from Bombay to London," etc., "by ship or ships;" & as pl'tfs. received advices of the shipments, they declared upon the policies, in the usual way, the particulars & value of the goods & the names of the vessels by which they were shipped. On Apr. 29, 1870, Bell & co. advised pl'tfs. of the shipment of two hundred & fifty bales of cotton on board the *Aurora*, & of their having drawn upon them for £3,000, at six months' sight, on account of that shipment, & requesting them to insure the cotton. This bill was negotiated by Bell & co. through the National Bank of India, with whom the shipping documents were lodged as security. The bill, with the shipping documents annexed, was transmitted by the bank to their manager in London, & on May 21, pl'tfs. accepted it "against delivery of shipping documents" for the cotton. With the assent of the National Bank, the two hundred & fifty bales of cotton per *Aurora*, valued at £5,000, were on May 23 declared by pl'tfs., who thereby intended to insure for Bell & co. & themselves, upon two open policies which they then had running with defts.; & pl'tfs. wrote to the bank undertaking "to hold the amount insured at their disposal until payment of their acceptances for £3,000 due Nov. 24." The *Aurora* left Bombay with the cotton on board, & was lost at sea on June 11. Pl'tfs. afterwards paid their acceptance & received the bill of lading for the cotton. In an action upon the policies to recover for the loss of the goods, the declaration averred that pl'tfs. caused themselves to be insured, that they or some or one of them were or was interested in the goods to the amount of all the moneys by them insured thereon, & that the insurances were



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made for the use & benefit & on account of the person or persons so interested. Defts. traversed these allegations:—*Held*: (1) plffs. were entitled to recover upon these policies to the extent of their advance; (2) plffs. had an equitable interest in every part of the cotton as security for their liability under their acceptance, & being also consignees to manage the consignment, they were entitled to insure the whole of it in their own names, & to its full value, & having intended by the insurances to cover the interests of all parties in the cotton, they were entitled to recover the whole amount upon a declaration averring interest in themselves; & they would hold any surplus beyond their advance as trustees for the other parties beneficially interested; & their right to insure & to recover was not limited to their own beneficial interest in the goods.

It seems to be stated on high authority that a legal owner, being trustee, may insure & recover in his own name, holding the proceeds in trust for his *cestui que trust*. This must be on the ground that the law will not dispute the legal interest which is the legal result of the legal ownership; though in insurance contracts it will also recognise an equitable interest as entitling the owner of it to enter into or to take advantage of the legal contract of insurance (BRETT, J.).—*EBSWORTH v. ALLIANCE MARINE INSURANCE CO.* (1873), L. R. 8 C. P. 596; 42 L. J. C. P. 305; 29 L. T. 479; 2 Asp. M. L. C. 125; *reversd.* by consent (1874), 43 L. J. C. P. 394, n., Ex. Ch.

*Annotation*:—*Consd.* Samuel v Dumas, Graham Joint Stock Shipping Co. v. Merchants Marine Insco. (No. 2), [1923] 1 K. B. 592.

**677. Pledge of bills of lading by consignee—Insurance by consignee for benefit of pledgee—Right of pledgee to sue in own name.]**—Where the consignee of goods pledges the bill of lading with another person as a security for advances made by him, & upon an agreement that the consignee shall effect an insurance on the goods for the benefit of the pledgee, & deposit the policy with him, the pledgee may sue on the policy in his own name.—*SUTHERLAND v. PRATT* (1843), 12 M. & W. 16; 13 L. J. Ex. 246; 152 E. R. 1092.

*Annotations*:—*Refd.* Ward v. Beck (1863), 13 C. B. N. S. 668; *Ebsworth v. Alliance Marine Insco.* (1873), L. R. 8 C. P. 596.

**678. Agent of consignor—Refusal of goods by consignees—Right of agent to insure—Subsequent ratification by consignor.]**—A. having consigned a cargo to B. & drawn bills on him to the amount of it, in favour of C. his general agent, sent these bills together with the bills of lading to C., desiring him to transmit them to B. “that B. may have an opportunity of insuring:” he also drew a bill for £300 on C., which was accepted; B. refused to take to the cargo or accept the bills drawn on him: C. then effected a policy in his own name, & informed A. thereof, who approved of his conduct. In an action by C. stating himself in the first count to be the agent of A. & averring interest in him; in the second averring interest in himself:—*Held*: (1) that the policy was good within Marine Insurance Act, 1788 (c. 56); (2) C. had an insurable interest to the amount of £300.

I agree that a debt which has no reference to the article insured & which cannot make a lien on it, will not give an insurable interest. But a debt which arises in consequence of the article insured & which would have given a lien on it, does give an insurable interest (BULLER, J.).—*WOLFF v.*

*HORNCastle* (1798), 1 Bos. & P. 316; 126 E. R. 924.

*Annotations*:—*As to* (1) *Refd.* *Ebsworth v. Alliance Marine Insco.* (1873), L. R. 8 C. P. 596. *As to* (2) *Appld.* *Stirling v. Vaughan* (1809), 11 East, 619. *Consd.* *Ebsworth v. Alliance Marine Insco.* (1873), L. R. 8 C. P. 596. *Refd.* *Lucena v. Craufurd* (1806), 2 Bos. & P. N. R. 269; *Conway v. Gray*, *Conway v. Forbes*, *Maury v. Shedden* (1809), 10 East, 536; *Bell v. Janson* (1813), 1 M. & S. 201.

**679. — For money advanced on bill of lading.]**—*WOLFF v. HORNCastle*, No. 678, *ante*.

**680. Right of creditor to insure—As indorsee of bill of lading.]**—The indorsement & delivery of a bill of lading to a creditor *prima facie* conveys the whole property in the goods from the time of its delivery. But if the intention of the parties appear to have been only to bind the net proceeds in case of the arrival of the goods, then an insurance made on account of the indorser, after such indorsement, is good.—*HIBBERT v. CARTER* (1787), 1 Term Rep. 745; 99 E. R. 1355.

*Annotations*:—*Refd.* *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357; *Burdick v. Sewell* (1884), 13 Q. B. D. 159.

**681. — Goods consigned to consignee to be held for creditor.]**—A. being indebted to B. without any order from him consigns goods to C. to be held for B. & indorses the bill of lading to C.; resolved that B. had an insurable interest in the goods so consigned.—*HILL v. SECRETAN* (1798), 1 Bos. & P. 315; 126 E. R. 924.

*Annotation*:—*Refd.* *Gerrard v. Lauderdale* (1831), 2 Russ. & M. 451.

**682. — In respect of disbursements.]**—*MORAN, GALLOWAY & CO. v. UZIELLI*, No. 57, *ante*.

*M. Commission payable to Charterers.*

**683. Liability of shipowner to pay.]**—A charterparty provided that a ship “now at Philadelphia & chartered for Japan” should, after discharging at Japan, proceed to British Columbia, & there load a cargo for London. The charterparty contained the following clause: “A commission of 3½ per cent. shall be paid to charterers . . . on amount of this charterparty on the completion of the loading, or should the vessel be lost.” The ship was lost on the voyage from Philadelphia to Japan:—*Held*: (1) the charterers were entitled to the commission payable to them under the charterparty.

(2) During the pendency of the outward voyage, the homeward freight may be insured, the policy attaches.

It is quite clear that in this case the shipowners could have insured this commission if they were minded so to do (MATHEW, J.).—*WARD & CO., LTD. v. WEIR & CO.* (1899), 4 Com. Cas. 216.

*N. Trustee and cestui que trust.*

*See, generally, TRUSTS & TRUSTEES.*

**684. Trustee—Right to insure.]**—*LUCENA v. CRAUFURD*, No. 555, *ante*.

**685. — —.]**—(1) The registry of a ship is conclusive evidence of the property, even between creditors; excluding all trusts, created by acts of the parties; as, by payment of money on a purchase in the name of another.

(2) Equitable interest insurable: both trustee & *cestui que trust* have an insurable interest.—*Ex p. HOUGHTON, Ex p. GRIBBLE* (1810), 17 Ves. 251; 34 E. R. 97.

*Annotations*:—*Generally, Mentd.* *The John* (1830), 2 Hag. Adm. 305; *De Wolf v. Pitcairn* (1869), 17 W. R. 914; *Barton v. Muir* (1874), L. R. 6 P. C. 134.

**686. — —.]**—*RHIND v. WILKINSON*, No. 592, *ante*.

**687. — —.]**—*EBSWORTH v. ALLIANCE MARINE INSURANCE CO.*, No. 676, *ante*.

**688. — Recovery on policy by—Proceeds in trust for cestui que trust.]—**EBSWORTH v. ALLIANCE MARINE INSURANCE CO., No. 676, *ante*.

**689. Cestui que trust—Right to insure.]—***Ex p.* HOUGHTON, *Ex p.* GRIBBLE, No. 685, *ante*.

**690. — Action by one—Maintainable for full amount—Subject to trust.]—**HISCOX v. BARRETT (1747), 2 Park's Marine Insurances, 7th ed. p. 603, n.

*Annotations:—*Consd. Bell v. Ansley (1812), 10 East, 141; Cohen v. Hannam (1813), 5 Taunt. 101.

#### O. Joint Owners.

**691. Whether interest of each owner extends to entirety.]—**In a declaration on a policy of insurance *pltf.* averred that Messrs. H. at the time of effecting the policy & at the time of the loss, were interested in the cargo which was the subject of the insurance "to a large amount, to wit, to the amount of all the money ever insured thereon;" at the trial it appeared that previous to effecting the policy, Messrs. H. had admitted another mercantile house to a joint concern in the cargo insured:—*Held*: the averment was supported by the evidence.—PAGE v. FRY (1800), 2 Bos. & P. 240; 3 Esp. 185; 126 E. R. 1258.

*Annotations:—*Distd. Bell v. Ansley (1812), 10 East, 141. Consd. Cohen v. Hannam (1813), 5 Taunt. 101; Ebsworth v. Alliance Marine Insce. (1873), L. R. 8 C. P. 596.

**692. —.]—**BELL v. ANSLEY, No. 461, *ante*.

**693. —.]—**It is necessary in a declaration on a policy truly to describe the interest on which the policy is effected. Therefore if A. & B. jointly interested effect an insurance & there be two counts, the one averring interest in A. & the other averring interest in B., *pltf.* can recover on neither count.—COHEN v. HANNAM (1813), 5 Taunt. 101; 128 E. R. 625.

*Annotations:—*Consd. Ebsworth v. Alliance Marine Insce. (1873), L. R. 8 C. P. 596. Refd. Wright v. Webbie (1819), 1 Chit. 49.

#### P. Captors, Prize Agents, etc.

See Naval Prize Act, 1864 (c. 25), s. 55; PRIZE LAW.

**694. Prize agents—Arrival of prize—Expectation from Crown.]—**(1) A squadron of ships of war, assisted by land forces, having captured two Spanish register ships:—*Held*: the officers & crews of the squadron have an insurable interest in the ships captured under 19 Geo. 3, c. 67, before condemnation.

(2) An average loss opens a valued policy.

(3) Is the expectation a sufficient interest? Wherever a capture has been made, since the Revolution, by sea or land, the Crown has made a grant: there is no instance to the contrary. Then, is the contingency of the ships coming home a risk which the captors may provide against? An interest is necessary, but no particular kind of interest is required. An agent of prizes may insure his profits though they are in contingency (LORD MANSFIELD).—LE CRAS v. HUGHES (1782), 3 Doug. K. B. 81; 99 E. R. 549.

*Annotations:—*As to (3) *Appld.* Wolff v. Horncastle (1798), 1 Bos. & P. 316; Boehm v. Bell (1799), 8 Term Rep. 154. *Distd.* Page v. Fry (1800), 2 Bos. & P. 240. Consd. The Elsebe (1804), 5 Ch. Rob. 173. *Distd.* Lucena v. Craufurd (1806), 2 Bos. & P. N. R. 269. If the *Omoa* case [*Le Cras v. Hughes*] was decided upon the expectation of a grant from the Crown, I never can give my assent to such a doctrine. That expectation, though founded upon the highest probability, was not an interest (LORD ELDON). Consd. Routh v. Thompson (1809), 11 East, 428. Consd. & Distd. Devaux v. Steele (1840), 8 Scott, 637.

**695. —.]—**CRAUFURD v. HUNTER, No. 704, *post*.

**696. —.]—**LUCENA v. CRAUFURD, No. 555, *ante*.

**697. —.]—**ROUTH v. THOMPSON, No. 471, *ante*.

**698. —.]—**DEVAUX v. STEELE, No. 602, *ante*.

**699. Captors of prize—Though adjudged no prize.]—**BOEHM v. BELL, No. 2510, *post*.

**700. —.]—**ST. EUSTATIUS CASES (*circa* 1768), cited in 4 Ch. Rob. p. 39; 1 Eng. Pr. Cas., p. 338; 165 E. R. 528.

*Annotations:—*Consd. The Catherine & Anna (1801), 4 Ch. Rob. 39. Refd. Tabbs v. Bendelack (1801), 3 Bos. & P. 207, n.

**701. — In expectation of condemnation.]—**The expectation, arising from the habit of the Crown as to prize, has been held an insurable interest.—NICOL v. GOODALL (1804), 10 Ves. 155; 32 E. R. 803, L. C.

**702. — Capture jointly effected.]—**A prize taken by the Navy & Army conjointly is insurable on account of the interest of the captors, under 45 Geo. 3, c. 72, s. 3, which grants prize so taken to the conjoint captors after condemnation, subject only to the apportionment of the Crown as to the respective shares.—STIRLING v. VAUGHAN (1809), 11 East, 619; 2 Camp. 225; 103 E. R. 1145.

*Annotations:—*Expld. Routh v. Thompson (1811), 13 East, 274. Mentd. Doe d. Garnons v. Knight (1826), 8 Dow. & Ry. K. B. 348.

**703. — Profit to arise from goods.]—**STOCKDALE v. DUNLOP, No. 641, *ante*.

**704. Crown commissioners—Authorised to take possession of prize—May insure arrival of prize in own names.]—**Comrs. appointed by the Crown, under the authority of an Act of Parliament, which enabled them "to take into their possession & care all Dutch ships & effects detained or brought into the ports of Great Britain, & to manage, sell, & dispose of the same to the best advantage, according to the instructions they should receive from His Majesty & his Privy Council," may insure in their own names such ships & effects, after seizure abroad, & while they are *in transitu* to this country.—CRAUFURD v. HUNTER (1798), 8 Term Rep. 13; 101 E. R. 1239.

*Annotations:—*Consd. Lucena v. Craufurd (1806), 2 Bos. & P. N. R. 269; Ebsworth v. Alliance Marine Insce. (1873), L. R. 8 C. P. 596. Refd. Page v. Fry (1800), 2 Bos. & P. 240; Nantes v. Thompson (1802), 2 East, 385; Cousins v. Nantes (1811), 3 Taunt. 513.

#### Q. Bottomry and Respondentia.

See Marine Insurance Act, 1906 (c. 41), s. 10.

Bottomry & respondentia generally, see SHIPPING.

**705. Repayment must depend on arrival of vessel.]—**An instrument executed in a foreign port by the master of a ship, reciting, that his vessel bound to London, had received considerable damage, & that he had borrowed £1,077 to defray the expenses of repairing her, proceeded as follows: "I bind myself, my ship, her apparel, tackle, etc. as well as her freight & cargo, to pay the above sum with £12 per cent. bottomry premium; & I further bind myself, said ship, her freight, & cargo, to the payment of that sum, with all charges thereon, in eight days after my arrival at the port of London; & I do hereby make liable the said vessel, her freight & cargo, whether she do or do not arrive at the port of London, in preference to all other debts or claims, declaring that this pledge or bottomry has now, & must have, preference to all

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d. Bottomry bond—After insurance effected.]—SMITH v. FLEMING & Co. (1849), 22 Sc. Jur. 7.—SCOT.

e. Interest of assured bondholders.]—MACKIE, DUNN & Co. v. S. BRITISH INSURANCE CO. (1885), 3 S. C. 405.—S. AF.



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other claims & charges, until such principal sum, with £12 per cent. bottomry premium, & all charges are duly paid":—*Held*: this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the voyage; that the words my arrival, must be understood to mean my ship's arrival; & that the words, "I make liable the said vessel, her freight & cargo, whether she do or do not arrive at London;" were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, & not to provide for the event of a loss of the ship.—*SIMONDS v. HODGSON* (1832), 3 B. & Ad. 50; 1 L. J. K. B. 51; 110 E. R. 19.

*Annotations:—Refd. Stainbank v. Fenning* (1851), 11 C. B. 51. *Mentd. Re The Royal Arch* (1857), 30 L. T. O. S. 198; *The Mary Ann* (1865), L. R. 1 A. & E. 13; *The James W. Elwell*, [1921] P. 351.

**708.** —.]—(1) The master of a vessel has no authority to hypothecate, for money borrowed at a foreign port for necessary repairs & disbursements, & at the same time pledge the personal credit of his owner for such advances, whether maritime interest be stipulated for or not. A vessel having put into a foreign port in a damaged state, the master borrowed money of a merchant there, for necessary repairs & disbursements; to secure which, he drew bills upon his owner, & also executed an instrument which purported to be an hypothecation of the ship, cargo, & freight. By this instrument, the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances; & the master took upon himself & his owner the risk of the voyage, making the money payable at all events, & subjecting the ship to seizure & sale by virtue of process "out of Her Majesty's High Ct. of Admlty. of England, or any ct. of Vice-Admiralty possessing jurisdiction at the port at which the said vessel might at any time happen to be lying, or to be, according to the maritime law & custom of England," in the event of the bills being refused acceptance, or being dishonoured:—*Held*: this not being such an hypothecation as could be enforced in the Ct. of Admlty., the payment of the money borrowed not being made to depend upon the arrival of the vessel, the merchant had no insurable interest in the ship.

(2) A mere debt . . . for repairs & disbursements, could not legally be made the subject of an insurance (*JERVIS, C.J.*).—*STAINBANK v. FENNING* (1851), 11 C. B. 51; 20 L. J. C. P. 226; 17 L. T. O. S. 255; 15 Jur. 1082; 138 E. R. 389.

*Annotations:—As to* (1) *Refd. Stainbank v. Shepard* (1853), 13 C. B. 418. *As to* (2) *Consd. Moran, Galloway v. Uzielli*, [1905] 2 K. B. 555.

**707.** —.]—The master of a vessel has no authority to hypothecate, for money borrowed at a foreign port for necessary repairs & disbursements, & by the same instrument pledge the personal credit of his owner for such advances, whether maritime interest be stipulated for or not. But a bottomry bond may be given at the same time with, & as a collateral security for, bills drawn on the owners for moneys so borrowed. A vessel put into a foreign port in a damaged state, the master borrowed money of a merchant there, for necessary repairs & disbursements; to secure which, he drew bills upon his owner, & also executed an instrument which purported to be an hypothecation of the ship, cargo & freight. By this instrument, the merchant who advanced the money forbore all interest beyond the amount necessary

to insure the ship to cover the advances; & the master took upon himself & his owner the risk of the voyage, making the money payable at all events, & subjecting the ship to seizure & sale by virtue of process "out of Her Majesty's High Ct. of Admlty. of England, or any ct. of Vice-Admiralty possessing jurisdiction at the port at which the said vessel might at any time happen to be lying, or to be, according to the maritime law & custom of England," in the event of the bills being refused acceptance, or being dishonoured:—*Held*: this not being such an hypothecation as could be enforced in the Ct. of Admlty., the payment of the money borrowed not being made to depend upon the arrival of the vessel, the merchant had no insurable interest in the ship.—*STAINBANK v. SHEPARD* (1853), 13 C. B. 418; 1 C. L. R. 609; 22 L. J. Ex. 341; 22 L. T. O. S. 158; 17 Jur. 1032; 1 W. R. 505; 138 E. R. 1262, Ex. Ch.

*Annotations:—Mentd. Bristow v. Whitmore* (1859), 4 D. G. & J. 325; *Willis v. Palmer* (1859), 7 C. B. N. S. 340; *The Onward* (1873), L. R. 4 A. & E. 38; *Miedbrodt v. Fitzsimon, The Energie* (1875), 32 L. T. 579; *The James W. Elwell*, [1921] P. 351.

#### *R. Masters' and Seamen's Wages.*

*See, now, Marine Insurance Act, 1906 (c. 41), s. 11.*

#### *S. Shareholders in Companies.*

*See Marine Insurance Act, 1906 (c. 41), s. 5 (2).*

**708. Insurable interest of shareholder—In company's adventure—Laying submarine cable.]—***PATERSON v. HARRIS*, No. 1594, *post*.

**709.** — — — —.]—Pltf., being a shareholder in the Atlantic Telegraph Co., caused himself to be insured with deft. in a policy, which was a common printed form of a marine policy, filled up with interlineations & marginal additions, & which contained the following words: "At & from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the Great Eastern, & to continue until it be laid in one continuous length between Ireland & Newfoundland, & until one hundred words shall have been transmitted each way . . . the ship, etc., goods, etc., are & shall be valued at £200 on the Atlantic cable, value, say on twenty shares, at £10 per share:" & also, written opposite to the clause, touching the adventures, etc., the words, "it is hereby understood & agreed that this policy, in addition to all perils & casualties herein specified, shall cover every risk & contingency attending the conveyance & successful laying of the cable, from & including its loading on board the Great Eastern, until one hundred words be transmitted from Ireland to Newfoundland, & vice versa; & it is distinctly declared & agreed that the transmission of the one hundred words from Ireland to Newfoundland, & vice versa, shall be an essential condition of the policy." The attempt to lay the cable failed, through the cable breaking whilst it was being hauled in to remedy a defect in the insulation; but one half of the cable was saved:—*Held*: (1) the policy was not on the cable, but on pltf.'s interest in "the adventure," that is, on the profits to be derived by him from the success of the adventure; & *semble*, the adventure was the attempt to lay the cable on that voyage; (2) such an interest was an insurable interest; (3) the loss was a loss by the perils insured against; (4) whether the adventure insured was the adventure of laying the cable on that voyage, or laying it generally, the loss was total, inasmuch as by the breaking of the cable the probability of laying it was reduced to a mere chance, & the



case was therefore within the rule making the loss of a ship total at the time of capture, although there may exist a *spes recuperandi*.—WILSON v. JONES (1867), L. R. 2 Exch. 139 ; 36 L. J. Ex. 78 ; 15 L. T. 669 ; 15 W. R. 435 , 2 Mar. L. C. 452, Ex. Ch.

*Annotations* :—As to (1) **Consd.** *Macaura v. Northern Assee.*, [1925] A. C. 619. As to (2) **Appld.** *Samuel v. Dumas*, [1921] A. C. 431. **Refd.** *Griffiths v. Fleming*, [1909] 1 K. B. 805 ; *Re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67. As to (4) **Refd.** *Moore v. Evans*, [1917] 1 K. B. 458. **Generally, Refd.** *Carlill v. Carbolite Smoke Ball Co.*, [1892] 2 Q. B. 484.

#### T. Reinsurance.

See Sect. 9, *post* ; Marine Insurance Act, 1906 (c. 41), s. 9.

#### U. Wagering Policies.

See Part IX., *post*.

### SECT. 9.—REINSURANCE.

#### SUB-SECT. 1.—IN GENERAL.

See, generally, Part I., Sect. 8, *ante* ; Marine Insurance Act, 1906 (c. 41), s. 9.

**710. Need not be so described.]**—MACKENZIE v. WHITWORTH, No. 506, *ante*.

**711. “Insured only for £4,000”—Insurance by mortgagee without knowledge of insured.]**—Resps. in a proposal for the reinsurance of a ship in applts.’ co., stated that she was “insured only for £4,000.” This was the amount of the original insurance. The proposal also contained the amounts of insurances effected in other offices, but from this list, an insurance, effected without resps.’ knowledge by a mtgee., was omitted :—**Held** : the words “insured only for £4,000,” must be construed as stating the amount of the original insurance, & not as a representation of the sum total insured in all offices whatever ; the occasion on which, & the purpose for which the words were used, suggesting some limitation on their generality.—ANDERSON v. PACIFIC FIRE & MARINE INSURANCE CO. (1869), 21 L. T. 408 ; 3 Mar. L. C. 294.

**712. Notice of abandonment—Unnecessary between reinsurers & reinsured.]**—Upon a constructive total loss happening to the ship insured, notice of abandonment need not be given to the underwriters of a policy of re-insurance. The owners of a ship insured her for twelve months in an ordinary Lloyd’s policy, which contained a suing & labouring clause. The underwriters of the Lloyd’s policy re-insured themselves with a French co. which re-insured itself with defts. The policy underwritten for the French co. by defts. was for £1,000, bound them to pay as might be paid on the original policy, was to cover the risk of total loss only, & contained a suing & labouring clause. Whilst the policy was in force, the ship went ashore & was much damaged. Her owners gave notice of abandonment to the underwriters of the Lloyd’s policy, but notice of abandonment was not given to defts. : the underwriters of the ship ultimately settled with her owners at 88 per cent. They expended more than £5,000 in floating the ship, & sold her to a builder, who repaired her at a cost of £9,000, & resold her for £11,200. The cost of floating the ship, after deducting the price paid by the shipbuilders, being added to the 88 per cent. represented a loss of 112 per cent. In an action by the French co. as re-insurers against defts. :—**Held** : a constructive total loss

had occurred, & as defts. had bound themselves to pay as might be paid on the original policy, they were liable to the extent of £1,000 ; but they could not be held liable for more, as the underwriters of the Lloyd’s policy were not the “factors, servants, or assigns” of plffs. within the meaning of the suing & labouring clause, & defts. were not liable, at least by virtue of that clause, for any part of the expenses incurred in floating the ship.—UZZELLI v. BOSTON MARINE INSURANCE CO. (1884), 15 Q. B. D. 11 ; 54 L. J. Q. B. 142 ; 52 L. T. 787 ; 33 W. R. 293 ; 1 T. L. R. 49 ; 5 Asp. M. L. C. 405, C. A.

*Annotations* :—**Consd. & Distd.** *Western Assee. of Toronto v. Poole*, [1903] 1 K. B. 376. **Consd.** *British Dominions General Insee. v. Duder*, [1915] 2 K. B. 394. **Refd.** *Nelson v. Empress Assee. Corpn.* (1905), 10 Com. Cas. 237 ; A.-G. v. Forsikringsakt. National (of Copenhagen) (1924), 93 L. J. K. B. 679.

—.]—See Sect. 24, *post*.

#### SUB-SECT. 2.—INCORPORATION OF CLAUSES OF ORIGINAL POLICY.

**713. Clauses incorporated unless inconsistent.]**—JOYCE v. REALM MARINE INSURANCE CO., No. 18, *ante*.

**714. ——— Continuation clause.]**—FRANCO-HUNGARIAN INSURANCE CO. v. MERCHANTS MARINE INSURANCE CO. (1888), cited in 5 Com. Cas., p. 412. *Annotation* :—**Distd.** *Charlesworth v. Faber* (1900), 5 Com. Cas. 408.

**715. ———.]**—A policy of reinsurance on a ship, expressed to be for & during the space of twelve months, commencing Oct. 18, 1898, & ending Oct. 18, 1899, contained the clause, “being a reinsurance subject to the same clauses & conditions as the original policy, & to pay as may be paid thereon.” The original policy was for the same period as the reinsurance policy, & contained the following clause : “Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until the arrival at her port of final destination . . . at a *pro rata* daily premium.” After Oct. 18, 1899, the ship was lost while on a voyage to her port of final destination. In an action on the reinsurance policy :—**Held** : the continuation clause in the original policy was a usual clause, & the reinsurance policy was not invalidated by reason of the non-disclosure of the fact that the original policy contained the clause ; but the reinsurance policy being for a period exceeding twelve months was null & void.—CHARLESWORTH v. FABER (1900), 5 Com. Cas. 408.

*Annotation* :—**Mentd.** *Soc. Des Hôtels Réunis (Soc. Anon.) v. Hawker* (1913), 29 T. L. R. 578.

**716. ——— Warehouse to warehouse clause.]**—MARTEN v. NIPPON SEA & LAND INSURANCE CO., LTD., No. 850, *post*.

**717. ——— Or unusual.]**—PROPERTY INSURANCE CO., LTD. v. NATIONAL PROTECTOR INSURANCE CO., LTD., No. 1230, *post*.

**Suing & labouring clause.]**—See Sect. 22, sub-sect. 3, *post*.

#### SUB-SECT. 3.—CONSTRUCTION OF PARTICULAR CLAUSES.

See, now, Marine Insurance Act, 1906 (c. 41), s. 9 (1), (2).

**718. “To pay as may be paid”—Payment on original policy—Not condition precedent to recover.]**

PART II. SECT. 9, SUB-SECT. 1.  
**1. Agent’s acceptance of risk—**  
**Binding contract.]**—CANADA

MARINE INSURANCE CO. v. WESTERN ASSURANCE CO. (1880), 5 A. R. 244.—CAN.

PART II. SECT. 9, SUB-SECT. 3.  
**g. Clause limiting time for action.]**  
—Plffs. having insured a steamer for

*Sect. 9.—Reinsurance: Sub-sect. 3.]*

—Co. A. having insured a ship, reinsured part of their risk with co. B., & duly paid them the premium. The reinsurance policy issued by co. B. contained the following clause: "Being a reinsurance applying to the lines of the A. Insurance co., policy No. . . ., subject to the same terms & conditions as the original policy, & to pay as may be paid thereon." The ship sustained damage by perils insured against, & the A. co. became liable upon their policy, but had, as yet, paid nothing thereon. Both cos. having gone into liquidation, the liquidator of the A. co. claimed in the winding up of the B. co. the amount secured by the policy of reinsurance:—*Held*: payment by the A. co. on their original policy was not a condition precedent to their recovering against the B. co. on the policy of reinsurance.—*Re EDDYSTONE MARINE INSURANCE CO., Ex p. WESTERN INSURANCE CO.*, [1892] 2 Ch. 423; 61 L. J. Ch. 362; 66 L. T. 370; 40 W. R. 441; 8 T. L. R. 393; 36 Sol. Jo. 308; 7 Asp. M. L. C. 107.

*Annotations*:—*Consd. Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Case*, [1914] 2 Ch. 617. *Refd. British Dominions General Insee. v. Duder*, [1915] 2 K. B. 394; *Norwich Union Fire Insee. Soc. v. Colonial Mutual Fire Insee.*, [1922] 2 K. B. 461.

**719. — Reinsurer's liability—Limited to loss for which insurer liable.**—A policy of reinsurance contained the following clause: "Being reinsurance subject to the same clauses & conditions as the original policy, & to pay as may be paid thereon, but against the risk of total &/or constructive loss, total loss only." The ship insured by the original policy stranded & was abandoned, & the underwriters paid a total loss. The reinsurance refused to admit any liability to pay under the policy of reinsurance, upon the ground that the ship had never been shown to be a constructive total loss:—*Held*: upon the true construction of this clause, it did not bind the reinsurer to pay such sum as the insurer might choose to pay the assured, whether liable or not.—*CHIPPENDALE v. HOIT* (1895), 65 L. J. Q. B. 104; 73 L. T. 472; 44 W. R. 128; 12 T. L. R. 50; 40 Sol. Jo. 99; 8 Asp. M. L. C. 78; 1 Com. Cas. 197.

*Annotations*:—*Refd. Marten v. Steamship Owners' Underwriting Asscn.* (1902), 71 L. J. K. B. 718; *St. Paul Fire & Marine Insee. v. Morice* (1906), 11 Com. Cas. 153; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Case*, [1914] 2 Ch. 617; *Street v. Royal Exchange Assee.* (1914), 111 L. T. 235. *Mentd. China Traders Insee. v. Royal Exchange Assee. Corpn.*, . . . . . 2 Q. B. 187.

**720. — — — — —.]**—Pltfs. were underwriters of a vessel against all risks, the vessel being valued in the policy at £16,000. Attached to the policy was a printed memorandum containing certain clauses called the Institute Time Clauses, one of which was as follows: "The insured value shall be taken as the repaired in ascertaining whether the vessel is a constructive total loss." Pltfs. had taken risks on many other vessels, in respect of which they had issued other policies. Pltfs. effected a policy of reinsurance with defts. "against the risk of total &/or constructive total loss only, warranted free of all average &/or salvage charges, being a reinsurance applying to policy or policies, & to pay as may be paid thereon." The Institute Time Clauses were printed upon the reinsurance policy, but many of them were struck

out including the clause which stipulated that the insured value was to be taken to be the repaired value in ascertaining whether the vessel was a constructive total loss. The vessel became a constructive total loss if the ordinary rules were applied to ascertaining the fact, but if the repaired value was to be taken at £16,000 & not at its true figure she was not a constructive total loss:—

*Held*: (1) pltfs. were not entitled to recover, inasmuch as by the policy of reinsurance defts. only reinsured the risk of total loss which arose when the repaired value was taken at £16,000; (2) pltfs. were not liable for, & therefore could not reinsure any other kind of total loss, & the words "to pay as may be paid thereon" in the policy of reinsurance meant only to pay as the reassured might have been compellable to pay.—*MARTEN v. STEAMSHIP OWNERS' UNDERWRITING ASSOCN.* (1902), 71 L. J. K. B. 718; 87 L. T. 208; 50 W. R. 587; 18 T. L. R. 613; 9 Asp. M. L. C. 339; 7 Com. Cas. 195.

*Annotations*:—*Generally, Refd. Street v. Royal Exchange Assee.* (1914), 111 L. T. 235; *Norwich Union Fire Insee. Soc. v. Colonial Mutual Fire Insee.*, [1922] 2 K. B. 461

**721. Subject to same terms as original policy or policies—Original policy warranted free from particular average—Reinsurance policy warranted free from all average.**—Defts. reinsured pltfs. by a policy "on nitrate warranted free of all average;" "subject to the terms, clauses & conditions of the original policy or policies;" "including risk of craft to & from the ship;" "beginning the adventure . . . from . . . the loading thereof on board the said ship." Two original policies contained similar provisions & also these clauses: "Each craft or lighter being deemed a separate insurance;" "In event of any loss . . . before completion of loading . . . the liability hereunder shall be in the same proportion as it would have been on completion of loading." When part of a quantity of nitrate intended to be shipped had been loaded on board it was destroyed by fire. The rest which was in lighters was uninjured:—*Held*: the loss was covered by the policy.—*ASSICURAZIONI GENERALI OF TRIESTE v. ROYAL EXCHANGE ASSURANCE CORPN.* (1897), 13 T. L. R. 307; *sub nom. GENERAL INSURANCE CO., LTD. OF TRIESTE v. ROYAL EXCHANGE ASSURANCE CORPN.*, 2 Com. Cas. 144.

**722. — Variation of terms of original policy—Without knowledge of reinsurer.**—*LOWER RHINE & WÜRTEMBERG INSURANCE ASSOCN. v. SEDGWICK*, No. 340, *ante*.

**723. — — — — —.]**—*NORWICH UNION FIRE INSURANCE SOCIETY v. COLONIAL MUTUAL FIRE INSURANCE CO.*, No. 1160, *post*.

**724. — Two slips signed by underwriter.**—In Jan. 1911, D. & W. initialled a slip agreeing to insure the *Olympic & Titanic* for twelve months from delivery. Shortly thereafter pltfs. agreed to reinsure part of this risk. In Dec. 1911, deft. initialled a slip for reinsuring a portion of pltfs.' risk "for twelve months from expiration or delivery, clauses & condition as original." In Jan. 1912, the *Titanic*, not having yet been delivered by the shipbuilders, D. & W. initialled another slip in the following terms: "*Olympic, Titanic*, twelve months from expiry." No intimation was given to D. & W. or to pltfs.' agent that this was intended to be anything else but what it purported to be—namely, a renewal for a further

£1,500, reinsured with defts. for £500, under a policy which provided that no suit should be maintained thereon unless commenced "within the term of twelve months next after any loss or damage shall occur." The steamer

was injured in Nov. 1854, & pltfs. having paid the amount claimed on Aug. 9, 1855, brought this action on Aug. 8, 1856, to recover from defts. their proportion:—*Held*: too late, for that the loss or damage referred to

in defts.' policy was the injury to the vessel, not the payment by pltfs.—*PROVINCIAL INSURANCE CO. v. AETNA INSURANCE CO.* (1858), 16 U. C. R. 135.—*CAN*,



twelve months after the expiry of the first twelve months, although it had been arranged with the leading underwriter that if the same amount of insurance was obtained on the second slip as on the first, the insurance should be treated, so far as the *Titanic* was concerned, not as a renewal but as a confirmation of the original twelve months. The same amount of insurance was in fact obtained on the second slip, although some of the underwriters were different; & before a policy was issued an intimation was sent to some of the underwriters, but not to D. & W. or to pltf.'s agent, explaining that the insurance so far as concerned the *Titanic* would commence from the delivery of the ship. A policy was issued by D. & W. on Apr. 3, 1912, insuring the *Titanic* for £2,500 from Apr. 2, 1912; by a policy dated Apr. 10, 1912, pltf's reinsured D. & W.'s risk to the extent of £400; & on Apr. 11, 1912, deft. underwrote a policy reinsuring pltf's risk to the amount of £80. This policy contained the following clause: "Being a reinsurance for account the Scottish National Insurance Co., Ltd., subject to the same clauses & conditions as original policy or policies, & to pay as may be paid thereon." The *Titanic* having been lost on Apr. 15, 1912, pltf's paid D. & W. under the policy of Apr. 10, & now sought to recover from deft. under the policy underwritten by him on Apr. 11, 1912. Deft. contended that the initialling of the second slip had the effect of cancelling the first slip, & that there was no "original policy" such as was contemplated by the policy underwritten by him:—*Held*: the second slip did not cancel the first slip & the policy of Apr. 10 was the "original policy" referred to in the policy of Apr. 10, & therefore deft. was liable.—*SCOTTISH NATIONAL INSURANCE CO., LTD. v. POOLE* (1912), 107 L. T. 687; 29 T. L. R. 16; 57 Sol. Jo. 45; 12 Asp. M. L. C. 266; 18 Com. Cas. 9.

*Annotations*:—*Folld. Emanuel v. Weir* (1914), 30 T. L. R. 518. *Refd. Norwich Union Fire Insce. Soc. v. Colonial Mutual Fire Insce.*, [1922] 2 K. B. 461.

**725. — More than one policy — Intention of reassured.**—By three policies of insurance dated respectively May 6, May 11, & Aug. 4, 1910, pltf's insured the ship *Kynance*. The first two policies were for £500 each & covered the vessel from Newcastle, New South Wales, to port or ports on the west coast of South America. The vessel was valued at £12,000, & the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage. The third policy, for £1,000, covered the vessel from Valparaiso &/or port or ports on the west coast of South America to the United Kingdom or Continent or the United States. The vessel was valued at £10,000. Risk to commence from expiration of previous policy.

On Aug. 9, 1910, pltf's reinsured the vessel with deft. at & from Valparaiso &/or any port or ports on the west coast of South America to the United Kingdom, Continent or United States. The ship was valued as in original policy. The policy was stated to be a reinsurance "subject to the same terms clauses & conditions as the original policy or policies & to pay as may be paid thereon." The charterparty under which the vessel made her voyage with a cargo from Newcastle, New South Wales, to the west coast provided that she should discharge at Valparaiso, or if ordered by the charterers' agents after her arrival there, should discharge at any safe port on the west coast not north of P., & by arrangement between charterers & owners she did not discharge all her cargo at Valparaiso, but proceeded

towards T., a west coast port not north of P., where she was to load a cargo under a fresh charterparty for a voyage to a European port. On her voyage from Valparaiso to T. she became a total loss. Pltf's having paid the owners for a loss under the first two policies, sued deft. on the policy of reinsurance. Deft. contended that pltf's did not intend by the reinsurance to cover any risk except that under the third policy, & adduced in support of that contention evidence of the instructions given by pltf's to their brokers, but uncommunicated to defts., on effecting the reinsurance:—*Held*: the reinsurance policy covered pltf's risk under "original policies," & the natural meaning of the contract could not be narrowed, as applying to one only out of the three original policies by evidence of intention on the part of pltf's uncommunicated to deft., to protect themselves only in respect of that single policy.—*RELIANCE MARINE INSURANCE CO. v. DUDER*, [1913] 1 K. B. 265; 81 L. J. K. B. 870; 106 L. T. 936; 28 T. L. R. 469; 12 Asp. M. L. C. 223; 17 Com. Cas. 24, 227, C. A.

*Annotations*:—*Distd. Janson v. Poole* (1915), 84 L. J. K. B. 1543. *Refd. Norwich Union Fire Insce. Soc. v. Colonial Mutual Fire Insce.*, [1922] 2 K. B. 461.

**726. — — — — —**—A ship was insured by certain policies by pltf's, who were underwriters to Lloyd's, for a voyage "from Newcastle, N.S.W., to port or ports, place or places of call, &/or discharge, backwards & forwards & forwards & backwards in any order or rotation on the West Coast of South America," at a premium of 70s. per cent., cargo screened coal or held covered. The ship was valued at £12,000 & the risk was to continue for thirty days after arrival at final port of discharge, or until sailing on next voyage, whichever might first occur. The ship was also insured by a Lloyd's policy issued by pltf's for a voyage "at & from Valparaiso &/or port or ports &/or place or places in any order or rotation on the West Coast of South America" to the United Kingdom or Continent of Europe or the United States, at a premium of 80s. per cent. "warranted nitrate or held covered at a premium to be arranged." The ship was valued in this policy at £10,000, & the risk was to commence from the expiration of the previous policy. Pltf's then reinsured the ship with deft. for a voyage "at & from Valparaiso &/or port or ports &/or place or places in any order or rotation on the West Coast of South America" to the United Kingdom, Continent of Europe, or the United States against the risk of total &/or constructive total loss of the vessel only at a premium of 40s. per cent., "being a reinsurance applying to policy or policies underwritten by Lloyd's underwriters subject to the same clauses & conditions as original policy or policies, & to pay as may be paid thereon." The ship was "valued at £10,000 or as in original policy or policies," & the policy contained the clause "warranted nitrate or held covered at a premium to be arranged." The vessel was chartered to load a cargo of coal at Newcastle, N.S.W., & under the charterparty the charterers directed her to discharge the cargo at Valparaiso, & bills of lading were issued making it deliverable at that port. She was then to proceed under a second charterparty to Tocopilla to load a nitrate cargo for a European port. When the vessel reached Valparaiso it was agreed between the owners & the charterers under the first charterparty that, instead of delivery the whole of the cargo of coal at Valparaiso, she should proceed with 800 or 900 tons of the coals still on board & deliver same to charterers at Tocopilla. This



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arrangement relieved the captain from the necessity of taking ballast on board for the voyage from Valparaiso to Tocopilla. On the voyage to the latter port the vessel stranded & became a total loss. Pltfs. paid the owners of the ship for a loss under the policies on the first voyage. In an action on the policy of reinsurance:—**Held**: (1) the policy of reinsurance, inasmuch as it was in respect of a named cargo & of a named value, was intended to recover the homeward voyage from Valparaiso to the United Kingdom, & not to cover the cross voyage from Newcastle to the West Coast of South America, & therefore deft. was not liable; (2) evidence extrinsic to the policy, namely of the slip, pltfs.' books & the evidence of deft. were admissible to identify the policy which was being re-insured & to show that the policy was intended to be a policy on the homeward voyage, the intention to insure a particular voyage having been communicated to deft.—**JANSON v. POOLE** (1915), 84 L. J. K. B. 1543; 31 T. L. R. 336; 20 Com. Cas. 232.

**727. Reinsurance of excess—Per named lines—Goods intended for named lines lost.]**—A contract of reinsurance provided that the reinsurers should take the excesses of the original insurers over a certain amount upon steamers belonging to certain lines. The contract covered such excesses on voyages (*inter alia*) from A. to B. & from B. & C. Goods on board a "tramp" steamer on a voyage from A. to B. which would have formed part of the cargo of a liner on a voyage from B. to C., & would have been covered by the contract were totally lost between A. & B.:—**Held**: the loss was not covered by the contract.—**INSURANCE CO. OF NORTH AMERICA v. NORTH CHINA INSURANCE CO.** (1898), 15 T. L. R. 101; 4 Com. Cas. 67, C. A.

**728. — Policy covering risk of craft, each craft to be deemed a separate insurance—Loss on one craft below limit of reinsurance.]**—Pltfs. by a policy of insurance underwrote a risk of £1,914 upon a cargo of wheat per steamship from Ghenitschek, in the Black Sea, to the United Kingdom, the risk being from warehouse to warehouse. Pltfs. reinsured their risk with defts. & other underwriters for "£1,000 in excess of £500." To the policy of insurance the following clauses were attached: "including all risks of craft &/or raft &/or of any special lighterage (each craft, raft, ~~package~~ or lighter to be deemed a separate insurance) . . . "&" warranted free of particular average, unless the ship, or craft, or cargo be stranded, sunk . . ." The ship's cargo was worth upwards of £23,000. A barge going to the ship with wheat to the value of £3,000 sank, pltfs.' interest in the cargo being about £400, & pltfs. became liable to the cargo owners under their original policy in respect of the loss to the extent of £298, which they paid. Pltfs. then claimed from defts. the proportion of the £298 which they (defts.) had undertaken to be responsible for under their policy of reinsurance. Defts. refused to pay, upon the ground that pltfs.' liability with regard to the barge was not in "excess of £500" & as each barge was to be deemed a separate insurance, they were not liable to pltfs. upon the policy of reinsurance. In an action upon the

policy of reinsurance:—**Held**: defts. were liable. The clauses could not be read as in any way affecting the contract of reinsurance, which was a contract by defts. to indemnify pltfs. from the excess of the risk they had undertaken over £500 up to £1,000, & pltfs. had undertaken a risk of £1,914 which was in excess of £500.—**SOUTH BRITISH FIRE & MARINE INSURANCE CO. OF NEW ZEALAND v. DA COSTA**, [1906] 1 K. B. 456; 75 L. J. K. B. 276; 94 L. T. 435; 54 W. R. 420; 22 T. L. R. 305; 50 Sol. Jo. 292; 10 Asp. M. L. C. 227; 11 Com. Cas. 81.

**729. Reinsurance of total or constructive loss only—To follow hull underwriters if compromised—Compromise of alternative claim for total or partial loss.]**—Pltf. took out a policy of reinsurance with defts. which contained the following clause: "Being a reinsurance & to pay as per original policy or policies, but the insurance is against the risk of the total or constructive total loss of the steamer only, but to follow hull underwriters in the event of a compromised or arranged loss being settled." The owner of the insured ship brought an action against the hull underwriters claiming for a constructive total loss & alternatively for a partial loss. This action was compromised without anything being said as to whether the settlement was as for a constructive total loss or as for a partial loss. In an action on the reinsurance policy:—**Held**: as a claim had been made by the shipowner in respect of a constructive total loss & had been persisted in down to the settlement of the action which had been compromised, there was a compromised loss within the terms of the reinsurance policy, even though there had been also an alternative claim in respect of a partial loss.—**STREET v. ROYAL EXCHANGE ASSURANCE** (1914), 111 L. T. 235; 30 T. L. R. 495; 12 Asp. M. L. C. 496; 19 Com. Cas. 339, C. A.

**Annotation:—Reid.** *Norwich Union Fire Insee. Soc. v. Colonial Mutual Fire Insee.*, [1922] 2 K. B. 461.

#### SUB-SECT. 4.—SETTLEMENT OF LOSSES.

**730. Defences of insurer against assured—Available to reinsurer—Discovery.]**—In an action by an underwriter on a policy of marine insurance brought by him against a reinsurer the latter is entitled to discovery of ship's papers.

All the defences open to the original underwriter against the assured were open to the reinsurer (*A. L. SMITH, L.J.*).—**CHINA TRADERS' INSURANCE CO. v. ROYAL EXCHANGE ASSURANCE CORPN.**, [1898] 2 Q. B. 187; 67 L. J. Q. B. 736; 78 L. T. 783; 46 W. R. 497; 14 T. L. R. 423; 42 Sol. Jo. 507; 8 Asp. M. L. C. 409; 3 Com. Cas. 189, C. A.

**Annotations:—Reid.** *Tannenbaum v. Heath*, [1908] 1 K. B. 1032; *Teneria Moderna Franco Española v. New Zealand Insee.*, [1924] 1 K. B. 79.

**731. Loss by peril insured against—Proof of loss.]**—Shipowners insured their ship with pltfs. for a voyage against partial as well as total loss, the sound value of the ship being expressed in the policy to be agreed at a specified sum. The pltfs. reinsured with deft. against the risk of total or constructive total loss only, the ship being valued as per original policy. The policy of reinsurance was in the form of an ordinary Lloyd's policy, containing in print the usual

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**h. Defences of insurer against assured—Available to reinsurer.]**—In an action by the insurer against the reinsurer, the latter has a right to

raise all defences which could have been raised in an action by the assured.—**NATIONAL MARINE INSURANCE CO. OF AUSTRALASIA v. HALFEY** (1879), 5 V. L. R. 226.—**AUS.**

**k. Settlement between insurer & assured—Whether binding on reinsurer.]**—**PHENIX INSURANCE CO. v. ANCHOR INSURANCE CO.** (1883), 4 O. R. 524.—**CAN.**

undertaking by the assurers to contribute to suing & labouring charges. It also contained in writing the following clauses: "Being a re-insurance subject to the same clauses & conditions as the original policy & to pay as may be paid thereon"; & "No claim to attach to this policy for salvage charges." During the course of the insured voyage the ship stranded & suffered damage. The probable cost of getting her afloat, taking her to a port of repair, & repairing her, exceeded the agreed value of the ship as expressed in the policy, but as it was in fact less than her real repaired value the owners elected not to give notice of abandonment. The ship was floated & placed in a condition of safety, & subsequently taken to a port of repair & repaired. The owners recovered from pl'ts. upon their policy £107 per cent. of their proportion of the agreed value of the ship, that sum being made up partly of the expense of repairs & partly of the expense of floating her. Pl'ts. then sued def't. for the full amount underwritten by him as in respect of a constructive total loss, or in the alternative for his proportion of the suing & labouring charges:—*Held*: (1) there being, in the absence of a notice of abandonment by the owners, no original liability upon pl'ts. to pay as for a constructive total loss, the mere fact that they had paid, in respect of a partial loss & suing & labouring charges combined, upwards of £100 per cent. did not entitle pl'ts. to recover that sum from def't. as for a constructive total loss under the words "to pay as may be paid thereon"; (2) the clause providing that no claim was to attach for "salvage charges" excluded def't.'s obligation to contribute to the suing & labouring charges, notwithstanding the omission to delete the printed clause imposing that obligation.

The printed clause & written clause being inconsistent the latter must prevail (BIGHAM, J.).

(3) To constitute a constructive total loss there must be not only such damage to the vessel as to make her not worth repairing, but there must also be a notice of abandonment (BIGHAM, J.).

(4) The reinsurer when called upon to perform his promise, is entitled to require the reassured first to show that a loss of the kind reinsured has in fact happened; & secondly that the reassured has taken all proper & businesslike steps to have the amount of it fairly & carefully ascertained (BIGHAM, J.).—WESTERN ASSURANCE CO. OF TORONTO v. POOLE, [1903] 1 K. B. 376; 72 L. J. K. B. 195; 80 L. T. 362; 9 Asp. M. L. C. 390; 8 Com. Cas. 108.

*Annotations*:—As to (2) *Appld.* Crouan v. Stanier, [1904] 1 K. B. 87. *Generally*, *Reid.* Street v. Royal Exchange Assce. (1914), 111 L. T. 235; British Dominions General Insce. v. Duder, [1915] 2 K. B. 394.

732. ———.]—NELSON v. EMPRESS ASSURANCE CORPN., LTD., No. 105, *ante*.

733. Amount of loss—Ascertainment by proper means.]—WESTERN ASSURANCE CO. OF TORONTO v. POOLE, No. 731, *ante*.

734. Compromise between insurer & assured—Reinsurer entitled to benefit.]—(1) A contract of reinsurance is a contract of indemnity, & therefore where the original underwriters have entered into a compromise with the assured with regard to a loss the reinsurers are entitled to the benefit of such compromise notwithstanding that they had at first refused to join in such compromise, & are not liable to the original underwriters for the

full amount of the loss where the original underwriters have discharged their liability by payment to the assured under the compromise of a less amount.

(2) The reinsurers are, however, also liable to their proportion of the expenses incurred in obtaining the compromise.—BRITISH DOMINIONS GENERAL INSURANCE CO., LTD. v. DUDER, [1915] 2 K. B. 394; 84 L. J. K. B. 1401; 113 L. T. 210; 31 T. L. R. 361; 13 Asp. M. L. C. 84; 20 Com. Cas. 270, C. A.

*Annotations*:—As to (1) *Distd.* British Union & National Insce. v. Rawson, [1916] 2 Ch. 476. *Reid.* Norwich Union Fire Insce. Soc. v. Colonial Mutual Fire Insce., [1922] 2 K. B. 461.

735. ——— Expenses thereof—Proportionate liability of reinsurer.]—BRITISH DOMINIONS GENERAL INSURANCE CO., LTD. v. DUDER, No. 734, *ante*.

## SECT. 10.—VALUED POLICIES.

### SUB-SECT. 1.—NATURE AND OBJECTS.

*See* Marine Insurance Act, 1906 (c. 41), s. 27.

736. Not a wagering policy.]—LEWIS v. RUCKER, No. 760, *post*.

Wagering policies generally, *see* Part IX., *post*.

737. Distinguished from open policy.]—LEWIS v. RUCKER, No. 760, *post*.

738. ———.]—TOBIN v. HARFORD, No. 826, *post*.

739. Object of valuation.]—FORBES v. ASPINALL, No. 2035, *post*.

740. ———.]—HERRING v. JANSON, No. 1192, *post*.

### SUB-SECT. 2.—FORM AND REQUISITES.

*See* Marine Insurance Act, 1906 (c. 41), s. 27.

741. What amounts to—Amount stated in memorandum.]—Policy on a ship & goods thus:—"At & from the coast of Africa, to her port of discharge in the United Kingdom; beginning the adventure upon the said goods & merchandises from the loading thereof on board the said ship, twenty-four hours after her arrival on the coast of Africa." There was a memorandum, that the ship was valued at £1,200, & the cargo at £4,800. The ship went out on her voyage to Africa, with cargo, for barter. A great part of the cargo was actually bartered; but all her substituted cargo was not on board when she was lost. A part of the outward cargo was still on board at the time:—*Held*: (1) the outward cargo was not covered by the policy; (2) the policy was not a valued policy as to the cargo, at the time of the loss.—RICKMAN v. CARSTAIRS (1833), 5 B. & Ad. 651; 2 Nev. & M. K. B. 562; 3 L. J. K. B. 28; 110 E. R. 931.

*Annotations*:—*Reid.* Tobin v. Harford (1864), 17 C. B. N. S. 528; Joyce v. Realm Insce. (1872), L. R. 7 Q. B. 580. *Mentd.* Beacon Life & Fire Assce. v. Gibb (1862), 1 Moo. P. C. C. N. S. 73.

742. ——— Particulars need not be stated.]—FRANCO v. NATUSCH, No. 1537, *post*.

743. ——— Freight "to be valued at as under"—Amount stated in margin.]—A policy of insurance was effected upon freight to "be valued at as under." The policy was in the usual form, containing the common memorandum, which was immediately followed by the words, "On freight

## PART II. SECT. 10, SUB-SECT. 1.

737 i. Distinguished from open policy.]—Where a declaration was

framed as on a valued policy on freight, & the cover note put in evidence by pl'tf. contained the words "have this day insured the sum of £400 on

freight":—*Held*: the policy was an open, & not a valued, policy.—ROSS v. ADELAIDE MARINE ASSURANCE CO. (1870), 1 V. R. (Law) 232.—AUS.

**Sect. 10.—Valued policies: Sub-sects. 2, 3 & 4.]**

warranted free of capture, seizure, piracy, detention, or the consequences of any attempt thereat." In the margin nearly opposite, but a little above these words, "£1,300" was written in figures:—*Held*: this was not a valued policy.

Parties who wish to make a policy a valued one must express [the amount] on its face (CROMPTON, J.).—WILSON v. NELSON (1864), 5 B. & S. 354; 4 New Rep. 191; 33 L. J. Q. B. 220; 10 L. T. 523; 10 Jur. N. S. 1044; 12 W. R. 795; 2 Mar. L. C. 25; 122 E. R. 863.

**SUB-SECT. 3.—CONCLUSIVENESS OF VALUATION.**

See Marine Insurance Act, 1906 (c. 41), s. 27 (3), (4).

**744. Valuation binding.]—ERASMUS v. BANKS** (1747), cited 3 Doug. K. B. 86.

*Annotation*:—**Consd.** Le Cras v. Hughes (1782), 3 Doug. K. B. 81.

**745. —.]—**In the case of a valued policy on both ship & cargo, the assured must recover the whole sum underwritten, because he could not have any claim for a return of premium for short interest, if the ship had arrived safe.—MACNAIR v. COULTER (1773), 4 Bro. Parl. Cas. 450; 2 E. R. 305, H. L.

**746. —.]—**IRVING v. MANNING, No. 2176, *post*.

**747. —.]—**Where a ship is insured under several valued policies, in some of which the vessel is valued at a higher amount than in the policy in question, & the assured has recovered insurance moneys under these policies, he can only recover, in an action upon the policy in question, the difference between the sum already recovered & the amount at which the ship is valued in the present policy.

In general the value must be taken to be that which is stated in the policy. If that is binding upon the underwriter, so that he cannot give evidence of the real value of the vessel, & so prevent the assured from recovering the amount stated in the policy, the assured is equally bound by the agreed value (POLLOCK, C.B.).—BRUCE v. JONES (1863), 1 H. & C. 769; 1 New Rep. 333; 32 L. J. Ex. 132; 7 L. T. 748; 9 Jur. N. S. 628; 11 W. R. 371; 1 Mar. L. C. 280; 158 E. R. 1094.

*Annotations*:—**Consd.** Wilson v. Nelson (1864), 33 L. J. Q. B. 220. **Refd.** Seagrave v. Union Marine Insce. (1866), L. R. 1 C. P. 305; Burnand v. Rodocanachi (1881), 44 L. T. 538.

**748. —.]—**In a valued policy of insurance, the parties are bound by the value therein named in respect of all rights & obligations which spring out of it.

A valued policy of insurance for £6,000 on one of defts.' vessels was underwritten by pl'tfs., the real value of the vessel being £9,000, & no other insurance being effected on it. The vessel having been run down & sunk by another vessel, pending the risk, pl'tfs. paid to defts. the £6,000, & afterwards recovered by proceedings instituted in defts.' name against the owners of the ship which caused the damage the sum of £5,683 11s. 7d.:—*Held*: pl'tfs., the underwriters, were entitled to the whole of the amount so recovered, after deducting the amount payable to the owners of the cargo & freight, & defts. were not entitled to any part of it on the ground that the vessel insured

was of greater value than that named in the policy.—NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCN. v. ARMSTRONG (1870), L. R. 5 Q. B. 244; 39 L. J. Q. B. 81; 21 L. T. 822; 18 W. R. 520; 3 Mar. L. C. 330.

*Annotations*:—**Consd.** Burnand v. Rodocanachi (1882), 7 App. Cas. 333; The Commonwealth, [1907] P. 216. **Fold** Thames & Mersey Marine Insce. v. British & Chilian S.S. Co. (1915), 85 L. J. K. B. 384. **Refd.** Simpson v. Thompson (1877), 3 App. Cas. 279; Midland Insce. v. Smith (1881), 6 Q. B. D. 561.

**749. —.]—**A policy issued by resps., a mutual marine insurance assocn., stipulated that the provisions contained in the arts. of assocn. should be deemed part of the policy. Among the provisions, purporting to be arts., indorsed on the policy was the following: "The sum insured on any one steamer shall . . . in no case exceed four-fifths of the value of such steamer . . . & it shall be a condition of this insurance that the assured shall keep one-fifth uninsured." This was part of an art. which had been registered, but which, for want of compliance with the formalities of the Cos. Act, was invalid. Resps. cancelled the policy because applt. had insured his steamer with them & another insurance co. to a greater amount than four-fifths of her value as declared in their policy. The vessel was lost. In an action on the policy:—*Held*: the meaning of the policy was that the assured should be his own insurer to the extent of one-fifth; the condition was binding as a contract, notwithstanding the invalidity of the article on which it was founded; & it was not open to applt. to show that the vessel was worth more than the value declared by the policy.—MUIRHEAD v. FORTH & NORTH SEA STEAMBOAT MUTUAL INSURANCE ASSOCN., [1894] A. C. 72; 10 T. L. R. 82; 6 R. 59, H. L.

*Annotation*:—**Refd.** S.S. Balmoral Co. v. Marten, [1901] 2 K. B. 896.

**750. — Although amount erroneous.]—**THE MAIN, No. 2039, *post*.

**751. —.]—**WOODSIDE v. GLOBE MARINE INSURANCE CO., No. 1985, *post*.

**752. — In absence of fraud.]—**(1) The sentence of condemnation of a foreign ct. of Admiralty cannot be received without previous proof of the ship having been captured. A licence is *prima facie* evidence, that when a ship left her port of outfit, she sailed upon the voyage insured.

(2) Goods protected by a valued policy, being captured are condemned as lawful prize, the captors paying the freight, the assured may nevertheless recover as for a total loss.

The cargo was intercepted on the voyage insured, & though carried into Leghorn, & sold by the consignees, this is the same as if it had been carried into any other hostile port, & disposed of in any other manner. It never reached the agents of the assured. The sale was for the benefit of the captors. Nor, without evidence of fraud, can I disturb the valuation (LORD ELLENBOROUGH).—MARSHALL v. PARKER (1809), 2 Camp. 69, N. P.

**753. — —.]—**In a valued policy unless there is a particular charge in the bill that the value of the cargo is below the amount insured, it is sufficient if deft. swears to the value as stated in the invoice.

It is clearly established that a valued policy is a legal policy, & it amounts to an agreement between the parties that the particulars of the value shall not be inquired into; if, therefore, we should allow this motion it would, in fact, set aside the agreement between the parties, which we

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**744 i. Valuation binding.]—**STEWART v. GREENOCK MARINE INSURANCE CO. (1844), 6 Dunl. (Ct. of Sess.) 359.—SCOT.



cannot do unless some fraud is shown (WOOD, B.).—AUBERT *v.* JACOBS (1810), Wight, 118; 145 E. R. 1197.

754. ———.]—BARKER *v.* JANSON, No. 1984, *post*.

755. ———.]—LIDGETT *v.* SECRETAN, No. 2033, *post*.

756. ———.]—AFRICAN MERCHANTS' CO. *v.* HARPER (1872), 54 L. T. Jo. 91.

*Annotation*:—*Apld.* The Main, [1894] P. 320.

757. ———.]—WILLIAMS *v.* NORTH CHINA INSURANCE CO., No. 473, *ante*.

758. ———.]—THAMES & MERSEY MARINE INSURANCE CO. *v.* GUNFORD SHIP CO., SOUTHERN MARINE MUTUAL INSURANCE ASSOCN. *v.* GUNFORD SHIP CO., No. 765, *post*.

759. **Partial loss.**]—ERASMUS *v.* BANKS (1747), cited 3 Doug. K. B. 86.

*Annotation*:—*Folld.* Le Cras *v.* Hughes (1782), 3 Doug. K. B. 81.

**Subrogation of insurer to rights of assured.**]—*See* Sect. 25, *post*.

#### SUB-SECT. 4.—OVERVALUATION IN POLICY.

Marine Insurance Act, 1906 (c. 41), s. 27 (3).

760. **Whether ground for avoiding policy—Valuation mere cover to a wager.**]—(1) A valued policy is not to be considered as a wager policy.

The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved; in a valued policy, it is agreed (LORD MANSFIELD).

If it should come out in proof that a man had insured £2,000 & had interest on board to the value of a cable only; there never has been, & I believe there never will be a determination, that by such an evasion the Act of Parliament may be defeated (LORD MANSFIELD).

There are many conveniences from allowing valued policies; but where they are used merely as a cover to a wager, they would be considered as an evasion (LORD MANSFIELD).

(2) The insurer takes the proportion of the difference between sound & damaged at the port of delivery & pays that proportion upon the value of the goods specified in the policy . . . the proportion of the difference is equally the rule whether the goods come to a rising or a falling market (LORD MANSFIELD, C.J.).

If part of the cargo capable of a several & distinct valuation at the outset, be totally lost; as if there be a hundred hogsheads of sugar & ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads without any regard to the price for which the other ninety may be sold (LORD MANSFIELD, C.J.).—LEWIS *v.* RUCKER (1761), 2 Burr. 1167; 97 E. R. 769.

*Annotations*:—*As to* (1) *Refd.* Murphy *v.* Bell (1828), 4 Bing. 567. *As to* (2) *Apld.* Johnson *v.* Sheddon (1802), 2 East, 581. *Consd.* Irving *v.* Manning (1847), 1 H. L. Cas. 287. *Distd.* Ralli *v.* Janson (1856), 6 E. & B. 422. *Refd.* De Costa *v.* Firth (1766), 4 Burr. 1966; Le Cras *v.* Hughes (1782), 3 Doug. K. B. 81; Usher *v.* Noble (1810), 12 East, 639; Hardy *v.* Innes (1822), 6 Moore, C. P. 574; Hills *v.* London Assoc. Corpn. (1839), 9 L. J. Ex. 25; Dawson *v.* Wrench (1849), 3 Exch. 359; Bruce *v.* Jones (1863), 1 H. & C. 769; Balmoral S.S. Co. *v.* Marten, [1901] 2 K. B. 896; Duus, Brown *v.* Binning (1906), 22 T. L. R. 529.

761. ——— **Intent to defraud underwriters.**]—If goods are fraudulently overvalued in a policy of insurance with intent to cheat the underwriters, the contract is entirely vitiated, & the assured cannot recover even for the value actually on board.—HAIGH *v.* DE LA COUR (1812), 3 Camp. 319, N. P.

762. ——— **Non-disclosure amounting to suppression of material fact.**]—TAYLOR *v.* SOUTH DEVON INSURANCE CO. (1828), Dan. & Ll. 91.

763. ———.]—Where the insurer, in effecting a marine policy, does not disclose to the underwriter the fact that the goods insured are largely overvalued, it is a question for the jury whether the concealment is material having regard to the reasonable practice of underwriters.

In an action upon three voyage policies upon a ship it appeared that the first was on commissions on goods valued at £14,700, the commissions being valued at £1,500; the second on profits on charter valued at £280; the third on spirits valued at £2,800. The price of goods put on board the vessel, including cost, charges & insurance, amounted in the whole to something less than £8,000, the various insurances on the goods including profits amounted to £14,000, & in addition to these there was the insurance on commissions of £1,500, & a further insurance of £1,000 on safe arrival. With regard to the spirits, the cost, charges and insurance amounted to £973, while for insurance they were valued at £2,800. Evidence having been given that it was material to underwriters to know the extent of the overvaluation when it was to such an extent as appeared in this case, as the risk was then considered a speculative risk, the jury found that the valuations were excessive, that it was material to the underwriters to know that they were excessive, & that the fact that they were excessive was concealed from the underwriters, but that there was no sufficient evidence of fraud:—*Held*: it was the duty of an insurer to disclose everything which would affect the judgment of a rational underwriter governing himself by the principles & calculations on which underwriters do in practice act, & therefore the jury were justified in finding that the overvaluation was a material fact which ought to have been & was not disclosed; & upon this finding the underwriters were entitled to the verdict.

It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, & that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy (BLACKBURN, J.).—IONIDES *v.* PENDER (1874), L. R. 9 Q. B. 531; 43 L. J. Q. B. 227; 30 L. T. 547; 22 W. R. 884; 2 Asp. M. L. C. 266.

*Annotations*:—*Folld.* Rivaz *v.* Gerussi (1880), 6 Q. B. D. 222. *Refd.* Tate *v.* Hyslop (1885), 15 Q. B. D. 368; Thames & Mersey Marine Insee. *v.* Gunford Ship Co., Southern Marine Mutual Insee. Assocn. *v.* Gunford Ship Co., [1911] A. C. 529.

764. ———.]—HERRING *v.* JANSON, No. 1192, *post*.

765. ———.]—Shipowners brought an action to recover for a total loss under policies of insurance on the hull of the ship during a specified voyage. The insurances were effected through the agency of the managing owner of the vessel. It appeared that twenty-two years had elapsed since the master of the vessel had been at sea, he having during that time been engaged as a stevedore; that he had lost his last ship & his certificate had been suspended; that the hull was largely over-insured, having regard to its market value, & that there were insurances on gross freight & disbursements. With regard to part of these disbursements there was no insurable interest & the insurance was effected by a p.p.i. or "honour policy." The managing owner, to whom money was due from the ship, had also taken out for his protection "honour policies" to a large amount on disbursements:—*Held*: (1) there was no duty

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**Sects. 11 & 12: Sub-sect. 1, A. & B.]**

on the part of the owners to inform the insurers of the past history of the master, & the omission to disclose the circumstances relating to his career did not constitute the non-disclosure of a material circumstance; but (2) the omission to disclose the facts relating to the over-insurance of the vessel & the existence & amount of the honour policies did amount to the non-disclosure of material circumstances, & the contract of insurance was voidable by the insurers.

(3) Although the contract of insurance is expressed to be a contract of indemnity, & the indemnity is properly based on market value at the time of the loss, yet the law allows the insured value to be agreed between the parties, & the agreed value, though frequently, & perhaps generally, in excess of the market value, is binding in the absence of fraud (LORD ROBSON).—**THAMES & MERSEY MARINE INSURANCE CO. v. GUNFORD SHIP CO., SOUTHERN MARINE MUTUAL INSURANCE ASSOCN. v. GUNFORD SHIP CO., [1911] A. C. 529; 80 L. J. P. C. 146; 105 L. T. 312; 27 T. L. R. 518; 55 Sol. Jo. 631; 12 Asp. M. L. C. 49; 16 Com. Cas. 270, H. L.**

**Annotations:—As to (2) Consd. Edwards v. Motor Union Insce., [1922] 2 K. B. 249. Rejd. Re Yager & Guardian Assce. (1912), 108 L. T. 38.**

**766. ———.]—The non-disclosure by the assured to the underwriters of the fact that the cargo had been largely overvalued held to avoid the policy.—GOODING v. WHITE (1913), 29 T. L. R. 312.**

#### SUB-SECT. 5.—RE-OPENING VALUATION.

See Marine Insurance Act, 1906 (c. 41), s. 75 (2).

**767. When valuation may be opened—Average loss.]—LE CRAS v. HUGHES, No. 694, ante.**

**768. ——— Part only of subject-matter at risk.]—FORBES v. ASPINALL, No. 2035, post.**

**769. ———.]—TOBIN v. HARFORD, No. 826, post.**

**770. ———.]—DENOON v. HOME & COLONIAL ASSURANCE CO., No. 2037, post.**

**771. ———.]—THE MAIN, No. 2039, post.**

**772. ——— Whole cargo not covered by policy.]—RICKMAN v. CARSTAIRS, No. 741, ante.**

**773. ——— To show intention of parties—As to what included in valuation.]—WILLIAMS v. NORTH CHINA INSURANCE CO., No. 473, ante.**

#### SUB-SECT. 6.—DOUBLE INSURANCE.

See Sect. 11, post.

#### SECT. 11.—DOUBLE INSURANCE.

See Marine Insurance Act, 1906 (c. 41), s. 32 (1), (2).

**774. Defined.]—GODIN v. LONDON ASSURANCE CO., No. 427, ante.**

**775. Amount recoverable by assured—Whole amount—From any one insurer.]—In case of a double insurance the insured may recover the whole against any of the insurers, & leave him**

to recover satisfaction from the rest.—**NEWBY v. REED (1763), 1 Wm. Bl. 416; 96 E. R. 237.**

**Annotations:—Rejd. Bruce v. Jones (1863), 32 L. J. Ex. 132; Munro, Brice v. War Risks Asscn., [1918] 2 K. B. 78.**

**776. ——— Several valued policies—Amount equal to complete indemnity.]—In an action on a valued policy, it is no defence to prove that the assured have received the amount of the valuation in this policy from the underwriters on another policy, if the subject-matter insured be proved to be of a value equal to the sum received & that sought to be recovered.**

I will take care that the assured do not recover upon the whole more than the real value of the subject-matter insured. But I think it is not enough for the underwriters on a particular policy to show that the assured has received from another quarter the amount of the valuation in that policy unless this amounts in point of fact to a complete indemnity (LORD ELLENBOROUGH).—**BOUSFIELD v. BARNES (1815), 4 Camp. 228, N. P.**

**Annotations:—Distd. Irving v. Richardson (1831), 1 Mood. & R. 153. Foll'd. Morgan v. Price (1849), 4 Exch. 615. Consd. Wilson v. Nelson (1864), 33 L. J. Q. B. 220.**

**777. ——— Value declared—Same value in each policy.]—IRVING v. RICHARDSON, No. 661, ante.**

**778. ———.]—A declaration on a policy of assurance stated that S. before his bkpey., made a policy of assurance on the ship *Defiance*, that the ship, etc., should be valued at £2,500; averring a loss, & non-payment by deft. of the sum insured. Plea, that M., official assignee of S., made a certain other policy upon the said ship & goods, valued at £2,500 in case of loss or average, the adjustment to be made irrespective of any other assurance. Averment of the identity of the ship, the interest, the risk, the amount of the interest & loss, & that the insurers had paid pl'tfs., who had accepted £2,500 as the agreed indemnity for the loss, & which was a full indemnity. Replication, *de injuriâ*:—**Held**: (1) on special demurrer, the replication was bad, as the plea amounted to a discharge & not to an excuse; (2) the plea was good on general demurrer.—**MORGAN v. PRICE (1849), 4 Exch. 615; 19 L. J. Ex. 201; 14 L. T. O. S. 257.****

**779. ——— Different valuations—Difference between amount already received & valuation in policy sued on.]—BRUCE v. JONES, No. 747, ante.**

See Marine Insurance Act, 1906 (c. 41), s. 32 (2). Valued policies generally, see Sect. 10, ante.

**780. Right of contribution between underwriters.]—NEWBY v. REED, No. 775, ante.**

**781. ———.]—ROGERS v. DAVIS (1777), 2 Park's Marine Insurances, 8th ed. p. 601.**

**782. ——— Different insurances in same rights.]—By floating policies of insurance effected by B. & Co., wharfingers, they insured against loss or damage by fire, in the sums named, grain & seed, the assured's own or on commission, for which they were responsible, subject to conditions of average, & to this condition, that "if at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, the co. shall not be liable to pay or contribute more than its ratable proportion of such loss or damage." While these**

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**775 1. Amount recoverable by assured—Whole amount—From any one insurer.]—BANK OF BRITISH NORTH AMERICA v. WESTERN ASSURANCE CO. (1884), 7 O. R. 166.—CAN.**

**1. ———.]—In an action on a policy of marine insurance for £500 on goods valued at £2,000, & which had been partially lost, the defence set up was that under a policy of prior insurance for £1,500, the whole loss**

was covered:—**Held**: the co. was only liable on the second policy for any deficiency not covered by the prior insurance.—**PARSONS v. MARINE INSURANCE CO. (1879), 6 Nfld. L. R. 192. —NFLD.**

policies were subsisting a fire destroyed a quantity of grain stored with B. & Co., part of which belonged to R. & Co., who had also effected policies, called merchants' policies on the grain thus destroyed, including also grain stored elsewhere, which policies contained the like conditions as the wharfingers' policies. B. & Co. were paid in full by the several insurance companies. In a suit to determine the liability of the cos. *inter se*:—*Held*: the grantors of the merchants' policies were not liable to contribute to the loss; B. & Co. were primarily liable, but, being indemnified by the grantors of the wharfingers' policies, the latter were ultimately liable: the condition as to double insurance only applied to cases where the same property was the subject-matter of insurance, & where the interests were the same.

I can see no reason why the principle in respect of contribution should not be exactly the same in respect of fixed policies as they are in respect of marine policies, & I think if the same person in respect of the same right insures in two offices, there is no reason why they should not contribute in equal proportions in respect of a fire policy as they would in the case of a marine policy. The rule is perfectly established in the case of a marine policy that contribution only applies where it is an insurance by the same person having the same rights, & does not apply when different persons insure in respect of different rights (*MELLISH, L.J.*).—*NORTH BRITISH & MERCANTILE INSURANCE CO. v. LONDON, LIVERPOOL & GLOBE INSURANCE CO.* (1877), 5 Ch. D. 569; 46 L. J. Ch. 537; 36 L. T. 629, C. A.

*Annotations*:—*Folld. Darrell v. Tibbitts* (1880), 5 Q. B. D. 560. *Reid. Castellain v. Preston* (1882), 8 Q. B. D. 613; *West of England Fire Insce. v. Isaacs* (1896), 66 L. J. Q. B. 36; *American Surety Co. of New York v. Wrightson* (1910), 103 L. T. 663; *Engel v. Lancashire & General Asso.* (1925), 41 T. L. R. 408.

See Marine Insurance Act, 1906 (c. 41), ss. 79, 80.

**783. Two policies overlapping—Whether double insurance or in substitution.**—By a policy of insurance a vessel was insured from Bombay to Calcutta, & for thirty days after she had been moored at the latter place. She had arrived there ten days before such policy had been effected; & on receiving news of her said arrival, her owners effected a second policy on her with the same insurers, by which she was insured at & from Calcutta to Bombay. The vessel was totally lost at Calcutta during the continuance of the risk under both policies, & the insurers, having paid the owners as for a total loss upon the second policy, sought to recover the full amount upon a policy of re-insurance which they had effected of the risk under the second policy, without deduction the money payable upon the first policy. The ct. being at liberty to draw inferences of fact as a jury, were of opinion from the above facts that the second policy was intended as a substitution for the first, & that the original insurers were liable only on the second policy, & were, therefore, entitled to recover the full amount on the policy of reinsurance.—*UNION MARINE INSURANCE CO., LTD. v. MARTIN* (1866), 35 L. J. C. P. 181.

## SECT. 12.—COMMENCEMENT, DURATION AND AREA OF RISK.

### SUB-SECT. 1.—TIME POLICIES.

#### A. In General.

**784. Loss must happen during period covered.**—Pltfs. were the owners of a vessel which they

chartered on certain terms as regards payment of freight for six months from Mar. 21, 1881, with the option to the charterers of extending the time for a period of three or six months. A clause in the charterparty provided that in the event of loss of time by collision, whereby the vessel was rendered incapable of proceeding for more than forty-eight hours, payment of hire was to cease until such time as she was again in an efficient state to resume her voyage. On Apr. 4, 1881, pltfs. insured against loss of freight with deft. "at & from & for & during the space of six calendar months from Apr. 15, to Oct. 14, 1881," deft. to pay only loss of hire which might arise under the clause in the charterparty "for accidents occurring between Apr. 15, & Oct. 15." On June 27, 1881, the vessel while on a voyage, struck something soft with her bottom, but was able to proceed on her voyage, & it was not until Nov. 18, when she arrived at Liverpool, that it was discovered that she required considerable repairs, owing to damage admittedly caused by the accident in June. The charterers, who had exercised their option of continuing the charter until Dec. 21, thereupon gave notice to pltfs. discontinuing the hire until the vessel was in a fit state to resume employment, which she never was until the end of Dec.:—*Held*: as the policy was a time policy, the loss insured against must happen during the period covered by the policy; & deft.'s liability being confined to loss of chartered freight between Apr. 15, & Oct. 15, could not be extended so as to include loss of hire which only occurred after the expiration of that time.—*HOUGH & CO. v. HEAD* (1885), 55 L. J. Q. B. 43; 53 L. T. 809; 34 W. R. 160; 5 Asp. M. L. C. 505, C. A.

*Annotation*:—*Mentd. Admiral Shipping Co. v. Weidner, Hopkins*, [1916] 1 K. B. 429.

**785. Insurance on freight—For period shorter than necessary to complete voyage.**—(1) Freight may be insured by a time policy, though for a period short of the time necessary to complete the voyage on which such freight is to be earned: & there is a total loss of freight, if the cargo be so damaged by a peril of the sea, in the course of the voyage, as to render it impossible, except at an expense which would greatly exceed its value on arrival, to carry it to its port of destination.

(2) Freight was insured by a "club-policy" from Jan. 24, 1852, to Mar. 1, 1852, subject to the rules of the association, one of which was as follows: "That the committee, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the committee shall cause similar notice to be given to the parties." No notice having been given:—*Held*: this was a continuing policy, & not merely a policy to enure till Mar. 1.—*MICHAEL v. GILLESPIE* (1857), 2 C. B. N. S. 627; 26 L. J. C. P. 306; 29 L. T. O. S. 162; 3 Jur. N. S. 1219; 140 E. R. 562.

#### B. Commencement of Risk.

See Marine Insurance Act, 1906 (c. 41), s. 25 (1).

**786. Insurance from date of sailing—Ship also covered by port risk policy—Damage after sailing but within limits of port.**—(1) Pltfs. effected insurances with defts. at Lloyd's on their ship, the *R. F. Mathews*, then lying in the Port of Leith, under two policies, one a "port" or "harbour" policy, "while at Leith"; the other a time policy for twelve months "from date of sailing from Leith." The ship after setting out on the voyage, but while still within the limits of the Port of



*Sect. 12.—Commencement, duration and area of risk:*  
*Sub-sect. 1, B., C., D. & E.]*

Leith, suffered damage:—*Held*: deft. was liable under the time, but not under the "port" policy.

(2) Evidence is admissible on any case of insurance to show consistently with the language of the policy, what the risk was. The terms of the policy of insurance are rarely sufficiently explicit, but the risk intended to be run may be identified by parol evidence. It is for this reason that misrepresentation or concealment when proved will render the policy void (MATHEW, J.).—HUNTING & SON v. BOULTON (1895), 1 Com. Cas. 120.

**787. Insurance "from" given date — Given date included—Reinsurance.]**—Where in a contract two days are mentioned as the dates on which a period is to begin & to end, the question whether those days are included in the period depends on the parties' intention as gathered from the circumstances of the case:—*Held*: in the case of a reinsurance of a risk on a ship, expressed to run from a given date, it included that date.—SCOTTISH METROPOLITAN ASSURANCE CO., LTD. v. STEWART (1923), 39 T. L. R. 407.

**788. Several ships in course of building — Insurance as from delivery from builders—When policy begins to run.]**—A slip was initialled by M. on behalf of his names in Jan. 1911, for the insurance of the steamers *Olympic* & *Titanic* for twelve months from delivery by the builders, & pl'tfs., acting on the instructions of M., obtained the reinsurance of part of the risk under that slip. The *Olympic* was delivered on May 18, 1911. In Jan. 1912, a fresh slip was initialled by M. on behalf of his names to cover the steamers for twelve months from the expiration of the original policy or slip. In Apr. 1912, the *Titanic* was delivered & M. issued a policy on her, thinking that he was doing so under the slip of Jan. 1911, while the brokers for the shipowners thought that he was acting under the slip of Jan. 1912, & M. requested defts. to issue the reinsurance policy. On Apr. 15, 1912, the *Titanic* was lost, & later defts. issued the reinsurance policy, which was expressed to reinsure the risk taken by M.'s names under the slip of Jan. 1911, & not under that of Jan. 1912. In an action by pl'ts. against defts. on the reinsurance policy:—*Held*: (1) when one slip included more than one steamer, the policy ran from the time when the first steamer came on the risk, & the original slip of Jan. 1911, remained in force till May 18, 1912; (2) the original policy of Apr. 1912, was issued under the slip of Jan. 1911, & not under that of Jan. 1912; (3) the reinsurance slip was a contract to issue a policy in the usual form covered by the slip; & (4) the reinsurance policy should be rectified so as to enable pl'tfs. to claim under it, & pl'tfs. were entitled to recover.—EMANUEL & CO. v. ANDREW WEIR & CO. (1914), 30 T. L. R. 518.

*Annotation*:—Generally, *Mentd.* Norwich Union Fire Insee. Soc. v. Colonial Mutual Fire Insee., [1922] 2 K. B. 461.

**Port risk policies.]—See Sub-sect. 4, post.**

*C. Duration of Risk.*

**789. Insurance on ship — Damage during currency of policy—Loss after expiration.]—MERETONY v. DUNLOPE (1783), cited 1 Term Rep. at p. 260.**

*Annotations*:—*Consd.* Lockyer v. Offley (1786), 1 Term Rep. 252; *Knight v. Faith* (1850), 15 Q. B. 649. *Refd.* Michael v. Gillespy (1857), 2 C. B. N. S. 627.

**PART II. SECT. 12, SUB-SECT. 1.—C.**  
*m. Insurance on ship — "Whilst running"—How terminated.]—A policy issued in 1895 insured the hull of a*

ship, including engines, etc., "whilst running on the inland lakes, rivers & canals during the season of navigation. To be laid up in a place of safety during

£1,000 for a year ending Sept. 23, was stranded, got off, & brought into the harbour of Santa Cruz, on Sept. 16. She remained there with her crew on board till the middle of Oct. &, during that time, was pumped; & her cargo was discharged into other vessels. Being then beached & surveyed, she was found so much damaged by the accident that the necessary repairs could not be done at Santa Cruz, there being no dockyard, workmen or materials there; nor could she be taken to any port where she could prudently have been repaired. Afterwards, in Oct. the master, who was a part-owner, & interested in the policy, sold her for the benefit of those whom it might concern; & she fetched £72. No notice of abandonment was given. A special case, in an action against the underwriters, set forth these facts stating also that the vessel, "received her death blow," by the said perils of the seas on Sept. 16, but that the damage was not ascertained till Sept. 24:—*Held*: (1) the sale by the master did not, nor did the other facts, constitute an actual total loss; (2) if there was a constructive total loss which would have entitled the assured to abandon, they could not recover for such loss, not having given notice of abandonment; (3) the assured were entitled to recover for partial loss by the stranding before Sept. 23, though the loss was not ascertained till after that day; the proximate cause of loss, the injury by stranding, having taken place during the year covered by the insurance; (4) the ultimate loss did not prevent such recovery; for the partial loss by stranding caused an actual prejudice to the assured, which was not merged in the final loss resulting from the sale, even assuming this to have been a total loss necessarily consequent upon the stranding: the loss being one which, as total, the insurers were not liable to pay for.

(5) The insurers on a ship, if they pay a total loss, certainly are not liable likewise in respect of any prior partial loss which has not been repaired; & if a total loss occurs from which they are exempt they are not liable for any prior partial loss which in that event does not prove prejudicial to the assured (LORD CAMPBELL, C.J.).—*KNIGHT v. FAITH* (1850), 15 Q. B. 649; 19 L. J. Q. B. 509; 15 L. T. O. S. 277; 14 Jur. 1114; 117 E. R. 605.

*Annotations*:—*As to* (1) *Refd.* Tronson v. Dent (1853), 8 Moo. P. C. C. 419; *Kemp v. Halliday* (1866), 6 B. & S. 723. *As to* (2) *Consd.* Jardine v. Leathley (1863), 3 B. & S. 700; *Farnworth v. Hyde* (1865), 18 C. B. N. S. 835; *Kemp v. Halliday* (1866), 6 B. & S. 723. *Dbtd.* Rankin v. Potter (1873), L. R. 6 H. L. 83. *Consd.* Pitman v. Universal Marine Insee. (1882), 9 Q. B. D. 192. *Refd.* King v. Walker (1864), 3 H. & C. 209; *Trinder, Anderson v. Thames & Mersey Marine Insee., Trinder, Anderson v. North Queensland Insee., Trinder, Anderson v. Weston, Crocker, [1898] 2 Q. B. 114.* *As to* (4) *Consd.* Lidgett v. Secretan (1871), L. R. 6 C. P. 616; *British & Foreign Insee. v. Wilson Shipping Co., [1921] 1 A. C. 188.* *As to* (5) *Consd.* *British & Foreign Insee. v. Wilson Shipping Co., [1921] 1 A. C. 188.*

**791. — — — Pre-existing defect.]—A policy of insurance on a ship for twelve months from Dec. 10, 1908, covering the ordinary perils insured against by a Lloyd's policy, provided that the insurance should also cover loss of or damage to the hull through any latent defect in the hull. In 1906, when the ship was built, the builders put into her a stern frame, supplied by a foreign firm, which contained a latent defect that was not discoverable by reasonable inspection until, during the currency of the policy it became visible**

winter months from any extra-hazardous building." The ship was laid up in 1893 & was never afterwards sent to sea. In 1896 she was de-

owing to the ordinary wear & tear of the ship. The stern frame was in consequence condemned:—*Held*: the cost of a new stern frame was not recoverable under the policy.—*HUTCHINS BROTHERS v. ROYAL EXCHANGE ASSURANCE CORPN.*, [1911] 2 K. B. 398; 80 L. J. K. B. 1169; 105 L. T. 6; 27 T. L. R. 482; 12 Asp. M. L. C. 21; 16 Com. Cas. 242, C. A.

**792. Insurance on goods—Liberty to barter—Loss while landed for purpose of barter.]**—A time policy was made on the *G. B.* “on £15,000 on cargo, valued at £15,000, with liberty to increase the value on the homeward voyage.” The body of the policy was in the ordinary printed form, expressing the risk on the goods to be from the loading thereof aboard the ship, including risk of craft, & to endure until discharged & safely landed. On the margin was a memorandum, “with liberty to load, reload, exchange, sell or barter, all or either, goods or property on the coast of Africa & African islands, & with any vessels, boats, factories, canoes; & to transfer interest from the vessel to any other vessel, or from any other vessels to this vessel, in port & at sea, & in any ports or places she may call at or proceed, without being deemed a deviation.” The *G. B.* sailed to Africa with a cargo, part of which was landed in a factory for the purposes of barter, & was lying at anchor loading from the factory native produce, when the factory with its contents were destroyed by fire:—*Held*: the policy embraced only maritime risks, & did not protect either the goods which had been part of the cargo of the *G. B.*, but had been landed in the factory, nor the produce intended to be her cargo, but still on shore; whether that produce had been obtained by barter of the *G. B.*’s cargo or otherwise.—*HARRISON v. ELLIS* (1857), 7 E. & B. 465; 26 L. J. Q. B. 239; 29 L. T. O. S. 76; 3 Jur. N. S. 908; 5 W. R. 494; 119 E. R. 1319.

**793. Insurance on freight—Loss after expiration of policy.]**—*HOUGH & CO. v. HEAD*, No. 784, *ante*.

**794. Continuation till expiry of last day.]**—Goods were insured by an open policy “at & from” T. to L. The policy contained these clauses: “beginning the adventure upon the said goods . . . from the loading thereof”; shipments held covered . . . from Nov. 1, to Dec. 31, 25s.; & the following warranty was written in the margin of the policy:—“in as many voyages as may be required until Dec. 31, 1894.” Goods were loaded on Dec. 31, 1894, & the ship having sailed on Jan. 1, 1895, was totally lost with her cargo. In an action by the assured against the underwriters:—*Held*: the goods having been shipped by Dec. 31, 1894, the loss was covered by the policy.—*JOHNSON & CO., LTD. v. BRYANT* (1896), 12 T. L. R. 368; 1 Com. Cas. 363.

**Continuation clause.]**—*See* Sub-sect. 1, D., *post*.

#### D. Continuation Clause.

*See, now*, Marine Insurance Act, 1906 (c. 41), s. 25 (2); Finance Act, 1901 (c. 7), s. 11; Revenue Act, 1903 (c. 46), s. 8.

**795. Policy prolonged beyond twelve months—**

stroyed by fire:—*Held*: the policy never attached; the steamship was only insured while employed on inland waters during the navigation season or laid up in safety during the winter months.—*LONDON ASSURANCE CORPN. v. GREAT NORTHERN TRANSIT CO.* (1899), 29 S. C. R. 577.—CAN.

**794 i. Continuation till expiry of last day.]**—A policy of insurance on a vessel “for four calendar months on a

fishing voyage, beginning the adventure from June 11, & to continue until the expiration of four months,” without stating where the vessel was to sail from, or whether she was to return, is a time risk, & is not terminated by the vessel returning from a fishing voyage within that period.—*DIMOCK v. NEW BRUNSWICK MARINE ASSURANCE CO.* (1848), 5 N. B. R. (3 Kerr.) 654; *subsequent proceedings*, 6 N. B. R. (1 All.) 398.—CAN.

**Validity.]**—*CHARLESWORTH v. FABER*, No. 715, *ante*.

**796. ———.]**—*ROYAL EXCHANGE ASSURANCE CORPN. v. SJOFORSKRINGS AKT. VEGA*, No. 238, *ante*.

*See, now*, Finance Act, 1901 (c. 7), s. 11.

#### E. Area of Risks.

**797. Express stipulation limiting area.]**—*WESTMORE* (1807), 6 Esp. 109; *sub nom. CLARKE v. WESTMORE*, Selwyn’s N. P. 13th ed. p. 940, N. P.

**798. ———.]**—A time policy against fire was effected on a steamship. The policy described it as then “lying in the Victoria Docks,” but gave it “liberty to go into dry dock, & light the boiler fires once or twice during the currency of this policy.” The only dry dock into which the ship could go was Lungley’s Dock, at some distance up the river. To go there it was necessary to remove the paddlewheels; they were removed in the Victoria Docks, & the ship was then towed up to Lungley’s Dock. The necessary repairs there having been completed, the ship was brought out & moored in the river, preparatory to replacing the paddlewheels. This operation could have been perfectly performed in the Victoria Docks, but it was found that in such case it was customary, as the more economical course, to replace the paddlewheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt:—*Held*: the policy covered the ship while in the Victoria Docks, & while passing from them to the dry dock, & while directly returning from the dry dock to the Victoria Docks; but did not cover the vessel while moored in the river for a collateral purpose. To construe the policy as allowing the vessel to remain in the river while the paddlewheels were replaced would be to add a new condition to the policy, which could not be done.

An insurance against fire necessarily has regard to the locality of the subject insured (*LORD CHELMSFORD*).—*PEARSON v. COMMERCIAL UNION ASSURANCE CO.* (1876), 1 App. Cas. 498; 45 L. J. Q. B. 761; 35 L. T. 445; 24 W. R. 951; 3 Asp. M. L. C. 275, H. L.

*Annotations*:—*Consd. Wingate v. Foster* (1878), 3 Q. B. D. 582. *Refd. Mountain v. Whittle*, [1921] 1 A. C. 615.

**799. ———.]**—A time policy of marine insurance on *pltf.*’s houseboat “whilst anchored in a creek off Netley, however employed, with liberty to shift,” against the usual perils contained a clause: “Including all risk of docking, undocking, changing docks & going on gridiron or graving docks as may be required during the currency of this policy.” The vessel was at the time anchored in the river Hamble, Southampton Water, which, it was agreed, came within the words “in a creek off Netley.” During the currency of the policy *pltf.* desired to have the houseboat cleaned & her underworks examined for repairs, & he arranged to have her towed by a low-powered tug from the Hamble up Southampton Water to a yard on

**n. Computation of time.]**—A policy of insurance dated Jan. 22, 1857, was issued by *deft. co.* to *pltf.* upon a schooner for a period of twelve calendar months from Jan. 14, 1857, to Jan. 14, 1858. The vessel was lost at 10 p.m. on Jan. 14, 1858:—*Held*: *pltf.* could not recover on the policy as the risk ceased at midnight on Jan. 13.—*COOK v. CAPE OF GOOD HOPE MARINE ASSURANCE CO.* (1858), 3 S.



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*Sub-sect. 3, A. (a), (b) & (c), & B. (a).]*

the goods from the loading thereof, on board the ship wheresoever:—*Held*: it would cover goods previously loaded at Liverpool, & which arrived at P., but were not unloaded there, & afterwards sustained a partial loss by wreck in the voyage from P. to M.

Wheresoever may mean either wheresoever in the course of the voyage, or in a larger sense, wheresoever, without confining it to the voyage. If it may have both senses, why may it not have the larger? more especially, if such appears to have been the intention of the parties (BAYLEY, J.). —GLADSTONE v. CLAY (1813), 1 M. & S. 418; 105 E. R. 156.

*Annotation*:—*Refd.* Rickman v. Carstairs (1833), 5 B. & Ad. 651.

**815. — Goods loaded before policy effected.]**—Policy of assurance on goods at & from G. to the ship's port of discharge, beginning the adventure on the said goods from the loading thereof aboard the said ship:—*Held*: the policy did not cover goods loaded at an anterior port, though they were in a loaded state & in good safety at G. just before effecting the insurance.—MELLISH v. ALLNUTT (1813), 2 M. & S. 106; 105 E. R. 322.

*Annotations*:—*Refd.* Park v. Hammond (1816), 6 Taunt. 495. *Mentd.* Lechmere v. Fletcher (1833), 3 Tyr. 450.

**816. —.]**—RICKMAN v. CARSTAIRS, No. 741, *ante*.

**817. Goods loaded at intermediate port—Forwards & backwards clause.]**—GRANT v. DELACOUR (1806), cited in 1 Taunt. at p. 465; 127 E. R. 915, N. P.

*Annotation*:—*Distd.* Grant v. Paxton (1809), 1 Taunt. 463.

**818. —.]**—A policy upon a homeward voyage from India, upon goods at & from a foreign port of loading, until the ship's arrival in London, beginning the adventure upon the said goods from the loading thereof at the foreign port of loading, & so should continue upon the goods, until the same should be discharged, was held to attach only on the particular cargo taken in at the first port of loading. Though the insurance was, to all or any ports & places whatsoever beyond the Cape of Good Hope, in port, & at sea, in all places, at all times, & in all services, with liberty to proceed to, touch & stay at any ports or places whatsoever for any purpose whatsoever. But upon an insurance on an India voyage out & home, the policy being equally extensive as that above stated, & containing the additional words, & forwards & backwards at sea, until the ship's arrival at her last station of discharge, though it purported literally to be on the said goods, the ct. held it must by necessary implication apply to all goods put on board in the course of the voyage. Forwards & backwards means from port to port in the course of the voyage, not from Europe to Asia & from Asia to Europe. Upon an insurance on an East India voyage, the underwriters are bound to know the course of the East India co.'s charterparties & trade, & that the ship's destination is liable to be changed after the policy is effected, & if the co. permit the voyage of a chartered ship to be altered, though it is at the request & partly for the benefit of the assured, the altered voyage continues protected by the policy.

—GRANT v. PAXTON (1809), 1 Taunt. 463; 127 E. R. 914.

**819. — Liberty reserved to touch at any port.]**—Liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured.—VIOLETT v. ALLNUTT (1811), 3 Taunt. 419; 128 E. R. 166.

*Annotations*:—*Consd.* Hunter v. Leathley (1830), 10 B. & C. 858. *Appld.* Leathley v. Hunter (1831), 5 Moo. & P. 457. *Refd.* Barclay v. Stirling (1816), 5 M. & S. 6.

**820. —.]**—Policy on goods in *Java Packet*. at & from Singapore, Penang, Malacca, Batavia, all or any, to ship's port of discharge in Europe, with leave to touch, stay, & trade at all or any ports & places whatever & wheresoever in the East Indies or elsewhere, beginning the adventure upon the goods from the loading thereof on board, as above, with leave in that voyage to proceed & sail to & touch & stay at any ports or places whatsoever & wheresoever, in any direction, & for any purpose, necessary or otherwise, particularly Singapore, Penang, Malacca, & Batavia, Cape of Good Hope & St. Helena. The ship took goods on board at Batavia; proceeded to Sourabaya, which is 400 miles to the eastward of Batavia, & directly out of the course from Batavia, Singapore, Penang, or Malacca to Europe; took goods on board at Sourabaya; returned to Batavia; & thence proceeded to Europe:—*Held*: the voyage performed was a voyage covered by the policy; the proceeding to Sourabaya was no deviation; & the goods put on board at Sourabaya were covered by the policy as well as those put on board at Batavia.—LEATHLEY v. HUNTER (1831), 7 Bing. 517; 1 Cr. & J. 423; 5 Moo. & P. 457; 1 Tyr. 355; 9 L. J. O. S. Ex. 118; 131 E. R. 200, Ex. Ch.; *previous proceedings, sub nom.* HUNTER v. LEATHLEY (1830), 10 B. & C. 858.

**821. Transit partly by land partly by sea.]**—Declaration on a policy of assurance on goods at & from L. by land carriage to H., & at & from thence by a packet to G., beginning the adventure on the goods from the loading on board the ship, & averred that the goods were delivered at L. to carriers to be carried from L. by land carriage to H., & by the fraud & negligence of the servants & persons employed by the carriers were wholly lost:—*Held*: this was a loss within the meaning of the policy, which was the usual printed form of marine policy, containing the usual printed enumeration of risks; & it was not necessary to aver that the goods were loaded at L. to be carried to H.—BOEHM v. COMBE (1813), 2 M. & S. 172; 105 E. R. 347.

*Annotation*:—*Refd.* Rodocanachi v. Elliott (1873), L. R. 8 C. P. 649.

(b) "At and from Port."

*See* Marine Insurance Act, 1906 (c. 41), s. 25 (1), sched. I., r. 2.

**822. Limited to particular place named.]**—CONSTABLE v. NOBLE, No. 894, *post*.

**823. —.]**—PAYNE v. HUTCHINSON, No. 893, *post*.

**824. — Usage of trade.]**—MOXON v. ATKINS, No. 321, *ante*.

**825. Risk commencing when any part of cargo loaded.]**—COLONIAL INSURANCE CO. OF NEW ZEALAND v. ADELAIDE MARINE INSURANCE CO., No. 652, *ante*.

goods at S. & C. The declaration claimed for a total loss of the goods shipped at both places:—*Held*: the words "beginning the adventure on the loading of the goods at S." did not

limit the risk to the goods so laden, but covered those laden at the other port.—TAYLOR v. UNION MARINE INSURANCE CO. (1871), 5 Nfld. L. R. 368.—NFLD.

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**822 i. Limited to particular place named.]**—BELL v. MILLER (1877), Knox, 331.—AUS.



(c) *Other Cases.*

**826. "Outward cargo homeward interest twenty-four hours after arrival"—Loss more than twenty-four hours after arrival.]—**(1) By a time policy the ship valued at £2,000 & goods valued at £8,000 were insured on a barter voyage to the coast of Africa; & it was stipulated that "outward cargo should be considered homeward interest twenty-four hours after arrival at first port or place of trade," "with liberty to extend the valuation of the homeward cargo." The vessel with the outward cargo on board arrived at K., the first place of trade on the coast of Africa, & there landed a portion of her cargo, & after remaining at K. more than twenty-four hours, she sailed thence with the remainder, without having received any other goods there, & was totally lost:—*Held*: the assured were only entitled to recover upon this policy the value of that portion of the cargo which was actually on board at the time of the loss.

(2) If the policy is a valued one, the value of the whole is admitted. If the loss be total, that whole value must be paid; if partial, the loss is to be estimated with reference to the admitted value of the whole. The only difference if the policy be open, is that you must prove the value of the whole which would otherwise be admitted, & the valued policy only dispenses with this proof (BLACKBURN, J.).—*TOBIN v. HARFORD* (1864), 17 C. B. N. S. 528; 4 New Rep. 373; 34 L. J. C. P. 37; 10 L. T. 817; 10 Jur. N. S. 850; 12 W. R. 1062; 2 Mar. L. C. 34; 144 E. R. 212, Ex. Ch.

*Annotations*:—As to (1) *Refd.* Carr v. Montefiore (1864), 5 B. & S. 408. As to (2) *Refd.* Denoon v. Home & Colonial Assoc. (1872), L. R. 7 C. P. 341.

**827. ———.]—JOYCE v. REALM MARINE INSURANCE CO., No. 18, ante.**

**828. From given date—Ship anchored off wharf on previous evening—Preparatory to sailing on given date.]—**In an action on a policy of marine insurance on goods in ships "sailing on or after Mar. 1," it appeared that the ship in question had finished loading her cargo before ten o'clock at night on Feb. 29, & having previously cleared the custom house, was then ready to proceed to sea; but by a regulation of the port ships were not permitted to go out to sea after dark. At ten o'clock the master, with the object of keeping his crew on board so as to be ready to start early in the morning, moved the ship away from the wharf about five hundred yards out into the river & there anchored. In so moving the ship, he placed her in a slightly more advantageous position for starting than she would have been in if she had remained at the wharf, but the gaining of that advantage was no part of the master's motive in moving her. On the following morning, Mar. 1, she proceeded on her voyage:—*Held*: the ship sailed on Mar. 1, & not on Feb. 29, & the policy attached.—*SEA INSURANCE CO. v. BLOGG*, [1898] 2 Q. B. 398; 67 L. J. Q. B. 757; 78 L. T. 785; 47 W. R. 71; 14 T. L. R. 474; 42 Sol. Jo. 590; 8 Asp. M. L. C. 412; 3 Com. Cas. 218, C. A.

*Annotation*:—*Mentd.* Mersey Docks & Harbour Board, Gore & Durrant v. Cunard S.S. Co., The Servia, The Carinthia (1898), 78 L. T. 54.

**829. From date of sailing—Delay in sailing—Altering nature of risk.]—**Pltfs. who had insured all shipments of coal by certain merchants for twelve months by a cover-note at premiums varying according to the date of sailing & port of destination, on July 30 received notice from the merchants of a proposed shipment by a certain vessel from the Tyne. The premiums payable

to pltfs. would be 12s. 9d. for Aug. & 15s. for Sept. On Aug. 2 they effected a reinsurance for £1,500 at a premium of 6s. 8d. with deft. & others at Lloyd's, by a slip which named the vessel & purported to be subject to the reinsurance & deviation clauses. The vessel was then, as the underwriters ascertained, near the Tyne, but she did not sail on the proposed voyage until Sept. 25, & was lost on Oct. 2. The policy of reinsurance was issued on Oct. 5, & pltfs. having paid the merchants for a total loss, claimed payment from deft.:—*Held*: the risk was materially altered by the delay of the voyage, & the underwriters were not liable.

The deviation contemplated is clearly a deviation in the course of the voyage. The words "deviation or change of voyage" clearly mean, inasmuch as the port of loading & departure is fixed, alteration in the port of arrival. In that case I agree that the clause might apply, but it has no operation here because there was no change of voyage. The voyage was the same, but it was unreasonably postponed (MATHEW, J.).—*MARITIME INSURANCE CO. v. STEARNS*, [1901] 2 K. B. 912; 71 L. J. K. B. 86; 50 W. R. 238; 17 T. L. R. 613; 6 Com. Cas. 182.

*Annotation*:—*Refd.* Scottish National Insce. v. Poole (1912), 107 L. T. 687.

**830. "From time of leaving warehouse."]**—By a marine insurance policy appcts. insured with the Traders & General Insurance Assocn., Ltd., one-half of certain goods from Antwerp to Karachi & the other half from Antwerp to Calcutta "beginning from the loading thereof aboard ship." The policy incorporated a "warehouse to warehouse" clause to the effect that the insured goods were covered "from the time of leaving the shippers' or manufacturers' warehouse during the ordinary course of transit until on board the vessel." The goods in question were purchased from a firm at Termonde, in Belgium, & were forwarded from thence on Oct. 7, 1920, to Antwerp by canal barge for shipment on a steamer to India due to sail on Oct. 12, 1920. They were received by the agents of the buyers on October 8 & warehoused to await shipment. On Oct. 11 a fire occurred at the warehouse & damage to the alleged amount of £621 was suffered. The insurance assocn. went into liquidation & the liquidator rejected appcts.' proof for the damage on the ground that the goods had not at the time of damage left the shippers' or manufacturers' warehouse. On appeal from that decision:—*Held*: as the *terminus a quo* mentioned in the specification, which formed part of the policy, was the port of shipment & the transit "by steamer" the clause referred to could not be construed as imposing liability from the commencement of the transit from the factory at Termonde, nor could the discharge from a barge be held equivalent to the time of leaving the warehouse referred to in the clause. Therefore, the decision of the liquidator was right.—*RE TRADERS & GENERAL INSURANCE ASSOCN., LTD., Ex p. CONTINENTAL & OVERSEAS TRADING CO.*, [1924] 2 Ch. 187; 93 L. J. Ch. 464; 131 L. T. 626; 40 T. L. R. 561; 68 Sol. Jo. 615; 16 Asp. M. L. C. 384; 29 Com. Cas. 302.

*B. Duration of Risk on Goods.**(a) Port of Discharge.*

*See* Marine Insurance Act, 1906 (c. 41), sched. I., r. 5.

**831. General rule—Port at which goods intended to be delivered.]—CLASON v. SIMMONDS**

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3, B. (a),

(1741), cited in 6 Term Rep. at p. 533 ; 101 E. R. R. 687.

*Annotations:—*Consd. Andrews v. Mellish (1814), 5 Taunt. 496. Refd. Beatson v. Haworth (1796), 6 Term Rep. 531.

**832. Destination comprising several ports—Until goods landed.]—**BARRAS v. LONDON ASSURANCE (1782), 1 Park's Marine Insurances, 8th ed. p. 74.

**833. ——— Intermediate voyage.]—**A policy in the common form, upon goods to the East Indies, ceases when the ship has delivered the co.'s outward cargo at a port in the East Indies & will not protect the goods to a market in an intermediate voyage made by the ship before her final departure for Europe.—RICHARDSON v. LONDON ASSURANCE Co. (1814), 4 Camp. 94, N. P.

**834. ——— Bulk of cargo discharged at one port.]—**LEIGH v. MATHER (1795), 1 Esp. 411, N. P.

(b) "Until Safely Landed."

See Marine Insurance Act, 1906 (c. 41), sched. 1, r. 5.

**835. Goods delivered to consignee's lighter.]—**Goods lost after the owner has taken them from the ship into a lighter is no charge on the insurer.—SPARROW v. CARUTHERS (1745), 2 Stra. 1236 ; 93 E. R. 1153.

*Annotations:—*Consd. Rucker v. London Assce. (1784), 2 Bos. & P. 432, n. Distd. Hurry v. Royal Exchange Assce. (1801), 2 Bos. & P. 430. Foll'd. Strong v. Natally (1804), 1 Bos. & P. N. R. 16. Consd. Lane v. Nixon (1866), L. R. 1 C. P. 412 ; Paul v. Insee. of North America (1899), 15 T. L. R. 534. Refd. Steel v. Lacy (1810), 3 Taunt. 285.

**836. ———.]—**If the lighter does not belong to a public co. but to the master of the goods himself the underwriters are not liable, but if the lighterman is a public officer they are liable (BULLER, J.).—RUCKER v. LONDON ASSURANCE Co. (1784), 2 Bos. & P. 432, n. ; 126 E. R. 1368.

*Annotations:—*Foll'd. Hurry v. Royal Exchange Assce. (1801), 3 Esp. 289. Apl'd. Lane v. Nixon (1866), L. R. 1 C. P. 412.

**837. ———.]—**Where a policy is on goods until safely landed, if a merchant takes the goods out of the ship into his own lighter, the policy is discharged ; yet it is not so if put into public lighters registered at Waterman's Hall, in case the goods are lost from on board the lighter.—HURRY v. ROYAL EXCHANGE ASSURANCE Co. (1801), 3 Esp. 289, N. P. ; *subsequent proceedings*, 2 Bos. & P. 430.

*Annotations:—*Refd. Strong v. Natally (1804), 1 Bos. & P. N. R. 16 ; Lane v. Nixon (1866), L. R. 1 C. P. 412.

**838. ——— "Risk of craft" clause.]—**The words in a policy "including all risks of craft to & from the vessel" will cover carriage in a lighter belonging to the assured.—PAUL, LTD. v. INSURANCE Co. OF NORTH AMERICA (1899), 15 T. L. R. 534.

**839. Goods delivered to public lighter.]—**PEILLY v. ROYAL EXCHANGE ASSURANCE Co., No. 291, *ante*.

**840. ———.]—**RUCKER v. LONDON ASSURANCE Co., No. 836, *ante*.

**841. ——— No negligence.]—**Insurance on goods from A. to B. "until they should be there discharged & safely landed ;" on their arrival at B. the merchant to whom the goods belonged, employed & paid a public lighter to land them, & the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss.—HURRY v. ROYAL EXCHANGE ASSURANCE Co. (1801), 2 Bos. & P. 430 ; 126 E. R. 1367.

*Annotations:—*Consd. Strong v. Natally (1804), 1 Bos. & P. N. R. 16 ; Lane v. Nixon (1866), L. R. 1 C. P. 412.

**842. ———.]—**Insurance on goods on board a Spanish ship from Nassau to Campeachy to continue on the goods till discharged & safely landed. The ship having a licence from the British Governor at Nassau sailed for Campeachy, & having arrived off that port made signals for launches to come out, into which the goods were put for the purpose of being run ashore. In this situation the goods were seized by two Spanish Government brigs, it being contrary to the Spanish laws to import British goods into the Spanish main. It seems that the goods were protected by the policy while on board the launches, such being the usual method of carrying on that trade :—*Held* : such a loss was not well described by an averment, stating that the goods were seized "in a forcible & hostile manner by certain persons enemies of our Lord the King to pl'ts. unknown."—MATTHIE v. POTTS (1802), 3 Bos. & P. 23 ; 127 E. R. 14.

**843. ——— Consignee undertaking to see to landing.]—**Action on a policy on goods "until the cargo should be discharged & safely landed ;" on the arrival of the ship the goods insured were put on board a lighter hired in the usual way, & brought to pl'tf.'s wharf in the evening, but not landed, on account of the rough weather ; pl'tf. then undertook to see to the landing himself, but in the night the lighter was by an unavoidable accident, sunk, & the goods lost :—*Held* : the underwriters were discharged.—STRONG v. NATALLY (1804), 1 Bos. & P. N. R. 16 ; 127 E. R. 362.

*Annotations:—*Consd. Paul v. Insee. of North America (1899), 15 T. L. R. 534. Refd. Lane v. Nixon (1866), L. R. 1 C. P. 412.

**844. ——— Lighter unseaworthy.]—**LANE v. NIXON, No. 1441, *post*.

**845. ——— To await transhipment — "Risk of craft" clause.]—**A policy of insurance on goods which includes "all risk of craft until the goods are discharged and safely landed" does not cover the risk to the goods while waiting on lighters at the port of delivery for transhipment into an export vessel.—HOULDER v. MERCHANTS MARINE INSURANCE Co. (1886), 17 Q. B. D. 354 ; 55 L. J. Q. B. 420 ; 55 L. T. 244 ; 34 W. R. 673 ; 2 T. L. R. 721 ; 6 Asp. M. L. C. 12, C. A.

**846. Landing in customary manner.]—**MATTHIE v. POTTS, No. 842, *ante*.

**847. ——— Customer unknown to underwriter.]—**Insurance from London to Jamaica generally. The goods insured were destined to a particular place in the island, & the usual course in such cases was for the ship to proceed to an adjoining port, & there to tranship the cargo into shallops ; but no information of this was given to the underwriters :—*Held* : notwithstanding, that they were liable for a loss occurring after such transhipment on board the shallops.—STEWART v. BELL (1821), 5 B. & Ald. 238 ; 106 E. R. 1179.

*Annotation:—*Consd. Lane v. Nixon (1866), L. R. 1 C. P. 412.

**848. ———.]—**LANE v. NIXON, No. 1441, *post*.

**849. ——— Lodged in government warehouse—Confiscation by government.]—**Upon a common policy on goods, the underwriters are discharged if the goods are landed at the port of destination by the officers of government there, & are lodged in the govt. warehouses, if this be the usual mode in which goods are landed at that port, although the goods insured are afterwards confiscated by the govt., & are never in the possession of the consignees.—BROWN v. CARSTAIRS (1811), 3 Camp. 161, N. P.

**850. ———.]—**(1) A policy on goods on a voyage from London to a port on the West Coast of South America contained a marginal clause

as follows:—"Including all risks whatsoever by land & water &/or of inland conveyance &/or transhipment from the place whence despatched, whilst waiting shipment, & until safely delivered to consignee":—*Held*: the clause, being one which was usually inserted in policies of the kind in question, was incorporated into a policy of reinsurance in the usual form.

(2) The goods in question were by the laws of the port of discharge liable to pay duty, & upon discharge from the vessel they had to be placed in a customs warehouse, where they remained at the order of the consignee subject to certain charges for which the consignee was liable. While there the goods were totally destroyed by fire. At the date of the fire the consignee had been unable owing to pressure of business at the Customs to obtain actual possession of the goods:—*Held*: placing the goods in the Customs warehouse was a delivery to the consignee within the meaning of the marginal clause, & therefore at the date of the fire the risk had terminated & the loss was not recoverable under the reinsurance policy.—*MARTEN v. NIPPON SEA & LAND INSURANCE CO., LTD.* (1898), 14 T. L. R. 333; 3 Com. Cas. 164.

**851. "Till discharged & safely landed"—Loss one month after arrival—Before discharge began.]**—*PARKINSON v. COLLIER* (1797), 2 Park's Marine Insurances, 8th ed. p. 653.

**852. — Loss on lighter awaiting transhipment.]**—*HOULDER v. MERCHANTS MARINE INSURANCE CO., No. 845, ante.*

**Transhipment.]**—See Sub-sect. 3, B. (e), *post*.

(c) *Conclusion of Transit.*

See Marine Insurance Act, 1906 (c. 41), sched. I., r. 5.

**853. "While temporarily placed on quay"—Loss whilst in "transit sheds" at port.]**—*WESTMINSTER FIRE OFFICE v. RELIANCE MARINE INSURANCE CO.* (1903), 19 T. L. R. 668, C. A.

**854. Until safely delivered into warehouse or other place.]**—Pltfs. effected a policy of marine insurance with deft. & other underwriters, at Lloyd's, in respect of a new cast-steel frame for a steamer. The policy was expressed to be "against all risks, especially including breakage & damage done & received through loading & discharging, irrespective of percentage." By clauses attached to the policy it was also provided that the insurance should include "all risks of craft &/or raft &/or of any special lighterage without recourse against lighterman . . . of fire, transhipment, landing, warehousing, & reshipment if incurred, & whilst waiting shipment &/or reshipment, & all other risks & losses by land & water from the time of leaving the warehouse at point of departure until safely delivered into warehouse or other place for which the goods have been entered, or in which it is intended they shall be lodged, whether previously discharged or landed elsewhere within the port or place of destination or not." The casting was shipped to Hamburg & discharged on the quay on June 14, at which time the steamer into which the steel frame was to be fitted had not arrived. On June 27, the frame was transported in a lighter to the quay of the V. co.'s shipbuilding yard at Hamburg, & while being lifted from the lighter to the quay it struck the quay wall & was thereby rendered useless. In an action by pltfs. to recover under the policy:—*Held*: the loss was not covered by the policy, as the transit was at an end when the loss occurred.—*DEUTSCH-AUSTRALISCHE DAMPSCHIFFS-GESELLSCHAFT v. STURGE*

(1913), 109 L. T. 905; 30 T. L. R. 137; 12 Asp. M. L. C. 453.

(d) *"Warehouse to Warehouse" Clause.*

See Marine Insurance Act, 1906 (c. 41), sched. I., r. 5.

**855. Usual condition in Lloyd's policies.]**—A contract for the sale of jute, to be shipped from Calcutta to Dundee, contained the following clause:—"Insurance to be effected under an f.p.a. policy on usual Lloyd's conditions, at Lloyd's, or with a London insurance co., or with Calcutta insurance cos. or agencies having a responsible & well-known London agent." Policies were effected with three insurance cos. Each policy contained a clause by which the goods were covered while temporarily placed on quay & until delivered to the export vessel, or at any wharf or warehouse within the limits of the port:—*Held*: by the terms of the contract the policies effected with the cos. must contain the usual Lloyd's conditions; the clause in question was not a usual Lloyd's condition; & the usual Lloyd's condition in such a case was a clause covering the goods until they were safely delivered into the warehouse of the consignee.—*IDE & CHRISTIE v. CHALMERS & WHITE* (1900), 5 Com. Cas. 212.

(e) *Transhipment.*

See Marine Insurance Act, 1906 (c. 41), s. 59.

**856. Express leave to tranship—Goods put in store ship—Custom of port.]**—*TIERNEY v. ETHERINGTON* (1743), cited in 1 Burr. at p. 348; 97 E. R. 347.

*Annotation*:—*Apld.* *Pelly v. Royal Exchange Assce.* (1757), 1 Burr. 341.

**857. — — —.]**—(1) A policy of insurance was effected on goods on board the ship *Penang*, on a voyage from L. to various ports in China; amongst others, to Macao, Hong Kong, & Canton, with liberty to tranship the goods on board any other vessel; & for the *Penang*, or the vessel on board of which the interest might have been transhipped, to touch at any port in China, & discharge there, or remain at the same until it should be deemed expedient to proceed to the port of discharge, & continuing the risk until the goods should arrive at their final port of destination. The policy contained a provision for the return of a portion of the premium if the *Penang* discharged at a port in China in the usual course, the port being open. The *Penang* & the cargo sustained damage on the voyage; in consequence of which, on her arrival at Macao, the consignees chartered the *James Laing*, in order to tranship the cargo, & ascertain the extent of the damage. The *Penang* & *James Laing* proceeded to Hong Kong; the intention of the consignees being, after the transhipment at Hong Kong, to keep the goods on board the *James Laing* there until they could be safely sent to Canton. It was unsafe & inexpedient to send them at that time to Canton, in consequence of the hostile feeling exhibited by the Chinese against the English. There had been no proclamation of war by England against China. While the transhipment was proceeding, the *James Laing* was driven ashore by a storm, & the goods lost:—*Held*: these facts did not show any agreement to make Hong Kong the final port of destination; the risk was not determined, & the insurers were entitled to recover the amount of the damage.

(2) A second policy of insurance upon other goods in the same ship contained no clause authorising their transhipment. The facts being the same as above stated, & it being admitted that



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**Sub-sect. 3, B. (e) & (f), & C. (a), (b) & (c).]**

the goods were transhipped without any intention of returning them to the *Penang*:—*Held*: this was a deviation not warranted by the terms of the policy.—*OLIVERSON v. BRIGHTMAN, BOLD v. ROTHERAM* (1846), 8 Q. B. 781; 15 L. J. Q. B. 274; 7 L. T. O. S. 81; 10 Jur. 875; 115 E. R. 1066.

*Annotation*:—*As to* (1) & (2) *Refd.* *Bold v. Claxton* (1850), 16 L. T. O. S. 7.

**858. — Goods in warehouse awaiting transhipment.**—Pltfs. insured wool against fire with defts., “in any shed, or store, or station, or in transit to S. by land only, or in any shed or store, or on any wharf in S. until placed on board ship;” They afterwards entered into another policy with another insurance co. in these terms; “Lost or not lost at & from the river H. to S. per ship or steamers, & thence per ship or steamers to L., including the risk of craft, from the time that the wools are first water borne, & of transhipment & landing & reshipment at S.” It was a condition in defts.’ policy that if the wool was “insured elsewhere,” notice of such insurance was to be given to them, otherwise the policy was to be void. No notice of this second policy was given to defts. by pltfs. The wool was burned while in warehouse at S. where it had been placed for the purpose of storage, & was waiting for reshipment. Pltfs. sued on the first policy for the loss of the wool:—*Held*: (1) they were entitled to recover. The second policy did not apply to keeping goods on land, but only to marine risks, these goods were not within the meaning of the words, “transhipment, landing, & reshipment at S.” while stored in warehouses there, & that there was therefore no double insurance, & consequently, the goods were not “insured elsewhere” so as to make notice of the second policy necessary; (2) by “insured elsewhere” was meant a specific insurance of the same risks, & the words were not satisfied in the case of different policies upon different risks, by the mere possibility of one overlapping the other under some possible circumstances.—*AUSTRALIAN AGRICULTURAL CO. v. SAUNDERS* (1875), L. R. 10 C. P. 668; 44 L. J. C. P. 391; 33 L. T. 447; 3 Asp. M. L. C. 63, Ex. Ch.; *affg.* (1872), cited 28 L. T. p. 844.

*Annotation*:—*As to* (1) *Refd.* *Rodocanochi v. Elliott* (1873), 28 L. T. 840.

**859. — “Liberties as per bill of lading.”**—By a policy of insurance in the ordinary Lloyd’s form, goods were insured “at & from London to any ports or places in Australia, in P. & O. & Orient steamers, with all liberties & exceptions as per bill of lading.” The goods were shipped at London in the P. & O. steamship *Arcadia* under a bill of lading, by the terms of which the goods were “to be delivered at Brisbane, as near thereunto as the local steamer can safely get,” & the goods were stated to be “for transhipment into local steamer at Sydney.” The bill of lading contained other provisions as to forwarding goods in vessels of other owners. The goods were transhipped at Sydney into a local steamer, & on the voyage to Brisbane were totally lost. P. & O. steamers do not go to Brisbane, & the course of business adopted was the ordinary course of business:—*Held*: the loss was covered by the policy. These goods were shipped within the meaning of the policy & carried to Sydney, & transhipped within the meaning of the policy & carried to the port of destination at which place the risk was to end (*BIGHAM, J.*).—*NEALE &*

*WILKINSON v. ROSE* (1898), 14 T. L. R. 506; 3 Com. Cas. 236.

*Annotation*:—*Apprvd.* *Belgian Grain & Produce Co. v. Cox (France)*, [1919] W. N. 308.

**860. — “Liberties as per contract of affreightment”—Double transhipment.**—*BELGIAN GRAIN & PRODUCE CO., LTD. v. COX & CO. (FRANCE), LTD.*, [1919] W. N. 308, C. A.

**861. No express leave to tranship—Transhipment of necessity.**—Insurance of ship *Duras*, “at & from, etc. during her stay & trade, etc. until her safe arrival back at her last port of discharge, etc., upon any kind of goods, & upon the body, etc., of the ship.” The ship being lost on the voyage the goods were transhipped & forwarded by another vessel:—*Held*: the underwriters were liable for an average loss on the goods, arising from the capture of the last-mentioned vessel.—*PLANTAMOUR v. STAPLES* (1781), 3 Doug. K. B. 1; 1 Term Rep. 611, n.; 99 E. R. 507.

*Annotations*:—*Distd.* *Mitchell v. Edle* (1787), 1 Term Rep. 608. *Refd.* *Idle v. Royal Exchange Assee.* (1819), 3 Moore, C. P. 115; *Canman v. Meaburn* (1823), 8 Moore, C. P. 127.

**862. — Intention to reship.**—A policy was effected on goods shipped on board the *Penang*, on a voyage from “Liverpool to any port or ports, place or places, on the Canton River, or on the Coast of China, or islands adjacent, inclusive of Manilla, with liberty to wait at any port or place until the intended port or place of discharge can be entered.” The *Penang* suffered damage on the voyage, & off Hong Kong the goods were transhipped on board another vessel, which was subsequently lost with the goods on board:—*Held*: if the goods were transhipped with the intention at the time that such transhipment should be final, & that the goods should not be returned on board the *Penang*, the risk was determined by the transhipment.

In some policies a clause is inserted which permits such transhipment; then a mere transhipment, though with no intention of reshipping, would not determine the risk. But in the absence of such a clause in the policy, a transhipment without any intention of returning the goods would determine the risk; the intention to return them must, in order to avail anything, have existed at the time of the transhipment; that there was a possibility of their being subsequently returned is immaterial (*WILDE, C.J.*).—*BOLD v. CLAXTON* (1850), 16 L. T. O. S. 7.

**863. — Goods put on store ship—No intention to reship.**—*OLIVERSON v. BRIGHTMAN, BOLD v. ROTHERAM*, No. 857, *ante*.

**Goods in lighter for transhipment to another port.**—*HOULDER v. MERCHANTS MARINE INSURANCE CO.*, No. 845, *ante*.

(f) *Protection during Land Transit.*

**865. Special description of voyage—Custom of shippers to send overland—Knowledge of underwriters.**—*RODOCONACHI v. ELLIOTT*, No. 1747, *post*.

**866. Land journey included in policy—Deviation clause—Change of voyage.**—*SIMON, ISRAEL, & CO. v. SEDGWICK*, No. 971, *post*.

**867. — — — — —**—*HYDERABAD (DECCAN) CO. v. WILLOUGHBY*, No. 1048, *post*.

**868. — “All risks by land & by water”—Accidental damage.**—*SCHLOSS BROTHERS v. STEVENS*, No. 1832, *post*.

C. *Commencement of Risk on Ship.*

(a) *Start of Voyage.*

See Marine Insurance Act, 1906 (c. 41), sect. 43, sched. I., rr. 2, 3 (a), (b).

**869. What constitutes a "sailing"—Time of clearing—Ready for sea.]—**PITTEGREW *v.* PRINGLE, No. 1339, *post*.

**870. — Warrant not to sail after given date—Moving to comply with warranty.]—**COCKRANE *v.* FISHER, No. 1341, *post*.

**871. — Anchoring in mid-stream before fixed date—Proceeding to sea on date—Intention to sail.]—**SEA INSURANCE CO. *v.* BLOGG, No. 828, *ante*.

**872. — Vessel equipped with crew & cargo—Commencement of navigation.]—**The risk under a "port risk" policy ceases when the insured vessel commences her voyage, & the voyage commences when the vessel being fitted & equipped for sea & possessed of her clearances, crew, & if necessary, cargo, commences to navigate upon her voyage, & no longer remains moored in the port in the course of preparing for the voyage.

The essential point in the words "port risks," both in the sense in which they are understood at Lloyd's & the ordinary sense is, that it is a risk of a character peculiar to a port & which is involved in a vessel being in port for the ordinary purposes for which a vessel is in port, as distinguished from the risks of a vessel on a voyage, subjecting herself to the ordinary perils of navigating on that voyage (HAMILTON, J.).

The commencement of a voyage as distinguished from the termination of a lying in port is determined by that which purports to be done at the time of the act of quitting the actual mooring; whether she has the intention of returning. The fact that the vessel unexpectedly & unintentionally got into difficulties afterwards cannot, take away from the force of the fact that she cast loose from the buoys & that the tug took her in charge with the intention of proceeding straight out to sea (HAMILTON, J.).—MERSEY MUTUAL UNDERWRITING ASSOCN., LTD. *v.* POLAND (1910), 26 T. L. R. 386; 15 Com. Cas. 205.

**873. What constitutes "preparing for voyage."]**—On a policy at & from Pernambuco, or any other port or ports, in the Brazils to London; "beginning the adventure from the loading the goods on board the ship, on the termination of her cruise, & preparing for her voyage to London;" The ship, on the termination of her cruise, touched at Pernambuco; but, failing to procure a cargo there, she proceeded for St. Salvador, & was lost on her voyage thither:—*Held*: (1) the policy attached at Pernambuco; (2) the ship's proceeding for St. Salvador was no deviation; & (3) the voyage was well described in the declaration, as from Pernambuco to London.—LAMBERT *v.* LIDDARD (1814), 5 Taunt. 480; 1 Marsh. 149; 128 E. R. 776.

**874. What constitutes "ready for sea"—Completion of ballast.]—**PITTEGREW *v.* PRINGLE, No. 1339, *post*.

**What is reasonable time.]—**See Sub-sect. 3, C.(c), *post*.

**As to modification of ordinary rules by incorporation of usage.]—**See Part II., Sect. 3, sub-sect. 5, *ante*.

#### (b) Good Safety.

See Marine Insurance Act, 1906 (c. 41), sched. I., r. 3 (a), (b).

**875. Arrival at "terminus a quo" in disabled condition.]—**Policy at & from the island of St. Michael's. The ship arrived there in a very disabled state, & after lying at anchor above twenty-four hours in great danger from a storm, was blown out to sea & wrecked:—*Held*: the policy on the homeward voyage never attached.

While the ship remains "at" the place a state of repair & equipment may be sufficient which would constitute unseaworthiness after the commencement of the voyage. While in port she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired & equipped for the voyage. She must have once been at the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck a policy on the homeward voyage never attaches (LORD ELLENBOROUGH, C.J.).—PARMETER *v.* COUSINS (1809), 2 Camp. 235, N. P.

*Annotation*:—*Reid*. Haughton *v.* Empire Marine Insce. (1866), L. R. 1 Exch. 206.

**876. Arrival at "terminus a quo" in good safety—Though in danger of condemnation.]—**

(1) Policy at & from Riga to the United Kingdom, on ship & freight declared to be in continuation of two other policies which were on ship & freight on a voyage from the United Kingdom to the ship's port of discharge in the Baltic, during her stay there, & from thence back to her port of discharge in the United Kingdom. The ship was seized & condemned at Riga before she had discharged her outward cargo:—*Held*: the first policy could not be applied to the outward freight.

(2) It was stipulated by a policy of insurance from Riga to the United Kingdom "that if the ship should not load a cargo at Riga by any act of the Russian govt., the assured were to receive a total loss." The ship was seized & condemned by the Russian govt., before her outward cargo was discharged:—*Held*: a total loss within the meaning of the policy.

(3) A policy at & from a foreign port attaches when the ship has arrived there in good physical safety although from political causes, she may be in great danger of condemnation.

(4) The assured on a policy at & from Riga were in possession of a letter from their correspondent there, stating that an order for sending the papers of all ships arriving at that port to Petersburg had produced a great sensation, intimating that the papers of the ship insured had been sent to Petersburg accordingly, & expressing considerable apprehensions for her safety. This letter was not communicated to the underwriters; but the broker informed them of the fact of the ship's papers being sent to Petersburg:—*Held*: the policy was not vitiated on the ground of concealment by the non-communication of the letter.—BELL *v.* BELL (1810), 2 Camp. 475, N. P.

*Annotation*:—*As to* (3) *Reid*. Haughton *v.* Empire Marine Insce. (1866), L. R. 1 Exch. 206.

**877. Must arrive sufficiently seaworthy to lie secure.]—**HAUGHTON *v.* EMPIRE MARINE INSURANCE CO., No. 14, *ante*.

(c) *Adventure must be commenced in Reasonable Time.*

See Marine Insurance Act, 1906 (c. 41), ss. 42, 88.

**878. Ship preparing for voyage.]—**Whilst a ship is preparing for a voyage, upon which it is insured, the insurer is liable; but if the voyage is laid aside, & the ship lies by for five, six, or seven years, with the owner's privity, the insurer is not liable.

CHITTY *v.* SELWIN & MARTYN (1742), 2 Atk. 359; 26 E. R. 617, L. C.

**879. Delay amounting to abandonment of voyage.]—**CHITTY *v.* SELWIN & MARTYN, No. 878, *ante*.

**880. — Question for jury.]—**Mere length of time elapsed between the signing of the policy & the sailing, is not sufficient to avoid a policy; it is

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*Sub-sect. 3, (c) & (d),*

matter of evidence to be left to the jury, if such a time has elapsed as amounts to an abandonment.  
 —GRANT *v.* KING (1802), 4 Esp. 175, N. P.

**881. Ship undergoing repairs for voyage.]**  
 FORBES *v.* WILSON (1800), 1 Park's Marine Insurances, 8th ed. p. 472.

*Annotation:—Refd.* Gibson *v.* Small (1853), 4 H. L. Cas 353.

**882. —.]—SMITH *v.* SURRIDGE**, No. 1081, *post.*

**883. Length of time between signing policy & sailing—Avoidance of policy.]—GRANT *v.* KING**, No. 880, *ante.*

**884. What is a reasonable time—Yacht.]**  
 Insurance Jan. 28, on a vessel afloat, at & from Bristol to London. The vessel sailed on May 17:—*Held*: the delay, unaccounted for, was unreasonable, & discharged the underwriter, although the vessel was of a species which does not usually sail in the winter.—PALMER *v.* MARSHALL (1832), 8 Bing. 317; 1 Moo. & S. 454; 131 E. R. 415.  
*Annotations:—Folld.* Palmer *v.* Fenning (1833), 9 Bing. 460.  
*Refd.* M<sup>r</sup> Andrew *v.* Adams (1834), 1 Bing. N. C. 29. *Mentd.* Simpson *v.* Clayton (1836), 2 Scott, 691.

**885. —.]—Insurance Jan. 28 on a yacht afloat, at & from Bristol to London.** The vessel was not fitted out for sailing till the May following, & did not sail till May 17:—*Held*: the circumstance of her being a yacht was no justification of such delay, & the underwriters were discharged.

It is clear insurance law, that on a policy at & from a port, the vessel ought to be ready to sail as soon as she reasonably can, & is not to lie in the port for months before she takes her departure (PARK, J.).—PALMER *v.* FENNING (1833), 9 Bing. 460; 2 Moo. & S. 624; 131 E. R. 685.

**886. — Where risk materially varied—Question for jury.]—If a ship be insured at & from a certain place, where in fact she is not at the time, but arrives there, after some interval, but the fact is not communicated to the underwriters, who do not call for information on the subject, it is a question for the jury, whether the delay which intervened materially varied the risk; & they held it did not, in a case where the insurance being effected on Aug. 13 in London, on goods at & from Heligoland to the Baltic, the vessel did not sail from the Thames till Aug. 27, to which was to be added the further time for her reaching Heligoland.—HULL *v.* COOPER (1811), 14 East, 479; 104 E. R. 685.**

*Annotations:—Apld.* Mount *v.* Larkins (1831), 8 Bing. 108; De Wolf *v.* Archangel Insce. (1874), L. R. 9 Q. B. 451.

**887. —.]—In a voyage policy of insurance "at & from" a port, it is an implied understanding that the ship shall be at the port within such a time that the risk shall not be materially varied; & if there is delay beyond such time, the policy does not attach.—DE WOLF *v.* ARCHANGEL INSURANCE CO. (1874), L. R. 9 Q. B. 451; 43 L. J. Q. B. 147; 30 L. T. 605; 22 W. R. 801; 2 Asp. M. L. C. 273.**

(d) "At and from" a "Port."

See Marine Insurance Act, 1906 (c. 41), ss. 25, 42, & sched. I., r. 3 (a) (b).

**888. Date of first arrival.]—MOTTEUX *v.* LON-**

**DON ASSURANCE (GOVERNOR & Co.), No. 152. ante.**

**889. "At & from" an island—Arrival at first port.]—CAMDEN *v.* COWLEY**, No. 922, *post.*

**890. — Ship moving from port to port in island.]—Under a policy "at & from" an island, a ship is protected in moving from port to port in the same island.—CRUICKSHANK *v.* JANSON (1810), 2 Taunt. 301; 127 E. R. 1093.**

*Annotations:—Refd.* Brown *v.* Tayleur (1835), 1 Har. & W. 578; Biecard *v.* Shepherd (1861), 14 Moo. P. C. C. 471.

**891. —.]—A policy of insurance was effected on a ship & her cargo, at & from Grenada to London.** The ship took out supplies to different estates in that island, & had arrived there, & discharged part of the outward cargo, at three different bays in the island. In the meantime, the master had made arrangements for the homeward cargo. Whilst the ship was proceeding, with part of the homeward cargo on board, to a fourth bay, for the double purpose of unloading part of her outward cargo, & to take in some of her homeward cargo, she was lost by perils of the sea. There is but one custom-house at Grenada:—*Held*: there had not been a deviation from the voyage insured.—WARRE *v.* MILLER (1825), 4 B. & C. 538; 7 Dow. & Ry. K. B. 1; 107 E. R. 1160; *sub nom.* MILLER *v.* WARRE, 4 L. J. O. S. K. B. 8.

*Annotations:—Refd.* Brown *v.* Tayleur (1835), 1 Har. & W. 578; M<sup>r</sup>Swiney *v.* Royal Exchange Assce. (1849), 14 Q. B. 634; Biecard *v.* Shepherd (1861), 14 Moo. P. C. C. 471. *Mentd.* Vines *v.* Reading Corpn. (1826), 1 Y. & J. 4.

**892. Part cargo loaded inside port—Remainder outside—Custom of port.]—KINGSTON *v.* KNIBBS** (1808), 1 Camp. 508, n., N. P.

*Annotation:—Refd.* Lang *v.* Anderdon (1824), 3 B. & C. 495.

**893. At & from named port—Head of port named in policy—Voyage from distinct place in port.]—If a policy describe a voyage at & from a place which is the head of a port, it will not cover a voyage at & from a distinct place which is a member of the same port.—PAYNE *v.* HUTCHINSON (1810), 2 Taunt. 405, n.; 127 E. R. 1135.**

*Annotation:—Distd.* Roelandts *v.* Harrison (1854), 23 L. J. Ex. 169.

**894. — Also name of town—Voyage from within limits of port.]—A policy at & from a place, the name of which equally designates a particular town, & a port comprehending an extensive district of coast, does not protect a cargo laden anywhere within the limits of the port, but refers to the town itself. A policy at & from Lyme to London does not protect a cargo laden at Bridport within the port of Lyme, & eight miles nearer to London.—CONSTABLE *v.* NOBLE (1810), 2 Taunt. 403; 127 E. R. 1134.**

*Annotation:—Distd.* Roelandts *v.* Harrison (1854), 23 L. J. Ex. 169.

**895. — "Or any other ports" on named coast—Cargo not available at named port.]—LAMBERT *v.* LIDDARD**, No. 873, *ante.*

**896. — Ship lost at moorings.]—Goods are insured at & from Mogadore to London.** The declaration avers "that after the loading the goods, the ship departed on her intended voyage, & while in the course of her said voyage was lost by perils of the sea":—*Held*: this was a material allegation, & therefore, the ship having been lost while at her moorings, & before the cargo was completed,

## PART II. SECT. 12, SUB-SECT. 3.— C. (d).

**r. At & from named port—Ship remaining outside harbour—According to usage.]—A ship was insured for a voyage "at & from S. to J., there &**

thence," etc. She went to S. for orders, & without entering the limits of the port as defined by statute for fiscal purposes, brought up or near the mouth of the harbour & having received her orders by signal attempted to put about for J. but missed stay & was

wrecked. In an action on the policy evidence was given establishing that S. was well known as a port of call, that ships going there for orders never entered the harbour, & that the insured vessel was in the port according to a Royal Surveyor's Chart furnished to



the insured could not recover.—*ABITBOL v. BRISTOW* (1816), 6 Taunt. 464; 2 Marsh. 157; 128 E. R. 1115.

*Annotation*:—*Reid. Doxford v. King* (1846), 8 L. T. O. S. 190.

**897. Open roadstead usual place of trading.]—***COCKEY v. ATKINSON*, No. 285, *ante*.

**“Port.”]**—Under a policy insuring a brigantine “at & from L. to S., & thence to Barcelona, & at & from thence & two other ports in Spain, to a port in Great Britain”:—*Held*: Saloe, a place lying in a bay, having warehouses & a jetty, with a depth of water sufficient for feluccas, but not for large ships, & a good roadstead anchorage where ships lie & are loaded by means of small craft; having also a custom house & officers, is a “port” within the meaning of the policy.—*SEA INSURANCE CO. OF SCOTLAND v. GAVIN* (1829), 4 Bli. N. S. 578; 2 Dow. & Cl. 129; 5 E. R. 206, II. L.

*Annotations*:—*Reid. Brown v. Tayleur* (1835), 4 Ad. & El. 241; *Hunter v. Northern Marine Insee.* (1888), 13 App. Cas. 717.

**899. “Port of lading” — First port where loading commenced.]—***BROWN v. TAYLEUR*, No. 282, *ante*.

#### *D. Termination of Risk on Ship.*

##### *(a) By Completion of Voyage.*

See Marine Insurance Act, 1906 (c. 41), ss. 44, 45.

**900. “Until discharged of her voyage” — When cargo unloaded.]—***ANON.* (1685), *Skin.* 243; 90 E. R. 111.

**901. Last port of discharge in particular river—Friendly port intended—Intention of parties.]—**A ship was insured from London to any port or ports in the river Plate until her arrival at her last port of discharge in that river; & the master intending to discharge her cargo at Buenos Ayres, passed Maldonado; but hearing that Buenos Ayres was then in the hands of the enemy, he went to Monte Video with intent to make a complete discharge there if the market were favourable; but after discharging a part, & not finding the market there so favourable as he expected, he had not abandoned his original intention of going to Buenos Ayres, if it should afterwards be practicable; but while he was still discharging part of his cargo at Monte Video a loss happened by a peril of the sea:—*Held*: as Buenos Ayres to which other port only in the Plate he had contemplated to go, was at the time of his arrival in the Plate, & in fact continued up to the time of the loss, in the hands of the enemy, so that he could not legally go there, Monte Video must be taken to be the ship’s last port of discharge, & on her arrival there the policy was discharged.

It is said that the insurance was to any port or ports in the river Plate; but that must be understood to mean any friendly port (*BAYLEY, J.*).—*BROWN v. VIGNE* (1810), 12 East, 283; 104 E. R. 110.

*Annotation*:—*Distd. Oliverson v. Brightman* (1846), 8 Q. B. 781

**902. “For — days after arrival” — Arrival at usual place for seeking freight.]—**Declaration on a policy of insurance on the barque “*Shanghai*,” “from Swan River to Mauritius, & for thirty days after arrival,” averring a total loss; plea: that the ship was unnecessarily delayed & abandoned, & deviated from her voyage. It was

proved that ships bound for the Mauritius loaded with cargoes, generally speaking, go into the harbour of Port Louis. If in ballast or seeking cargo, it is customary for them to anchor at the Bell Buoy, which is a buoy in the main ocean, a few miles from the harbour itself. The “*Shanghai*” having sailed in ballast from Swan River to the Mauritius on her arrival anchored at the Bell Buoy & remained there fourteen days, awaiting the arrival of money to pay a bottomry bond, at the expiration of which period she was wrecked:—*Held*: it was a question of fact for the jury whether the ship had arrived at the Mauritius.

The question is, whether it is an arrival at the place at which ships of her character ordinarily anchor (*per CUR.*).—*LINDSAY v. JANSON* (1859), 4 H. & N. 699; 28 L. J. Ex. 315; 3 L. T. 341; 157 E. R. 1016.

**903. — How time calculated.]—**Policy of insurance on ship at & from “L. to any port or ports in the South & North Pacific Oceans in any order backwards & forwards, & during thirty days stay in her last port of discharge”; these words were written: in other respects the policy was in the usual printed form. The ship arrived at her last port of discharge at 7 p.m. on May 25, & anchored there, & so remained until June 24, on which day, at 3.45 a.m., she was driven on shore in a gale of wind & lost:—*Held*: the thirty days were to be reckoned from the expiration of the twenty-four hours after the ship had arrived at her last port of discharge, & therefore the loss was covered by the policy.—*MERCANTILE MARINE INSURANCE CO. v. TITHERINGTON* (1864), 5 B. & S. 765; 5 New Rep. 82; 34 L. J. Q. B. 11; 11 L. T. 340; 11 Jur. N. S. 62; 13 W. R. 141; 122 E. R. 1015.

*Annotation*:—*Appld. Gambles v. Ocean Marine Insee. of Bombay* (1876), 1 Ex. D. 141.

**904. — —.]—**In a policy of marine insurance on a ship the insurance was described as being for a voyage to Algoa Bay “& for thirty days in port after arrival” & as continuing “until the ship with all her ordnance, tackle apparel, etc., shall be arrived at as above upon the said ship, etc., until she hath there moored at anchor in good safety.” The ship arrived at Algoa Bay, & was there moored at anchor in good safety at 11.30 a.m. on Aug. 2, 1902. She remained in Algoa Bay until Sept. 1, 1902, & was there totally lost through perils insured against at 4.30 p.m. on that day:—*Held*: the expression “30 days” in the policy meant thirty consecutive periods of twenty-four hours, the first of which began to run at 11.30 a.m. on Aug. 2; & therefore, the insurance had come to an end before the loss occurred.—*CORNFOOT v. ROYAL EXCHANGE ASSURANCE CORPN.*, [1904] 1 K. B. 40; 73 L. J. K. B. 22; 89 L. T. 490; 52 W. R. 49; 20 T. L. R. 34; 48 Sol. Jo. 32; 9 Asp. M. L. C. 489; 9 Com. Cas. 80, C. A.

**905. — Cargo discharged on arrival—Loss while taking in next cargo.]—**A ship insured “at & from the port of Pomaron to Newcastle-on-Tyne, & for fifteen days whilst there after arrival,” arrived safely at Newcastle on Dec. 4, & on the 13th completed the discharge of her inward cargo within the port of Newcastle. Having been chartered to load in the river Tyne a cargo of coals for delivery at Gibraltar, & having received on

navigators:—*Held*: the words “at & from S.” meant at & from the first arrival of the ship; she was at S. within the terms of the policy; & the policy had attached when he attempted to put about for J.—*ST.*

*PAUL FIRE & MARINE INSURANCE CO. v. TROOP* (1896), 26 S. C. R. 5.—*CAN.*

**PART II. SECT. 12, SUB-SECT. 3.—**  
**D. (a).**

*t. Voyage terminated at inter-*

*mediate port.]—*A ship having, during the subsistence of the non-intercourse law with America been insured from Liverpool to New Orleans, with liberty to call at any port in the course of the voyage, & part of the premium to be

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**Sub-sect. 3, D. (a) & (b).]**

board two keels of the same as a stiffening, the ship was moved on Dec. 15 to a loading place on the Tyne, within the port of Newcastle, there to complete her loading. Whilst moored there she was, on the 16th, injured in a storm. The stamp on the policy was sufficient to cover both a voyage & a time policy. The policy did not contain the usual twenty-four hours' clause:—*Held*: the policy must be construed as a voyage policy with a time policy engrafted upon it, & although the voyage was terminated & the inward cargo discharged, the underwriters were liable.—**GAMBLES v. OCEAN MARINE INSURANCE CO. OF BOMBAY** (1876), 1 Ex. D. 141; 45 L. J. Q. B. 366; 34 L. T. 189; 24 W. R. 384; 3 Asp. M. L. C. 120, C. A.

*Annotation*:—**Refd.** Crocker v. General Insee. of Trieste (1897), 3 Com. Cas. 22.

**906. — However employed — Any port in specified area.**—Pltf. reinsured a risk with defts. on a ship "at & from Newcastle, N.S.W., to any ports or places in any order on the West Coast of South America & for thirty days in port after arrival however employed." The ship sailed with a cargo of coals from Newcastle, N.S.W., to Valparaiso, & there discharged the whole of it. She remained at Valparaiso for thirty days & loaded ballast & sugar for T., a port on the West Coast of South America. While proceeding to T., she was stranded & became a total loss:—*Held*: (1) "any ports or places" did not mean ports or places "of discharge" only, & the ship was covered at the time of her loss; (2) a policy of marine insurance can only be rectified when it is clearly shown that it has been drawn up by common mistake.

[The slip] cannot be looked at for showing the contract, but it can for the purpose of the rectification of the policy (**MATHEW, J.**).—**SPALDING v. CROCKER** (1897), 13 T. L. R. 396; 2 Com. Cas. 189.

*Annotations*:—**As to (1) Consd.** Crocker v. General Insee. of Trieste (1897), 3 Com. Cas. 22; Kynance Sailing Ship Co. v. Young (1911), 104 L. T. 397. **As to (2) Refd.** Empress Assee. Corp'n. v. Bowring (1905), 11 Com. Cas. 107.

**907. To particular place — Anchored at usual place of discharge—No "good safety" clause.**—The risk on a vessel under a policy of insurance to a place generally, without any provision as to her safety there, continues until she is anchored at her port of destination, in the usual place for discharge of her cargo. By a memorandum indorsed on a policy made by way of reinsurance on a vessel from Liverpool to Baltimore & United Kingdom, the vessel, in consideration of an additional premium, was to be at liberty to go to Antwerp. On leaving Baltimore she went direct to Antwerp, where she arrived the day before the memorandum was made. Two days after, while in the outer dock, on her way into the inner dock, the usual place of discharge, she was ordered to Leith, on her way to which place she was lost. In an action on a policy or for a return of the additional premium:—*Held*: the memorandum did not give liberty to touch or call at Antwerp, & so did not permit the vessel to go to Antwerp, & thence to England; & as the vessel had not, when the memorandum was made, reached the usual place of discharge, the voyage was not then at an end, & the additional premium could not be recovered back.—**STONE v. MARINE INSURANCE CO. OCEAN, LTD. OF GOTHENBURG**

returned if the voyage terminated at Pensacola; & the ship having arrived safely there, but being lost

three weeks thereafter, & there being evidence to show an intention of holding the voyage terminated:—

(1876), 1 Ex. D. 81; 45 L. J. Q. B. 361; 34 L. T. 490; 24 W. R. 554; 3 Asp. M. L. C. 152.

**908. "Final port"—Final port of discharge.**—**MOORE v. TAYLOR**, No. 926, *post*.

**909. — — — — —**—By a written clause inserted in the ordinary form of Lloyd's policy a ship was insured on a voyage "from any port or ports place or places on the River Plate to any port or ports place or places in France &/or the United Kingdom, final port, excluding Mediterranean via any ports in any order." The policy was upon the ship only & against total loss only. The ship was loaded in the River Plate with a mixed cargo, & sailed from Buenos Aires for Dakar, where she was ordered to discharge part of her cargo at St. Nazaire & the rest at Havre. After discharging the final parcels of cargo at Havre she sailed for Barry for bunkers & was totally lost on the way:—*Held*: upon the true construction of the policy "final port" meant the final port of discharge either in the United Kingdom or in France, & at the time of her loss the ship was not upon the insured.—**MARTEN & VESTLEY BROTHERS, LDD., [1920]** A. C. 307; 89 L. J. K. B. 663; 122 L. T. 785; 36 T. L. R. 228; 14 Asp. M. L. C. 600; 25 Com. Cas. 175, H. L.

**910. — "However employed"—Not to final port of discharge.**—A ship was insured by pltfs. "at & from Sydney to Newcastle, N.S.W., while there & thence to any port or ports place or places on the West Coast of South America . . . while there & thence to any port or ports" in the United Kingdom. Pltfs. reinsured with defts. a portion of their risk by a policy which expressed to be "at & from Newcastle, N. to any port or ports place or places in any order on the West Coast of South America & for thirty days after arrival in final port however employed." The ship sailed with a cargo of coal from Newcastle, N.S.W., & proceeded to Valparaiso, on the West Coast of South America, where she discharged her cargo; she there loaded a small quantity of ballast & sugar & sailed for Talcahuano, another port on that coast, in order to finish loading there a cargo for the United Kingdom; before reaching Talcahuano she was totally lost, the loss occurring more than thirty days after her arrival at Valparaiso:—*Held*: the expressions in the reinsurance policy, "port or ports place or places" & "final port," were not limited to ports or places of discharge & final port of discharge respectively, but must be construed to include ports or places of loading & final port of loading for the voyage to the United Kingdom; & pltfs., who had paid the claim of the owner on the original policy, were therefore entitled to recover from defts. on the policy of reinsurance.—**CROCKER v. STURGE**, [1897] 1 Q. B. 330; 66 L. J. Q. B. 142; 75 L. T. 549; 45 W. R. 271; 13 T. L. R. 96; 41 Sol. Jo. 158; 8 Asp. M. L. C. 208; 2 Com. Cas. 43.

*Annotations*:—**Appld.** Spalding v. Crocker (1897), 13 T. L. R. 396. **Consd.** Crocker v. General Insee. of Trieste (1897), 2 Com. Cas. 233; Kynance Sailing Ship Co. v. Young (1911), 104 L. T. 397. **Refd.** Royal Exchange Assee. Corp'n. v. Sjöforsakrings Akt. Vega, [1902] 2 K. B. 384.

**911. — — — — —**—Pltfs. reinsured a risk with defts. on a ship "at & from Newcastle, N.S.W., to any port or ports, place or places, in any order, on the West Coast of South America & for thirty days in port, after arrival in final port, however employed." The ship sailed with a cargo of coals from Newcastle to Valparaiso, & there discharged the whole. She remained there

*Held*: the insurers were not liable.—**NEWBIGIN v. M'GREGOR & CO.** 1 Sh. Sc. App. 117.—**SCOT.**

thirty days, & loaded ballast & sugar for T., another port on the West Coast of South America. While proceeding to T. she was lost:—*Held*: “final port” did not mean the final port of discharge, & plffs. were entitled to recover.—(CROCKER v. GENERAL INSURANCE CO., LTD. (1897), 14 T. L. R. 112; 3 Com. Cas. 22, C. A.

*Annotations*:—*Consd.* Kynance Sailing Ship Co. v. Young (1911), 104 L. T. 397. *Refd.* Royal Exchange Assce. Corp. v. Sjöforsakrings Akt. Vega, [1902] 2 K. B. 384.

**912. “Port or ports of call &/or discharge”**—**Not limited to one port of discharge.**—By a policy of insurance plffs. insured their ship for a voyage from Newcastle, N.S.W., “to port or ports, place or places of call &/or discharge backwards & forwards & forwards & backwards in any order or rotation on the West Coast of South America, & while in port for thirty days after arrival, however employed, or until sailing on next voyage, whichever may first occur.” The vessel was chartered to load a cargo of coal at Newcastle, N.S.W., & under the charterparty the charterers directed her to discharge the cargo at Valparaiso, & bills of lading were issued making it deliverable at that port. She was then, under a second charterparty, to proceed to Tocopilla to load a nitrate cargo for a European port. When the vessel reached Valparaiso it was agreed between plffs. & the charterers under the first charterparty that, instead of delivering the whole of the cargo of coal at Valparaiso, she should proceed with 800 or 900 tons of the coal still on board & deliver same to the charterers at Tocopilla. This arrangement also relieved the captain from the necessity of taking ballast on board for the voyage from Valparaiso to Tocopilla. On the voyage to the latter port the vessel stranded, & became a total loss:—*Held*: it was competent for plffs. & charterers to vary the mode of performing the charterparty by discharging the cargo of coal at two ports, instead of one, & the loss was covered by the policy.—KYNANCE SAILING SHIP CO. v. YOUNG (1911), 104 L. T. 397; 27 T. L. R. 306; 11 Asp. M. L. C. 596; 16 Com. Cas. 123.

*Annotations*:—*Refd.* Reliance Marine Insce. v. Duder, [1913] 1 K. B. 265; Janson v. Poole (1915), 84 L. J. K. B. 1543.

(b) “Moored in Good Safety.”

**913. Opportunity for discharge of cargo — Ship ordered to quarantine within 24 hours.**—Insurer is liable where ship goes back to perform quarantine.

Ship insured at & from Loughorn to the port of London & till then moored 24 hours in good safety. She arrived July 8, at Fresh wharf & moored, but was the same day served with an order to go back to the “Hope” to perform a 14 days’ quarantine. Before she returned she was burnt, Aug. 23, & the question was, whether the insurer was liable.—WAPLES v. EAMES (1745), 2 Stra. 1243; 93 E. R. 1158.

*Annotation*:—*Refd.* Lidgett v. Secretan (1870), L. R. 5 C. P. 190.

**914. — Ship moored awaiting turn of unloading.**—ANGERSTEIN v. BELL (1795), 1 Park’s Marine Insurances, 7th ed. p. 55.

**915. — Ship moored outside dock — Prevented from entering by ice.**—A vessel insured from Sierra Leone to London, & upon which the insurance was to endure until she had been moored in good safety twenty-four hours, arrived in the evening of Feb. 18, & the captain having orders to take her into the King’s Dock at Deptford, moored her near the dockgates. On the following morning he was informed at the dock, that no order for his

admittance had been received; but that if it had, the vessel could not be then admitted, on account of the quantity of ice in the river. The order was sent by the Navy Board on the 21st, but on account of the ice, the ship could not be moved until the 27th, & then, in warping her towards the dock, a rope broke, she grounded, & was totally lost. The jury found that the vessel remained at her moorings from Feb. 18 to 27, on account of the ice, & not for want of an order to enter the dock:—*Held*: upon this finding, plff. was entitled to recover, for the place where the vessel was moored, not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours; & as the vessel remained at those moorings on account of the ice, & not waiting for the order, the underwriters were not discharged by the delay.—SAMUEL v. ROYAL EXCHANGE ASSURANCE CO. (1828), 8 B. & C. 119; 6 L. J. O. S. K. B. 315; 108 E. R. 987.

*Annotations*:—*Distd.* Whitwell v. Harrison (1848), 2 Exch. 127. *Consd.* Stewart v. Greenock Marine Insce. (1848), 2 H. L. Cas. 159; Scottish Marine Insce. v. Turner (1853), 21 L. T. O. S. 10. *Appld.* Stone v. Marine Insce. Co. Ocean, Ltd. of Gothenburg (1876), 1 Ex. D. 81. *Refd.* Dahl v. Nelson, Donkin (1880), 6 App. Cas. 38; Houlder v. Merchants’ Marine Insce. (1886), 2 T. L. R. 241. *Mentd.* Tharsis Sulphur & Copper Co. v. Morel, [1891] 2 Q. B. 647; Bulman & Dickson v. Fenwick, [1894] 1 Q. B. 179; Akt. Olivebank v. Danck Svovlsyre Fabrik, [1919] 1 K. B. 388.

**916. — Ship moored outside port — Bulk of cargo discharged.**—A vessel was insured “at & from Liverpool to Quebec, during her stay there, & from thence back to her discharging port in the United Kingdom, & until she had moored at anchor twenty-four hours in good safety.” The vessel was chartered to take on board a cargo of timber at Quebec, & to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, & there discharge her cargo. The vessel sailed from Quebec on July 23, 1845, & arrived in the Mersey on Sept. 4, & anchored at the Bell Buoy. The next morning she was towed up by a steam-boat, & came abreast of Wallasey Pool; but, being unable to enter the pool by reason of her too great draft of water, the captain anchored & proceeded to Liverpool to report the vessel, & engaged lumpers to discharge the cargo at a fixed rate of payment, which was to include the expense of rafting the timber from the vessel into Wallasey Pool, & discharged his crew, as was usual on a ship’s arrival at Liverpool. He then proceeded to discharge the deck cargo, & afterwards a considerable portion of the other cargo, by the usual mode, at the stern port; & after occupying in this way several days, the ship, on Sept. 14, fell over & sustained damage. The captain always intended to take the vessel into Wallasey Pool with as much of the cargo on board as he could carry with safety:—*Held*: in above circumstances, the underwriters were not liable, the vessel having been moored in safety twenty-four hours after her arrival at her port of discharge.—WHITWELL v. HARRISON (1848), 2 Exch. 127; 18 L. J. Ex. 465; 7 L. T. 75; 151 E. R. 433.

*Annotation*:—*Consd.* Gibson v. Hillstrom (1869), 21 L. T. 302.

**917. Political safety — Seizure after 24 hours in port.**—(1) A ship being insured for a voyage, the underwriter is not liable for any loss arising from seizure after she has been 24 hours in port: though such seizure was in consequence of an act of smuggling committed by the master during the voyage.

The general question here is, whether, as the



*Sect. 12.—Commencement, duration and area of risk:*  
*Sub-sect. 3, D. (b), (c), (d) & (e), & E. (a) i.]*

loss occasioned by the barratry of the master did not happen during the continuance of the voyage, the insurers are liable? . . . The policy by the terms of it is an undertaking by the insurer for a limited time, during the voyage from Hamburg to London, till the ship has been moored 24 hours in safety; & the ship was not actually seized till near a month afterwards. . . . There must be some certain & reasonable limitation in point of time laid down by the ct., when the insurer shall be released from his engagement. . . . We all think that the law on insurance would be left unsettled, & in much confusion, if any other time were suggested than that prescribed by the policy, namely, the continuance of the voyage, & the ship's being moored 24 hours in safety (WILLES, J.).

(2) Many definitions of barratry are to be found in the books, but perhaps this general one may comprehend almost all the cases. Barratry, is every species of fraud or knavery in the master of the ship by which the freighters or owners are injured; & in this light a criminal deviation is barratry, if the deviation be without their consent (WILLES, J.).—LOCKYER v. OFFLEY (1786), 1 Term Rep. 252; 99 E. R. 1079.

*Annotations:—As to (1) Consd. Knight v. Faith (1850), 15 Q. B. 649; Lidgett v. Secretan (1870), L. R. 5 C. P. 190. Refd. Cory v. Burr (1883), 8 App. Cas. 393. As to (2) Consd. Cory v. Burr (1883), 8 App. Cas. 393. Refd. Earle v. Rowcroft (1806), 8 East, 126.*

**918. — Ship laid under embargo on arrival.]—**If a policy be on a ship bound to a foreign port until she is twenty-four hours moored in safety there; & previous to such ship's arrival at her destined port an embargo is laid on all English vessels in that port, & she on entering it is also detained, & her crew made prisoners of war, the assured is entitled to recover.—MINETT v. ANDERSON (1794), Peake, 277, N. P.

**919. — Papers seized on arrival—Subsequent condemnation.]—**Where immediately upon the arrival of a ship at Riga, her papers were taken & her hatches sealed down by the officers of Govt., & so kept till her papers were sent to St. Petersburg to be examined; & on such examination immediate orders were issued for the seizure of the ship & cargo, which were afterwards condemned for carrying simulated papers it was held that this was not a mooring twenty-four hours in safety after her arrival, within those words in the policy. But that as the ship had no leave to carry simulated papers, although without such she would certainly have been seized & condemned, as coming from an enemy's country; the underwriters were not liable for the loss which ensued from the act of the assured himself. A policy of insurance on goods "at & from Gottenburg to Riga, beginning the adventure on the goods from the loading thereof aboard the ship at Gottenburg," will not cover goods previously loaded on board at London, which arrived in the ship at Gottenburg.—HORNEYER v. LUSHINGTON (1812), 15 East, 46; 3 Camp. 85; 104 E. R. 761.

*Annotations:—Refd. Nonnen v. Reld, Nonnen v. Kettlewell (1812), 16 East, 176; Mellish v. Allnutt (1813), 2 M. & S. 106; Rickman v. Carstairs (1833), 5 B. & Ad. 651; Lidgett v. Secretan (1870), L. R. 5 C. P. 190.*

**920. Arrival in port damaged—Whether as ship or wreck.]—**On an insurance on ship & goods valued at so much, on a voyage to Africa & the West Indies, the assured is entitled to recover the whole sum on a total loss which happened in the latest period of the voyage; although a considerable part of the estimated value consisted

originally in stores & provisions for the purchase & sustenance of slaves during the voyage, & the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, & soon after foundered. Where a ship insured arrived in port a mere wreck, & was obliged to be lashed to a hulk to avoid sinking, & in attempting to remove her to the shore a few days afterwards she sank:—*Held*: the assured might recover as for a total loss, though her cargo was saved & brought to a profitable market.—SHAWE v. FELTON (1801), 2 East, 109; 102 E. R. 310.

*Annotations:—Consd. Forbes v. Aspinall (1811), 13 East, 323. Refd. Knight v. Faith (1850), 15 Q. B. 649; Tobin v. Hartford (1864), 17 C. B. N. S. 528; Lidgett v. Secretan (1870), L. R. 5 C. P. 190; Burnand v. Rodocanachi (1881), 44 L. T. 538; Woodside v. Globe Marine Insce., [1896] 1 Q. B. 105; Wilson Shipping Co. v. British & Foreign Insce., [1920] 2 K. B. 25.*

**921. — — —.]—**By a Lloyd's policy on ship, the risk was described in writing to be "at & from London to Calcutta, & for thirty days after arrival," & then followed the usual printed words. "upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety." After having sustained damage at sea to such an extent as to require constant pumping to keep her afloat, the vessel arrived at Calcutta, & was safely moored there on Oct. 28, 1866. Her cargo was unloaded in safety by Nov. 8. It was necessary to continue the pumping during the discharge of the cargo until she was much lightened. On Nov. 12 she was taken from her moorings to a dry-dock for survey & repair, & was there destroyed by an accidental fire on Dec. 5:—*Held*: as the vessel remained at her moorings more than twenty-four hours as a ship, though damaged, & not as a mere wreck, she had been moored "twenty-four hours in good safety," & as her destruction did not take place until after thirty days from that time, that the risk had terminated at the time of the loss.

*Qu.*: whether the thirty days were to be reckoned from the arrival at Calcutta or from the expiration of the twenty-four hours after she had been moored in good safety.—LIDGETT v. SECRETAN (1870), L. R. 5 C. P. 190; 39 L. J. C. P. 106; 22 L. T. 272; 18 W. R. 692; 3 Mar. L. C. 365.

*(c) Terminus comprising Several Ports.*

*See Marine Insurance Act, 1906 (c. 41), s. 47.*

**922. Twenty-four hours after arrival at first port.]—**(1) Evidence of the general opinion of merchants allowed to be given to prove the custom of merchants.

(2) Insurance on a ship to Jamaica is determined, by the ship's mooring twenty-four hours in any port there, & does not continue till she comes to the last port of delivery.—CAMDEN v. COWLEY (1763), 1 Wm. Bl. 417; 96 E. R. 237.

*Annotations:—As to (2) Refd. Miller v. Warre (1824), 1 C. & P. 237; Marton v. Vestey, [1920] A. C. 307. Generally, Menth. Waters v. Waters (1848), 2 De G. & Sm. 591.*

**923. — — —.]—**BARRAS v. LONDON ASSURANCE (1782), 1 Park's Marine Insurances, 8th ed. p. 74.

**924. Bulk of cargo unloaded at first port—Proceeding to another port with residue—Mooring one month at first port.]—**LEIGH v. MATHER (1795), 1 Esp. 411, N. P.

**925. — — — & to obtain homeward cargo.]—**Where a ship insured to Martinique & all or any of the Windward & Leeward Islands, landed the greatest part of her cargo at Martinique, & sailed with the residue to Antigua, where she was wrecked while stopping partly to dispose of the

residue of the outward cargo, & partly to obtain a homeward cargo:—*Held*: the underwriters were not liable.—*INGLIS v. VAUX* (1813), 3 Camp. 437, N. P.

*Annotations* :—**Distd.** Warre v. Miller (1825), 4 B. & C. 538.  
**Folld.** Moore v. Taylor (1834), 1 Ad. & El. 25. **Refd.**  
 Crocker v. General Insee. of Trieste (1897), 3 Com. Cas.  
 22.

926. — Proceeding to another port for homeward cargo.]—An insurance was made on a ship at & from St. Vincent, Barbadoes, & all or any of the West India Islands, to her port or ports of discharge & loading in the United Kingdom, during her stay there, & thence back to Barbadoes, & all or any of the West India colonies, until the ship should have arrived at her final port as aforesaid : —*Held* : the adventure terminated at the place in the West India colonies where she substantially discharged her cargo from the United Kingdom. The ship discharged all the cargo, except some coals & bricks, at Barbadoes, & was proceeding elsewhere for a fresh cargo. It became a question, on the evidence, whether the coals & bricks were retained for the mere purpose of ballast. The jury having found that the cargo was substantially discharged, the ct. refused to disturb the verdict.

“Final port” must mean the port which is final with reference to the goods to be taken on board in the United Kingdom (PARKE, J.).—MOORE v. TAYLOR (1834), 1 Ad. & El. 25; 3 Nev. M. K. B. 406; 3 L. J. K. B. 132; 110 E. R. 1117.

*Annotations* :—**Consd.** *Marten v. Vestey*, [1920] A. C. 307.  
**Refd.** *Crocker v. General Insee. of Trieste* (1897), 3 Com.  
Cas. 22.

**927. Arrival at port hostile at time of insurance.]**  
—NEILSON v. DE LACOUR (1797), 2 Esp. 618, N. P.

(d) *Abandonment and Change of Voyage.*

*See Sect. 13, post.*

(e) *Deviation and Delay.*

*See Sect. 14, post.*

*E. Commencement and Duration of Risk on Freight.*

(a) *Commencement.*

i. *Chartered Freight.*

*See* Marine Insurance Act, 1906 (c. 41), sched. I., Rule 3 (c).

928. Goods to be shipped at intermediate port—  
Beginning of voyage thereto.]—Where a ship was chartered from L. to T. there to take on board a certain number of pipes of wine & proceed to B., etc., for which the owner was to receive freight at the rate of so much per pipe, a policy of insurance on such freight was held to attach from the sailing of the ship from L.—THOMPSON v. TAYLOR (1795), 6 Term Rep. 478; 101 E. R. 657.

**Annotations :—****Folld.** Horncastle v. Stuart (1806), 7 East, 400 ; Davidson v. Willasey (1813), 1 M. & S. 313. **Apld.** Parke v. Hebbson (1820), cited in 2 Brod. & Bing. at p. 326 ; Truscott v. Christie (1820), 2 Brod. & Bing. 320. **Expld.** Barber v. Fleming (1869), L. R. 5 Q. B. 59. **Folld.** Foley v. United Fire & Marine Insoc. of Sydney (1870), L. R. 5 C. P. 155. **Refd.** Lucena v. Craufurd (1802), 3 Bos. & P. 75.

929. — — —.]—ATTY v. LINDO, No. 2101,  
post.

930. ———.]—Where a ship was chartered from Liverpool to Jamaica, there to take on board a full cargo for Liverpool at the current rate of freight, to be paid at one month from the discharge of her cargo at Liverpool; & the ship owners effected a valued policy on the freight at & from Jamaica to her port of discharge in the United Kingdom; & the ship arrived at Jamaica, & after taking on board one-half of her cargo, was lost by storm, the remainder of her cargo

being on shore & ready to be shipped:—*Held*: the assured were entitled to recover as for a total loss.—*DAVIDSON v. WILLASEY* (1813), 1 M. & S. 313; 105 E. R. 117.

*Annotations* :—**Folld.** Barber v. Fleming (1869), L. R. 5 Q. B. 59; Foley v. United Fire & Marine Insce. of Sydney (1870), 18 W. R. 437. **Refd.** Truscott v. Christie (1820), 2 Brod. & Bing. 320.

931. ———.]—Pltf. on Aug. 7, 1866, chartered his ship *C.*, "now lying at Bombay," for a voyage from Howland's Island to a port in the United Kingdom, for a full cargo of guano, freight to be paid at port of discharge; the ship to be at the island on or before June 1, 1867, or the charterer to have the option of declaring the charter void. Pltf. on Sept. 7, 1866, effected an insurance with deft. at & from Bombay to Howland's Island, while there, & thence to any port in the United Kingdom, on freight chartered or otherwise, valued at £3,600, in the ship *C.*; & it was made lawful for the ship to sail to, touch, & stay at any ports whatsoever, without prejudice to the insurance, which was against the usual perils. The ship sailed from Bombay, in ballast, on Oct. 4, 1866, for Howland's Island, one of the Chincha islands, intending to call at a port in New Zealand for water. She got on shore on the coast of New Zealand on Dec. 25, & was so much damaged that pltf. was obliged to abandon the voyage:—*Held*: as the ship had sailed in ballast from Bombay with the sole object of going to Howland's Island in order to earn the freight under the charter from thence to the United Kingdom, the interest in the chartered freight had commenced; & pltf. could recover the loss under the policy.

When there is an insurance upon freight, so long as the matter remains merely contingent, so long as the shipowners have only a good hope of getting freight, no freight is in existence; & if the ship is lost, there would be no loss of freight, inasmuch as the freight had never come into existence, & all the shipowners have lost is the hope of earning freight (BLACKBURN, J.).

The spirit & reason of the rule are, that the interest commenced, not because the man acted under compulsion of the contract, but because he has acted so far under the contract as to show it is no longer speculation, but he had actually begun to do something which makes the inchoate interest attach (BLACKBURN, J.).—BARBER *v.* FLEMING (1869), L. R. 5 Q. B. 59; 10 B. & S. 879; 39 L. J. Q. B. 25; 18 W. R. 254.

**Annotations :—****Folld.** *Foley v. United Fire & Marine Insce. of Sydney* (1870), L. R. 5 C. P. 155 ; *Mercantile S.S. Co. v. Tyser* (1881), 7 Q. B. D. 73. **Consd.** *Scottish Shire Line v. London & Provincial Marine & General Inscc.*, [1912] 3 K. B. 51. **Refld.** *Rankin v. Potter* (1873), L. R. 6 H. L. 83 ; *Ward v. Weir* (1899), 4 Com. Cas. 216.

932. ———.] — A vessel, when about to proceed on a voyage with cargo from Calcutta to Mauritius, was chartered "to proceed with all convenient speed on her present voyage to Mauritius, & having discharged her cargo there," to "sail & proceed to Akyab, etc., & load from the charterers a cargo of rice for a port in the United Kingdom." Subsequently the owner insured the freight to be earned under the charterparty by an insurance "at & from Mauritius to rice ports, & at & thence to a port of discharge in the United Kingdom," "on chartered freight, valued at £1,150." The vessel was afterwards lost at Mauritius, by a peril insured against, before she had discharged the whole of her cargo there:—*Held*: the risk on the policy attached upon the arrival of the vessel at Mauritius, & the assured was therefore entitled to recover.—**FOLEY v. UNITED FIRE & MARINE INSURANCE CO. OF SYDNEY**



*Sect. 12.—Commencement, duration and area of risk : Sub-sect. 3, E. (a) i., ii. & iii., & (b).]*

(1870), L. R. 5 C. P. 155 ; 39 L. J. C. P. 206 ; 22 L. T. 108 ; 18 W. R. 437 ; 3 Mar. L. C. 352, Ex. Ch. *Annotations* :—*Refd.* Rankin v. Potter (1873), L. R. 6 H. L. 83 ; Ward v. Weir (1899), 4 Com. Cas. 216.

**933.** ———.]—*RANKIN v. POTTER*, No. 2259, *post.*

**934.** ———.]—*MERCANTILE S.S. CO., LTD. v. TYSER*, No. 1683, *post.*

**935.** ——— *On arrival at intermediate port.*]—Policy on freight valued at £500 on a voyage at & from Demerara, Berbice, & the Windward & Leeward Islands to London ; the ship being at Demerara, an agreement was entered into by the master with a house there, for a freight from Berbice to London, the cargo to be put on board at Berbice, & the ship to take a cargo of bricks & planks from Demerara to Berbice, & deliver them there ; while proceeding from Demerara to Berbice, with the bricks & planks on board, she met with an accident, & in consequence never earned her freight :—*Held* : it was not a loss within the policy.—*SELLAR v. M'VICAR* (1804), 1 Bos. & P. N. R. 23 ; 127 E. R. 365.

*Annotation* :—*Distd.* Barber v. Fleming (1869), L. R. 5 Q. B. 59.

**936.** ———.]—Where a ship was chartered on a voyage from London to Dominica & back to London, at a certain rate of freight upon the outward cargo ; & after delivering her outward cargo at Dominica, the charterers were to provide her a full cargo homeward at the current freight from Dominica to London, etc. :—*Held* : an insurance by the owner of the ship on the freight, at & from Dominica to London, attached while the ship lay at Dominica delivering her outward cargo, & before any part of the homeward cargo was shipped, during which time she was captured by an enemy ; the contract of affreightment by the charterparty being entire, & the risk on the policy having commenced.—*HORNCastle v. SUART* (1806), 7 East, 400 ; 103 E. R. 155.

*Annotations* :—*Distd.* Forbes v. Cowie (1808), 1 Camp. 520. *Fold.* Davidson v. Willasey (1813), 1 M. & S. 313. *Refd.* Truscott v. Christie (1820), 2 Brod. & Bing. 320.

**937.** ———.]—Policy "at & from Sheerness in ballast to Charente, & back to a port in the British Channel & London, from the date thereof, till the ship should be arrived at Charente & back at a port in the Channel & London, on freight valued at the sum insured, to be deemed interest in the outward voyage, although in ballast." The ship was freighted for the voyage in question by a charterparty, whereby she was to proceed to Charente in ballast, & there the freighter was to provide her with a full cargo of brandy. On the arrival of the ship at Charente she was put under an embargo, & after being so kept for six months, she was seized & condemned by the French Govt. :—*Held* : the freight was protected by the policy while the ship lay at Charente before any goods were put on board & the underwriters were liable for a loss so happening.—*MACKENZIE v. SHEDDEN* (1810), 2 Camp. 431, N. P.

— *Express stipulations.*]—*See* Sub-sect. 3, E. (c), *post.*

## ii. Freight Other than Chartered Freight.

*See* Marine Insurance Act, 1906 (c. 41), sched. I., Rule 3 (d).

**938. Goods actually shipped.**]—The freight a ship would earn is no part of the damages unless the goods are on board.—*TONGE v. WATTS* (1746), 2 Stra. 1251 ; 93 E. R. 1163.

*Annotations* :—*Distd.* Thompson v. Taylor (1795), 6 Term Rep. 478. *Refd.* Lucena v. Craufurd (1802), 3 Bos. & P.

75 ; Truscott v. Christie (1820), 5 Moore, C. P. 33 ; Foley v. United Fire & Marine Insco. of Sydney (1870), L. R. 5 C. P. 155.

**939.** ———.]—The owner of a ship sent her to St. Domingo, with a cargo to be bartered for goods there, which she was to bring back to England. When a small part of the outward cargo had been unloaded, & bartered for goods which were put on board, the ship was lost ; but the remainder of the outward cargo was saved, & bartered for other goods, which would have formed a sufficient cargo for the ship, if she could have performed the homeward voyage :—*Held* : the underwriters on a policy on the ship's freight, at & from St. Domingo, were only liable for the freight of the homeward goods that were on board when the ship perished.—*FORBES v. COWIE* (1808), 1 Camp. 520, N. P.

*Annotations* :—*Consd.* Warre v. Miller (1825), 4 B. & C. 538. *Refd.* Forbes v. Aspinall (1811), 13 East, 323.

**940.** ———.]—*FORBES v. ASPINALL*, No. 2035, *post.*

**941.** ———.]—*PATRICK v. EAMES*, No. 943, *post.*

**942.** ———.]—*FLINT v. FLEMING*, No. 947, *post.*

**943. Goods under contract to be shipped.**]—Where there is a valued policy on freight, & the ship is lost while taking in her cargo, the assured can only recover for the freight of the goods actually on board, unless a full cargo be then provided for her, or there be a contract either written or parol to supply one.—*PATRICK v. EAMES* (1813), 3 Camp. 441, N. P.

**944.** ———.]—*PARKE v. HEBSON* (1820), cited in 2 Brod. & Bing. at p. 326 ; 129 E. R. 992.

*Annotation* :—*Consd.* Truscott v. Christie (1820), 2 Brod. & Bing. 320.

**945.** ———.]—The East India co. having hired A.'s ship to carry goods & 40 invalids, agreed, in concurrence with the Govt. at Madras, to increase the number to 200, provided A. would make certain proposed alterations in his ship, & she should be found, on the usual military survey, capable of accommodating so many. A. agreed to the terms proposed, commenced the projected alterations, received the greater part of the goods on board, & had shipped water for 100 invalids, when, before the alterations were completed, the provisions shipped, or the invalids embarked, the vessel was so much disabled by a gale that she could not perform her homeward voyage :—*Held* : in an action on a policy of insurance at & from Madras to the United Kingdom, on freight & passage-money, there was a sufficient contract, & a sufficient inception of the risk, to render the insurers liable for the freight, & also for the passage money of the 200 invalids.—*TRUSCOTT v. CHRISTIE* (1820), 2 Brod. & Bing. 320 ; 5 Moore, C. P. 33 ; 129 E. R. 990.

*Annotation* :—*Mentd.* Flint v. Fleming (1830), 8 L. J. O. S. K. B. 350.

**946.** ———.]—*MILLER v. WARRE*, No. 625, *ante.*

**947.** ———.]—(1) A shipowner having effected a policy on freight, may, in the event of loss, recover from the underwriter the value of the benefit, he, the shipowner, would have derived, if there had been no loss, by carrying his own goods on the voyage insured. (2) The risk on freight does not attach until goods are either actually shipped on board, or until there is an actual contract for shipping them.

Before the statute of 19 Geo. 2, c. 37, it was not necessary to prove any interest in the subject-matter of insurance. Since that statute, it would be as good a proof of interest in freight, to show that the owner of a ship was conveying his own goods in his own ship, as that he was conveying



the goods of others (LORD TENTERDEN, C.J.).—*FLINT v. FLEMYNG* (1830), 1 B. & Ad. 45; L. & Welsb. 257; 8 L. J. O. S. K. B. 350; 109 E. R. 704.

*Annotations*:—As to (1) **Consd.** *Denoon v. Home & Colonial Assce.* (1872), L. R. 7 C. P. 341. **Refd.** *Devaux v. J'Anson* (1839), 5 Bing. N. C. 519; *Allison v. Bristol Marine Insce.* (1876), 1 App. Cas. 209; *Inman S.S. Co. v. Bischoff* (1882), 7 App. Cas. 670; *The Thyatira* (1883), 8 P. D. 155. As to (2) **Refd.** *Scottish Shire Line v. London & Provincial Marine & General Insce.*, [1912] 3 K. B. 51.

**948. Goods ready to be shipped.**—The assured upon a valued policy on freight is entitled to recover the whole amount, though part of the goods only were on board at the time the ship was lost, the rest being ready to be shipped.—*MONTGOMERY v. EGGINGTON* (1789), 3 Term Rep. 362; 100 E. R. 621.

*Annotations*:—**Consd.** *Forbes v. Aspinall* (1811), 13 East, 323. **Refd.** *Thompson v. Taylor* (1795), 6 Term Rep. 478; *Truscott v. Christie* (1820), 5 Moore, C. P. 33.

**949.** ———.]—*PATRICK v. EAMES*, No. 943, *ante*.

**950.** ———.]—*DEVAUX v. J'ANSON*, No. 2085, *st.*

**951. Ship ready to receive goods.**—A homeward policy on freight at & from A., attaches when the ship is at A. in a condition to begin to take in her homeward cargo.

If the ship is in a condition to begin to take in her homeward cargo, pltf. is entitled to recover (LORD LYNTHURST, C.B.).—*WILLIAMSON v. INNES* (1831), 8 Bing. 81, n.; 1 Mood. & R. 88; 131 E. R. 331, N. P.

*Annotation*:—**Refd.** *Palmer v. Marshall* (1831), 8 Bing. 79.

**Express stipulations.**—See Sub-sect. 3, E. (c), *post*.

### iii. Express Stipulation in Policy.

**952. "From time any part of cargo put on board"—"At & from" particular place—Goods shipped at anterior port.**—Policy of insurance "at & from all or any of the Windward & Leeward Islands to London, on the freight from the time that any part of the cargo should be put on board," *qu.*: whether goods put on board before the ship's arrival at the Leeward or Windward Islands are protected by the policy.—*BARNES v. AKERS* (1795), Peake, Add. Cas. 22, N. P.

**953. "Risk to commence from loading of goods"—"Liberty to call & load at intermediate ports"—Goods loaded at intermediate ports.**—*BARCLAY v. STIRLING*, No. 2345, *post*.

**954. ——— No cargo loaded.**—A ship was chartered to carry a cargo from Liverpool to Lagos, on the West Coast of Africa, there discharge & reload another cargo for the United Kingdom, in consideration of a lump sum by way of freight, payable half before sailing from Liverpool, half on delivery of the homeward cargo. Pltf., the shipowner, effected an insurance on freight "at & from Lagos," & the policy contained a clause whereby defts., the insurance co., agreed that the insurance "shall commence upon freight & goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above." The ship was lost before she had shipped any of her homeward cargo:—*Held*: this clause precluded the assured from recovering against the underwriters, although the freight was chartered freight.—*BECKETT v. WEST OF ENGLAND MARINE INSURANCE CO., LTD.* (1871), 25 L. T. 739; 1 Asp. M. L. C. 185.

*Annotation*:—**Distd.** *Hydarnes S.S. Co. v. Indemnity Mutual Marine Assce.*, [1895] 1 Q. B. 500.

**955. ——— Lost in lighters.**—Pltfs., ship-owners, by a policy of insurance underwritten by defts. caused "themselves to be insured, lost or not lost, at & from Libau to Bordeaux, upon

freight, valued at interest, of & in the vessel *Hawthorn*, beginning the adventure upon the said goods or freight from the loading thereof on board the said ship at Libau, & to continue & endure during the said vessel's abode there, & until the said vessel shall have arrived at Bordeaux, & the said goods shall be delivered from the said ship." Pltfs.' said vessel commenced loading at Libau a cargo of oats for Bordeaux, & a portion of the cargo was in lighters alongside, & was about to be transferred to the said vessel, when by reason of the perils of the sea, the said lighters & portion of cargo were wholly lost, & pltfs. were prevented from earning the freight insured:—*Held*: upon demurrer, pltfs. could not recover.—*HOPPER v. WEAR MARINE INSURANCE CO.* (1882), 46 L. T. 107; 4 Asp. M. L. C. 482.

*Annotation*:—**Refd.** *Hydarnes S.S. Co. v. Indemnity Mutual Marine Assce.* (1895), 72 L. T. 103.

**956. ——— Part cargo loaded.**—Pltfs. caused themselves to be insured with defts., "lost or not lost, in £500, upon the freight payable to them in respect of this present voyage to be performed by the vessel *Napier* from Baker's Island to a point of discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel. Being a re-insurance to be paid as on original policy." Pltfs. had underwritten a policy on chartered freight of a cargo of guano, from Baker's Island, while there, & thence to a port in England. The vessel arrived at Baker's Island, & had taken in two-thirds of her cargo, a full cargo being ready, when she was wrecked. Pltfs. having paid upon a total loss, sought to recover it from defts.:—*Held*: the risk had not attached.—*JONES v. NEPTUNE MARINE INSURANCE CO.* (1872), L. R. 7 Q. B. 702; 41 L. J. Q. B. 370; 27 L. T. 308; 1 Asp. M. L. C. 416.

*Annotation*:—**Mentd.** *Maspous y Hermano v. Mildred* (1882), 9 Q. B. D. 530.

**957. ——— "At" particular place—Loading impossible thereat—Knowledge of parties.**—*HYDARNES S.S. CO. v. INDEMNITY MUTUAL MARINE ASSURANCE CO.*, No. 265, *ante*.

**958. "From time of engagement of goods"—Ships engaged & ready for shipment—Non-arrival of ship at terminus a quo.**—By a policy of freight "at & from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom" the freight was to be covered "from the time of the engagement of the goods."

Goods were engaged for the vessel which was to earn the freight, & were ready for shipment in her at the time of her loss, which occurred before she arrived at her first loading port on the west coast of South America:—*Held*: the "engagement" clause must be construed with reference to the voyage described in the policy, & therefore, as the vessel had not arrived at her first loading port on the west coast of South America, the risk had not attached.—*THE COPERNICUS*, [1896] P. 237; 65 L. J. P. 108; 12 T. L. R. 496; *sub nom.* *LIVERPOOL, BRAZIL, & RIVER PLATE STEAM NAVIGATION CO., LTD. v. HOLMES, THE COPERNICUS*, 74 L. T. 757; 8 Asp. M. L. C. 166, C. A.

### (b) Duration.

**959. For part only of a voyage.**—*MURDOCK v. POTTS* (1795), 2 Park's Marine Insurances, 7th ed. p. 451; cited in 2 C. B. N. S. at p. 643; 140 E. R. 569.

*Annotations*:—**Dbtd.** *Taylor v. Wilson* (1812), 15 East, 324. **Distd.** *Michael v. Gillespy* (1857), 2 C. B. N. S. 627.

**960. ———**—The only question is, whether a freight voyage may be insured part of the way.

*Sect. 12.—Commencement, duration and area of risk: Sub-sect. 3, E. (b): sub-sect. 4. Sect. 13: Sub-sects. 1 & 2. Sect. 14: Sub-sect. 1, A.]*

... There is no doubt that a party may insure his ship & goods during part of a voyage; & I cannot conceive why he may not also insure freight in the same manner (LORD ELLENBOROUGH, C.J.).—*TAYLOR v. WILSON* (1812), 15 East, 324; 104 E. R. 867.

*Annotation:—Apld. Michael v. Gillespy* (1857), 2 C. B. N. S. 627.

**961. "At & from" foreign port—Outward voyage not covered.]—***BELL v. BELL*, No. 876, *ante*.

**962. Fishing voyage—Part of produce sent home by other ship.]—**An insurance on the freight of a ship, destined for a fishing adventure, in the South Seas, is not determined by the arrival of part of the cargo in another ship.—*PHILLIPS v. CHAMPION* (1815), 6 Taunt. 3; 1 Marsh. 402; 128 E. R. 932.

**963. Commencement of voyage unreasonably delayed.]—**Deft. executed, Feb. 28, 1824, a policy of assurance on freight from Singapore to Europe, with liberty to sail to, touch, & stay at, any places whatsoever, to load, unload, reload, & for all necessary purposes whatever. The ship sailed from London in Sept. 1823, & having been detained by the captain for his own purposes at Van Dieman's Land, did not arrive at Singapore till Mar. 30, 1825; she sailed thence on the voyage insured May 3, 1825;—*Held*: by so long a postponement of the risk the deft. was discharged, a jury having found the delay unreasonable.—*MOUNT v. LARKINS* (1831), 8 Bing. 108; 1 Moo. & S. 165; 1 L. J. C. P. 20; 131 E. R. 342; *subsequent proceedings* (1832), 8 Bing. 195.

*Annotations:—Apld. Freeman v. Taylor* (1831), 8 Bing. 124. *Consd. Rankin v. Potter* (1873), L. R. 6 H. L. 83; *De Wolf v. Archangel Maritime Bank & Insee.* (1874), L. R. 9 Q. B. 451. *Refd. Palmer v. Marshall* (1832), 1 Moo. & S. 454; *M'Andrew v. Adams* (1834), 1 Bing. N. C. 29; *Phillips v. Irving* (1844), 7 Man. & G. 325; *Small v. Gibson* (1850), 20 L. J. Q. B. 152; *Company of African Merchants v. British & Foreign Marine Insee.* (1873), 28 L. T. 233.

**964. Advance freight paid under charterparty—Part of adventure completed.]—**In Feb. 1847, plffs. chartered a vessel at Monte Video to proceed to the Falkland Islands, & thence to Santa Cruz, & there load a cargo of guano, & discharge it at a port in Europe, freight to be paid at the rate of £250 per month, & one month's pay to be paid when the vessel sailed from the Falkland Islands, & the balance on the delivery of the cargo at the port of discharge. The vessel sailed from Monte Video, & arrived at the Falkland Islands with a cargo, which was there safely delivered. While there, plffs. paid the captain £250 for one month's pay, as agreed by the charterparty. The vessel then proceeded to Santa Cruz, & loaded some guano with which she returned to Monte Video, where she completed her cargo by taking in a quantity of hides. In Oct. 1847, whilst the vessel was at Monte Video, plffs. entered into a new charterparty, by which the vessel was to proceed with the cargo then on board to Havre, freight to be paid at the rate of £250 per month, the time to commence from Mar. 26, last; freight to be paid at the port of discharge, after deduction of £250, which it was stated the captain received on account of that charterparty. In Dec. 1847, the agent of plffs. by their direction, effected with deft. a policy of insurance, "lost or not lost from Monte Video to Havre on £450 freight advanced." The vessel & cargo were totally lost on the voyage from Monte Video to Havre:—*Held*: (1) plffs. had an

insurable interest, & were entitled to recover on the policy the £250 as freight advanced, since that was not a separate sum due on the arrival of the vessel at the Falkland Islands, but a portion of the entire amount payable for the whole voyage; & as the parties, by entering into the second charterparty, had annulled the first, & had agreed to treat the £250 as paid under the second charterparty, that sum still remained at risk; (2) there was no misdescription of plffs.' interest in the policy.—*ELLIS v. LAFONE* (1853), 8 Exch. 546; 22 L. J. Ex. 124; 17 Jur. 213; 1 W. R. 200; 155 E. R. 1468, Ex. Ch.

*Annotation:—As to* (1) *Refd. Traves v. Worms* (1865), 11 Jur. N. S. 639.

#### SUB-SECT. 4.—"PORT RISKS" POLICIES.

**965. Termination of risk.]—***MERSEY MUTUAL UNDERWRITING ASSOCN., LTD. v. POLAND*, No. 872, *ante*.

What constitutes "in port."—See Sect. 3, sub-sect. 4, D., *ante*.

"At & from" a "port."—See Sub-sect. 3, C. (d), *ante*.

#### SECT. 13.—ABANDONMENT AND CHANGE OF VOYAGE.

##### SUB-SECT. 1.—ABANDONMENT OF VOYAGE.

See Marine Insurance Act, 1906 (c. 41), ss. 43, 44.

**966. General rule.]—**An underwriter is not liable, unless the loss happens upon the voyage insured.—*DUNNING v. LASCOMB* (1677), 2 Mod. Rep. 267; 86 E. R. 1064.

**967. Whether underwriters discharged—Ships not sailing on intended voyage.]—**If a ship insured for one voyage, sails upon another, though she be taken before the dividing point of the two voyages, the policy is discharged.

A deviation merely intended but never carried into effect is as no deviation. In all the cases of that sort, the *terminus a quo*, & *ad quem*, were certain & the same (LORD MANSFIELD, C.J.).—*WOOLDRIDGE v. BOYDELL* (1778), 1 Doug. K. B. 16; 99 E. R. 14.

*Annotations:—Apld. Way v. Modigliani* (1787), 2 Term Rep. 30. *Distd. Kewley v. Ryan* (1794), 2 Hy. Bl. 343; *Taylor v. Wilson* (1812), 15 East, 324; *Hunter v. Leathley* (1830), 8 L. J. O. S. K. B. 274.

**968. ——— Afterwards getting into its course.]—***WAY v. MODIGLIANI*, No. 803, *ante*.

**969. ——— Abandonment by authorised agent.]—**A determination made by an agent duly authorised or acknowledged not to sail upon the voyage insured, but upon a different voyage, is an abandonment, & discharges the underwriters.

Correspondents at Cadiz, of shipowners in England, having received directions to ballast & freight a ship for the Clyde, suggested a slight variance as to the port of destination, which the owners adopt by insuring the ship & cargo for a voyage, including the port named & fixed by their agents. Soon afterwards, the agents at Cadiz informed the owners that, owing to a change of circumstances, & with the advice & concurrence of the captain, they had determined not to send the ship according to their former suggestion, i.e. upon the voyage insured, but direct to Newfoundland. Eight days after this new determination the ship was stranded in the bay of Cadiz, & burnt by the French army. The several letters containing intelligence of the new alteration of the voyage & of the loss of the ship, arrived in England, & were received by the owners upon the same day.

The House of Lords reversing the judgments of the ct. below, decided, that the correspondents at Cadiz were the agents of the resp.; that the voyage insured was abandoned by their determination to send the ship on a different voyage, & therefore that the underwriters were not liable for the loss. The consequence of this decision being that the owners were bound to refund to the underwriters, with interest, moneys which had been paid by them before they were apprised of the facts.

Undoubtedly a mere meditated change does not affect a policy. But circumstances are to be taken as evidence of a determination, & what better evidence can we have than that those who were authorised had determined to change the voyage? (LORD ELDON, C.).—TASKER v. CUNNINGHAME (1819), 1 Bli. 87; 4 E. R. 32, H. L.

**970. ——— Loss at place named in policy.]—**Unless there be an original intention to proceed on the voyage insured against, the policy of insurance will not protect a loss happening at a place expressly mentioned in the policy; & which place, had there been such an intention, would not have been inconsistent with the course of the intended voyage. Accordingly, where a policy was in terms, "from Sydney to Otaheite, with leave to call at M'Quarrie Island," & it appeared from the facts, that there never was any intention to go to Otaheite:—*Held*: the underwriters were not chargeable, although the loss happened at M'Quarrie Island.—LORD v. ROBINSON (1828), Dan. & Ll 11; 6 L. J. O. S. K. B. 212.

**971. ——— Risk never attached.]—**Pltfs., merchants at Bradford, effected an open policy of insurance with defts. on merchandise, "as interest may appear or be hereafter declared," from the Mersey or London, to any port in Spain this side of Gibraltar, & thence by inland conveyance to any place in the interior of Spain. There was a marginal note providing that deviation or change of voyage, not included in the policy, was to be held covered at a premium to be arranged. Pltfs. dispatched goods from Bradford to Madrid, expecting that they would be carried, as former consignments had been, to Seville, on this side of Gibraltar, & thence to Madrid; but they were, in fact, shipped on a vessel bound from Liverpool to Carthagea & other ports beyond Gibraltar, & the bills of lading were made out to Carthagea. Pltfs. declared the goods under the policy, & told the insurance broker that the goods were going to Seville. The ship was lost before she touched at any port in Spain:—*Held*: the risk had never attached, for the voyage to Carthagea was not one of the voyages covered by the policy, & defts. were not liable.—SIMON, ISRAEL & CO. v. SEDGWICK, [1893] 1 Q. B. 303; 62 L. J. Q. B. 163; 67 L. T. 785; 41 W. R. 163; 9 T. L. R. 104; 7 Asp. M. L. C. 245; 4 R. 128, C. A.

*Annotation*:—*Distd.* Simpson S.S. Co. v. Premier Underwriting Assn. (1905), 92 L. T. 730.

**972. ——— Ship returning to port of sailing—From fear of capture.]—**Insurance on a voyage from C. to D. on a representation that the ship was first to sail from A. to B. & from B. to C.; the voyage from A. to B. was performed, but that from B. to C., being unavoidably prevented, the ship

returned to A., from thence proceeded immediately to C. & in performing the voyage from C. to D. was lost:—*Held*: a good commencement of the voyage insured.—DRISCOL v. PASSMORE (1798), 1 Bos. & P. 200; 126 E. R. 858.

*Annotations*:—*Folld.* Driscoll v. Bovil (1798), 1 Bos. & P. 313. *Distd.* Scott v. Thompson (1805), 1 Bos. & P. N. R. 181. *Refd.* De Wolf v. Archangel Insce. (1874), L. R. 9 Q. B. 451.

**973. ——— ———.]—**Insurance on a voyage from A. to B., from B. to C. & from C. to A. The voyage from A. to B. was performed, but that from B. to C. being unavoidably prevented, the ship returned to A.; from whence the captain wrote to his broker in London, requesting him to obtain the opinion of the underwriters as to his proceeding directly to C. if the charterer should insist upon it; & was answered by him that he thought the policy at an end. At the instance of the charterer the captain proceeded to C., & on his return from thence to A. the ship was captured:—*Held*: the voyage insured was never abandoned.

Whether the deviation were justified by necessity or not rests on one plain fact, namely, that on receipt of the intelligence of some Moorish cruisers being off Saffi, the crew refused to proceed. What then could the captain do but return? (BULLER, J.).—DRISCOL v. BOVIL (1798), 1 Bos. & P. 313; 126 E. R. 923.

*Annotation*:—*Distd.* Scott v. Thompson (1805), 1 Bos. & P. N. R. 181.

**974. ——— Mere meditated change of voyage.]—**TASKER v. CUNNINGHAME, No. 969, *ante*.

#### SUB-SECT. 2.—CHANGE OF VOYAGE.

See Marine Insurance Act, 1906 (c. 41), s. 45.

### SECT. 14.—DEVIATION AND DELAY.

#### SUB-SECT. 1.—DEVIATION.

##### A. In General.

See Marine Insurance Act, 1906 (c. 41), s. 46.

**975. Question of fact.]—**Action upon a policy of insurance from Grenada to London, with the usual covenants, & that the ship should sail to & from Grenada. The ship sailed, & on his return the captain stopped at Antigua, meaning as it appeared on the state of the evidence to go home, & not to continue captain the whole voyage. The ship laid at anchor off Antigua thirty-six hours. The ship on return was lost. Jury found as a fact this was a deviation & an application for new trial was refused.—ANON. (1774), Loft, 421; 98 E. R. 726.

*Annotation*:—*Refd.* Phillips v. Irvine (1844), 13 L. J. C. P. 145.

**976. Distinguished from change of voyage.]—**It is often a nice question on the facts whether an interruption of the voyage amounts to a deviation only or is a change of voyage. The usual test is whether the ultimate *terminus ad quem* remains the same (LORD DAVEY).—THAMES & MERSEY MARINE INSURANCE CO., LTD. v. VAN LAUN & CO. (1905), [1917] 2 K. B. 48, n.; 86 L. J. K. B.

India Island from New York, & his disinclination to return to Halifax; & the vessel was wrecked while on the track common both to the voyage from Nassau to New York, & to that from Nassau to Halifax:—*Held*: a change of voyage, & not merely a deviation, or intention to deviate, & the underwriters were not liable.—

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#### PART II. SECT. 14, SUB-SECT. 1.—A.

**975 i. Question of fact.]—**DIMOCK v. BRUNSWICK MARINE ASSURANCE (1849), 6 N. B. R. (1 All.) 398.—

**975 ii. ———.]—**PROVIDENCE WASH-  
14 S. C. R. 731.—CAN.

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**976 i. Distinguished from change of voyage.]—**Where a vessel insured on a voyage from Halifax to Nassau & back, arrived at Nassau & sailed thence for New York, having previously taken in cargo at Nassau for New York, & none for Halifax; & the captain expressed his determination before leaving Nassau to return there or to some other West



**Sect. 14.—Deviation and delay: Sub-sect. 1, B. (c), (d) & (e) i. & ii.]**

jury to consider, whether he had not abandoned the intention of going to Trinidad, & restricted himself to the residue of the voyage only. If ports of call are named in a policy in a successive order, the ship must take them in the same succession in which they are named. If they are not named in any order in the policy, they must be taken in the order in which they occur in the usual & most convenient & practicable course of the voyage, not according to the shortest geographical distances.—**GAIRDNER v. SENHOUSE** (1810), 3 Taunt. 16; 128 E. R. 7.

**Annotations:—Distd.** Bragg v. Anderson (1812), 4 Taunt. 229. **Refd.** Ashley v. Pratt (1847), 16 M. & W. 471. **Mentd.** Margetson v. Glynn, [1892] 1 Q. B. 337.

**1006. Where no order designated in policy—Geographical order.]—CLASON v. SIMMONDS** (1741), cited in 6 Term Rep. at p. 533; 101 E. R. 687.

**Annotations:—Consd.** Andrews v. Mellish (1814), 5 Taunt. 496. **Refd.** Beatson v. Haworth (1796), 6 Term Rep. 531.

**1007. — Usual & most practicable order.]—GAIRDNER v. SENHOUSE**, No. 1005, *ante*.

**(d) Usual Course of Voyage.**

See Marine Insurance Act, 1906 (c. 41), s. 46 (2) (b).

**1008. Construed according to usage.]—Deviation or not, must be construed according to usage.—BOND v. GONSALES** (1704), 2 Salk. 445; Holt, K. B. 469; 91 E. R. 386.

**Annotations:—Refd.** Gordon v. Morley, Campell v. Bordieu (1747), 2 Stra. 1265; Pelly v. Royal Exchange Assce. (1757), 1 Burr. 341; Long v. Allan (1785), 4 Doug. K. B. 276.

**1009. —.]—CLASON v. SIMMONDS** (1741), cited in 6 Term Rep. at p. 533; 101 E. R. 687.

**Annotations:—Consd.** Andrews v. Mellish (1814), 5 Taunt. 496. **Refd.** Beatson v. Haworth (1796), 6 Term Rep. 531.

**1010. —.]—(1) If goods are insured on board a ship from London to Nantz, with liberty to call at Ostend, & she is cleared only for Ostend, but sails directly for Nantz, that being the known course of the trade in order to save certain duties both in England & France, there is no fraud on the underwriter so far as to vacate the policy.**

**(2) If an insurance is made before the commencement of hostilities, but when everybody expects a war immediately, the insured is not bound to give the underwriter notice, though the ship do not sail till after the war takes place, & the underwriter is liable in case of capture.**

**(3) The cts. in this country do not take notice of foreign revenue laws.—PLANCHÉ v. FLETCHER** (1779), 1 Doug. K. B. 251; 99 E. R. 165.

**Annotations:—As to (1) Consd.** Atkinson v. Abbott (1809), 11 East, 135. **Generally, Refd.** Furtado v. Rogers (1802), 3 Bos. & P. 191.

**1011. —.]—In an action on a marine policy at & from London to the South Sea Fishery, during the ship's stay, trade, & fishing, & until her arrival back at London, with liberty to touch & stay at all ports & places wheresoever, & for all purposes, whether necessary or otherwise, & to fish in all seas, & that it should be lawful for the ship in that**

**voyage to proceed & sail to & touch & stay at all ports or places whatsoever & wheresoever without being deemed a deviation, it appeared that the object of the voyage, which was not a new one, was to fish for sea elephants & seals at an uninhabited island within the limits of the South Sea Fishery, & that the mode of carrying on such voyage & adventure was to moor the vessel in a bay, & for the crew to leave her there while they proceeded to fish round the coast in the tenders which accompanied the ship, & that on one occasion, when the ship was so left, & without a man on board, in consequence of the diminished numbers of the crew, the ship was driven from her moorings in a storm, & no more seen or heard of:—Held: (1) that was evidence from which the jury might presume & find a loss; (2) the mooring & staying at one spot for a year, being according to the custom of the particular adventure, the nature of which was well known, was not a deviation; & (3) these facts did not support a plea that the ship was lost solely by unseaworthiness consequent upon the negligent & unreasonable desertion of her by the crew.—STURGE v. HALDEMAND** (1848), 11 L. T. O. S. 28, N. P.

**1012. — Usage not general.]—SALISBURY v. TOWNSON** (circa 1770), 2 Park's Marine Insurances, 8th ed. p. 646.

**Incorporation of usage generally.]—See Sect. 3, sub-sect. 5, *ante*.**

**(e) "Touch and Stay" Clause.**

**i. What Ports Covered.**

See Marine Insurance Act, 1906 (c. 41), sched. I. r. 6.

**1013. Ports lying in direct & usual course of voyage.]—HOGG v. HORNER** (1797), 2 Park's Marine Insurances, 8th ed. p. 626, N. P.

**Annotations:—Folld** Gairdner v. Senhouse (1810), 3 Taunt. 16. **Distd.** Leathly v. Hunter (1831), 7 Bing. 517. **Refd.** Lambert v. Liddard (1814), 1 Marsh. 149; Margetson v. Glynn (1892), 66 L. T. 142.

**1014. —.]—GAIRDNER v. SENHOUSE**, No. 1005, *ante*.

**1015. —.]—RANKEN v. REEVE** (1814), 2 Park's Marine Insurances, 8th ed. p. 627.

**1016. Ports lying outside direct course of voyage—If contemplated by scope of policy.]—A policy at & from Martinique & all & every West India islands, warrants a course from Martinique to islands not in the homeward voyage.—BRAGG v. ANDERSON** (1812), 4 Taunt. 229; 128 E. R. 317. **Annotation:—Refd.** Ashley v. Pratt (1847), 16 M. & W. 471.

**1017. —.]—Under a policy of insurance of goods at & from London to any port or ports, place or places, in the Baltic, backwards & forwards; with leave to touch & stay at any ports & places, for all purposes whatsoever; the assured may wait at any port for information as to what port in the Baltic the ship might safely proceed to discharge her cargo; that being one of the objects of the adventure arising out of the troubled & shifting state of the different Governments on the Baltic shores from the pressure of the French arms: & this liberty, it seems, is not abridged by a**

**PART II. SECT. 14, SUB-SECT. 1.—B. (c).**

**1006 i. Where no order designated in policy—Geographical order.]—SMITH v. ROYAL CANADIAN INSURANCE CO.** (1882), 6 Nfld. L. R. 380.—**NFLD.**

**PART II. SECT. 14, SUB-SECT. 1.—B. (d).**

**1008 i. Construed according to usage.] of fish was insured at &**

**from E., to H. The vessel after partly loading at E., proceeded to T., which was admittedly outside E., & to M., which was 7 miles therefrom, & where she took in supplies. There was no evidence to show a usage that M. was considered the same as E.:—Held: there was a deviation.—RODGERS v. JONES** (1883), 16 N. S. R. (4 R. & G.) 96.—**CAN.**

**1012 i. — Usage not general.]—FISHER v. WESTERN ASSURANCE CO.**

**(1854), 11 U. C. R. 255.—CAN.**

**1012 ii. —.]—Pltf. shipped a number of barrels of flour at P., in a vessel of deft.'s, to be carried to She proceeded to T., where she too in more barrels, & thence to O., where more were shipped for Q. also. She was wrecked near O.:—Held: deft. was liable, such deviation being beyond the established usages of trade.—WRIGHT v. HOLCOMBE** (1857), 6 C. P. 531.—**CAN.**

subsequent special leave given to wait for information, etc., off any ports & places.—**RUCKER v. ALLNUTT** (1812), 15 East, 278; 104 E. R. 849.

**1018.** ———.]—Policy on ship “at & from Antigua to England, with liberty to touch at all or any of the West India Islands, Jamaica included”:—*Held*: the ship under the protection of this policy might touch at any of the West India Islands, although not in the direct course from Antigua to England, & stay at such as she visited the time necessary to complete her homeward cargo.—**METCALFE v. PARRY** (1814), 4 Camp. 123.

*Annotations*:—**Refd.** Leathly v. Hunter (1831), 7 Bing. 517; Ashley v. Pratt (1847), 16 M. & W. 471; Bliccard v. Shepherd (1861), 14 Moo. P. C. C. 471.

**1019.** ———.]—Under a policy from London to the ship’s discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders, or any other purpose, the ship, in touching for orders before she has selected her port of discharge, is not confined to take the ports in the successive order in which they lie in the course of the voyage, but may return to a port she has quitted, for orders as to her port of discharge. After she has selected her port of discharge, she must touch at ports only in their successive order.—**ANDREWS v. MELLISH** (1814), 5 Taunt. 496; 128 E. R. 782, Ex. Ch.; *affg.* S. C. *sub nom.* **MELLISH v. ANDREWS** (1813), 2 M. & S. 27.

*Annotations*:—**Apld.** Hunter v. Leathley (1830), 10 B. & C. 858. **Refd.** Margetson v. Glynn, [1892] 1 Q. B. 337.

**1020.** ———.]—**LAMBERT v. LIDDARD**, No. 873, *ante*.

**1021.** ———.]—A policy was effected “at & from Singapore, Penang, Malacca, & Batavia, all or any, to the ship’s port of discharge in Europe, with leave to touch, stay, & trade at all or any ports or places whatsoever & wheresoever in the East Indies, Persia, or elsewhere, etc., upon goods in certain vessels, beginning the adventure from the loading thereof abroad the ships as above.” The ship took in part of her cargo at Batavia, then went to Sourabaya, another port in the East Indies, not in the course of a voyage from Batavia to Europe, & not specified by name in the policy, & took in other goods, then returned to Batavia, whence she afterwards sailed for Europe, & was lost by perils of the sea:—*Held*: going to S. was not a deviation, & the goods there taken on board were protected by the policy.—**LEATHLY v. HUNTER** (1831), 7 Bing. 517; 1 Cr. & J. 423; 5 Moo. & P. 457; 1 Tyr. 355; 9 L. J. O. S. Ex. 118; 131 E. R. 200, Ex. Ch.; *affg.* S. C. *sub nom.* **HUNTER v. LEATHLEY** (1830), 10 B. & C. 858.

*Annotations*:—**Mentd.** Gibson v. Overbury (1841), 7 M. & W. 555; Ley v. Barlow (1848), 1 Exch. 800; Boyle v. Wiseman (1855), 10 Exch. 647; *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1.

## ii. For What Purposes.

**1022. Purpose not defined—Insurer informed for purposes of trade—So construed.**—**URQUHART v. BARNARD**, No. 1033, *post*.

**1023. Restricted to purposes of voyage.**—(1) Under a liberty to touch & stay at all ports for all purposes whatsoever, the stay must be for some purpose connected with the furtherance of the adventure. Whether the purpose is within the scope of the policy, is a question for the ct.

(2) The policy not limiting the time of stay, whether a ship has stayed an unreasonable time, for the purpose, is purely a question for the jury.

(3) Where a total loss is recovered, there cannot also be a return of premium for convoy, because the total loss includes the entire premium added

to the invoice price.—**LANGHORN v. ALLNUTT** (1812), 4 Taunt. 511; 128 E. R. 429.

*Annotations*:—*As to* (1) **Refd.** Palmer v. Marshall (1832), 8 Bing. 317; Palmer v. Fenning (1833), 2 Moo. & S. 624, *Generally*, **Mentd.** Kahl v. Jansen (1812), 4 Taunt. 565; Reyner v. Pearson (1812), 4 Taunt. 662; Coates v. Bainbridge (1828), 2 Moo. & P. 142; Udell v. Atherton (1861), 7 H. & N. 172.

**1024.** ———.]—Where a ship was insured from London to Berbice, with an extensive liberty of touching & trading at all places:—*Held*: by putting into Madeira & staying there after the convoy with which she sailed had proceeded on the voyage; she was guilty of a deviation which discharged the underwriters. *Semble*: as the captain did not know when the convoy sailed away, & expected to overtake it, this was not a deserting of convoy within the meaning of the convoy Act.

The liberty in the policy must be construed with reference to the main scope of the voyage insured (**LORD ELLENBOROUGH, C.J.**).—**WILLIAMS v. SHEE** (1813), 3 Camp. 469, N. P.

*Annotation*:—**Refd.** Gambles v. Ocean Insce. (1875), 1 Ex. D. 8.

**1025.** ———.]—Policy of insurance from Para to New York, with leave to call at any of the Windward & Leeward Islands on the passage, & to discharge, exchange, & take on board the whole or any part of any cargo at any ports or places, particularly at all or any of the Windward & Leeward Islands, without being deemed any deviation:—*Held*: on this policy, the ship having proceeded to two of the Leeward Islands for a purpose wholly unconnected with the voyage, that it was a deviation, & vitiated the insurance.—**HAMMOND v. REID** (1820), 4 B. & Ald. 72; 106 E. R. 865.

*Annotation*:—**Refd.** Gambles v. Ocean Insce. (1875), 1 Ex. D. 8.

**1026.** ———.]—By a policy a ship was insured at & from Hull to her port, or ports, of loading in the Baltic Sea & Gulf of Finland, with liberty to proceed to, & touch & stay at, any port or ports whatsoever, for any purpose, particularly at Elsinore, without being deemed a deviation. The ship touched & stayed at Elsinore & Danzig, to deliver goods, Pillau being her port of loading:—*Held*: this was a deviation.—**SOLLY v. WHITMORE** (1821), 5 B. & Ald. 45; 106 E. R. 1110.

*Annotations*:—**Distd.** Warre v. Miller (1825), 4 B. & C. 538. **Refd.** Ashley v. Pratt (1847), 16 M. & W. 471; Sweeting v. Darthez (1854), 23 L. T. O. S. 93.

**1027.** ———.]—A liberty to touch, stay, & trade at any ports or places whatsoever has been held to be confined to a staying or trading at any port for a purpose subordinate to the voyage insured, which is the principal object of the policy. I think the liberty to sail backwards & forwards & forwards & backwards must be construed so as to protect the ship’s so long only as she was sailing on a voyage having for its ultimate object the accomplishment of the principal voyage insured (**BAYLEY, J.**).—**BOTTOMLEY v. BOVILL** (1826), 5 B. & C. 210; 7 Dow. & Ry. K. B. 702; 4 L. J. O. S. K. B. 237; 108 E. R. 79.

**1028.** ———.]—*Assumpsit* on a policy of insurance on the goods of a vessel called the *Clipper*, at & from Liverpool to any port or ports, place or places of loading & trade on the coast of Africa & African islands, during her stay & trade on the coast & islands, & at & from thence to her port or ports of discharging in the United Kingdom, with leave to call at all ports & places backwards & forwards, & forwards & backwards, without being deemed any deviation; with liberty for the ship in that voyage to proceed & sail to & stay at any ports or places whatsoever, & with leave to load, unload,



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etc., goods wheresoever she might proceed to, with any ships, boats, etc., in loading & unloading included, particularly with liberty to tranship on board any vessel or craft in the same employ; with an agreement that the vessel might be employed or used as a tender to any other vessel or ship in the same employ. The vessel arrived at Benin in Africa, & stayed there thirteen months, during which time she was employed in conveying goods from a vessel in the same employ at the mouth of the river, to Camaroons, & putting them on board another vessel also in the same employ; but on her return with a homeward cargo was lost:—*Held*: (1) the learned judge who tried the cause was right in telling the jury that the voyage to the Camaroons was a deviation, & that it was not an acting as a tender within the meaning of the policy; (2) it was a proper question for the jury, whether her stay at Benin was unreasonable or no; & they having found in the affirmative, it was warranted by the evidence.—*HAMILTON v. SHEDDON* (1837), 3 M. & W. 49; Murp. & H. 334; 7 L. J. Ex. 1; 6 L. T. 479; 150 E. R. 1051.

*Annotation*:—*Refd.* *Grant v. Aetna Insce.* (1862), 8 Jur. N. S. 705.

**1029.** ———.]—*COMPANY OF AFRICAN MERCHANTS v. BRITISH & FOREIGN MARINE INSURANCE CO.*, No. 1059, *post*.

**1030.** ———.]—*LAING v. UNION MARINE INSURANCE CO., LTD.*, No. 1223, *post*.

**1031. Breaking bulk.**]—On a policy of insurance on a voyage, with liberty to touch at any port in her passage; if she is forced by stress of weather into any port, under that clause, she is not protected in breaking bulk while at such port; if she does, it avoids the policy.—*STITT v. WARDELL* (1797), 2 Esp. 609, N. P.

*Annotations*:—*N.F. Raine v. Bell* (1808), 9 East, 195. *Dbtd.* *Urquhart v. Barnard* (1809), 1 Taunt. 450. *N.F. Laroche v. Oswin* (1810), 12 East, 131.

**1032. Taking in cargo—While waiting for convoy.**]—Under the terms of a policy of insurance, with liberty to touch & discharge goods at Lisbon, though there is a clause for a return of premium, if she sails from the place where she touches with convoy, she is not warranted in taking in any cargo there, whilst waiting for convoy.—*SHERIFF v. POTTS* (1803), 5 Esp. 96, N. P.

*Annotations*:—*N.F. Raine v. Bell* (1808), 9 East, 195. *Dbtd.*

**1033.** ——— **No extra delay occasioned.**]—(1) If a ship has liberty to touch at a port, it is no deviation to take in merchandise during her allowed stay there, if she does not by means thereof exceed the period allowed for her remaining there.

(2) If liberty be given to touch at a port, the contract not defining for what purpose, but a communication having been made to the underwriter, that the ship was to touch for a purpose of trade, it shall be intended as a liberty to touch for that purpose.—*URQUHART v. BARNARD* (1809), 1 Taunt. 450; 127 E. R. 909.

**1034.** ———.]—A ship from Stockholm to New York was by the course of the voyage to touch at Elsinour for convoy, & to pay the Sound dues: & the owner of sheep on board took in a short stock of provender for them at Stockholm, & laid in the rest at Elsinour before the Sound dues could be paid:—*Held*: the voyage not being thereby delayed, though the occurrence was foreseen & intended, the policy was not avoided, but the underwriters were liable for a subsequent

loss of the ship by the perils of the sea.—*CORMACK v. GLADSTONE* (1809), 11 East, 347; 103 E. R. 1038.

*Annotation*:—*Refd.* *Laroche v. Oswin* (1810), 12 East, 131.

**1035.** ———.]—An insurance on goods shipped on a certain voyage is not avoided by the ship, while lying in a roadstead at anchor under orders of the convoy & after a signal to prepare for sailing & about the time when the signal for weighing was made, taking in other goods on board: by which it was found that no delay was occasioned & that the ship got under weigh as soon as she could otherwise have done.—*LAROCHE v. OSWIN* (1810), 12 East, 131; 104 E. R. 52.

*Annotations*:—*Fold.* *Ashley v. Pratt* (1847), 16 M. & W. 471. *Refd.* *Company of African Merchants v. British & Foreign Insce.* (1873), 21 W. R. 484.

**1036.** ——— **“For any purpose whatsoever.”**]—*VIOLETT v. ALLNUTT*, No. 819, *ante*.

**1037.** ———.]—On a policy at & from London to New South Wales, & from thence to the ship's loading port or ports, in the East Indies, & elsewhere & that she might proceed & sail to, & touch & stay at, any ports or places whatsoever & wheresoever, & for any purpose whatsoever. The ship went from London with convicts to New South Wales, where, having discharged them, she proceeded in ballast, to Batavia, where she took on board a quantity of iron, & discharged same at Sourabaga, & was there loaded with a full cargo of rice; with which she proceeded to the Mauritius, where it was discovered that she had sustained an injury, & she was accordingly broken up:—*Held*: to be no deviation, although it was insisted, that by the terms of the policy the ship was only warranted to go to her loading ports, & not to trade or take in a fresh cargo.—*ARMET v. INNES* (1820), 4 Moore, C. P. 150.

*C. Effect of Deviation.*

See Marine Insurance Act, 1906 (c. 41), s. 46.

**1038. Insurer discharged—Losses after deviation.**]—*GREEN v. YOUNG*, No. 1751, *post*.

**1039.** ———.]—A policy, in the usual form, was effected on pearl ashes on a voyage at & from Liverpool to London. The captain took in goods at Liverpool for Southampton as well as London, intending to go first to the former place. He accordingly went into Southampton, & delivered the goods shipped for that place, & afterwards proceeded to London. The termini of the voyage being the same as those described in the policy, it was held to be the same voyage until the vessel reached the dividing point, & that the policy attached, although putting into Southampton was a deviation. The goods insured received considerable damage from sea water. But they were not examined at Southampton, nor until they reached London, when the damage was found to amount to 60 *per cent.* Before the vessel reached the dividing point of the two voyages she had met with bad weather, & had made much water, & on one occasion, the water pumped up appeared to hold the pearl ashes in solution. On the voyage from Southampton to London there were no heavy seas, & the weather was tolerably fair. Under these circumstances, it was held, that it was a question for the jury, whether the pearl ashes had sustained damage to the amount of 3 *per cent.* before the deviation; & they having found that they had sustained damage to that amount, the ct. refused to disturb the verdict.—*HARE v. TRAVIS* (1827), 7 B. & C. 14; 9 Dow. & Ry. K. B. 748; 5 L. J. O. S. K. B. 348; 108 E. R. 630.

*Annotations*:—*Refd.* *Knight v. Faith* (1850), 15 Q. B. 649; *Pitman v. Universal Marine Insce.* (1882), 9 Q. B. D. 192.



**1040. — Losses before deviation.]—GREEN v. YOUNG**, No. 1751, *post*.

**1041. — —.]—HARE v. TRAVIS**, No. 1039, *ante*.

**1042. — Deviation wilful.]—CLASON v. SIMMONDS** (1741), cited in 6 Term Rep. at p. 533; 101 E. R. 687.

*Annotations:—Refd.* Beatson v. Haworth (1796), 6 Term Rep. 531; Andrews v. Mellish (1814), 5 Taunt. 496.

**1043. — —.]—A wilful deviation from the due course of an insured voyage, is in all cases a determination of the policy; from that moment the contract between the insurers & insured is at an end; & it is totally immaterial from what cause, or at what place the subsequent loss arises, the insurers being in no case answerable for it.—ELLIOT v. WILSON** (1776), 4 Bro. Parl. Cas. 470; 2 E. R. 320, H. L.

**1044. — Deviation before policy effected.]—The owner of a vessel bound from London to Berbice, which had deviated by taking in goods at Madeira, insured her, with notice to the underwriter of the circumstances, "at & from London to Berbice," & inserted the words "at sea" in another part of the policy:—Held: the deviation was a good defence.**

(2) If parties describe, in the usual terms, the voyage they insure, both knowing that the adventure has deviated from that description, they are nevertheless bound by the description they have chosen, & the previous deviation is fatal.—**REDMAN v. LOWDON** (1814), 5 Taunt. 162; 1 Marsh. 136; 3 Camp. 503; 128 E. R. 769.

**1045. — Notice of deviation given to underwriter.]—REDMAN v. LOWDON**, No. 1044, *ante*.

**1046. Recovery of premium.]—TAIT v. LEVI**, No. 985, *ante*.

**Effect of intention to deviate.]—See Sub-sect. 1, B. (b), ante.**

#### D. Deviation Clause.

See Marine Insurance Act, 1906 (c. 41), s. 31 (2).

**1047. Application of clause—Not till policy attaches.]—SIMON, ISRAEL & Co. v. SEDGWICK**, No. 971, *ante*.

**1048. — Deviation within scope of adventure.]—Pltfs. insured with defts. by a Lloyd's policy a box containing bullion "at & from Boodinni to London, "in a P. & O. steamer, "including all risks of every description from the mines by escort to railway station at Raichur (forty miles) thence by rail (400 miles) to Bombay, thence to London." The policy contained a clause covering the assured "in the event of deviation or change of voyage at a premium to be hereafter arranged." At Raichur the stationmaster improperly refused to receive the box at other than owners' risk rate, & the official in charge of it took it for safety to pltfs.' head office at Secunderabad, 170 miles from Raichur, & off the route from that place to Bombay; the box was kept there for a month in pltfs.' safe while arrangements were being made with the railway co. The box was then taken to Raichur & forwarded by the prescribed route to London, where upon arrival a bar of gold was found to be missing; it had in fact been stolen while the box was in pltfs.' office at Secunderabad:—Held: the taking of the box at Secunderabad was a necessary act done in the prosecution of the insured journey, & was within the scope of the adventure; the risk was always a transit risk; the delay at Secunderabad was unreasonably long, & there was at that place an unjustifiable**

deviation not covered by the premium paid, but, being a deviation in the course of the voyage, it was covered by the deviation clause in the policy, & defts. were therefore liable.—**HYDERABAD (DECCAN) Co. v. WILLOUGHBY**, [1899] 2 Q. B. 530; 68 L. J. Q. B. 862; 15 T. L. R. 449; 4 Com. Cas. 270.

**1049. — Delay in commencement of voyage.]—MARITIME INSURANCE Co. v. STEARNS**, No. 829, *ante*.

**1050. Notice of deviation—Necessity for—Contract of reinsurance.]—STEAMSHIP INSURANCE SYNDICATE, LTD. v. MORTGAGE INSURANCE CORPN., LTD.** (1891), 7 T. L. R. 555.

**1051. — — In reasonable time.]—THAMES & MERSEY MARINE INSURANCE Co., LTD. v. VAN LAUN & Co.** (1905), [1917] 2 K. B. 48, n.; 86 L. J. K. B. 840, n.; 116 L. T. 368, n.; 14 Asp. M. L. C. 14, n.; H. L.; *previous proceedings, sub nom.* VAN LAUN v. THAMES & MERSEY MARINE INSURANCE Co., cited in 11 Com. Cas. at pp. 163, 165, 166.

*Annotations:—Apld.* Hood v. West End Motor Car Packing Co., [1917] 2 K. B. 38. *Mentd.* St. Paul Fire & Marine Insce. v. Morice (1906), 11 Com. Cas. 153.

**1052. — May be given after loss—If deviation previously unknown to insurer.]—By a policy effected on commissions on the *Viduco*, barratry of the master was included among the perils insured against. The policy also contained a marginal clause in the following terms: "In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change of voyage shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage." While the *Viduco* was at Punta Arenas, in Costa Rica, where she received orders to proceed to Cocos Bay to load a cargo for a European port, the captain made an arrangement with the concessionaire of certain rights in Cocos Island to take him in the *Viduco* to that island, & to return later & bring him back to the mainland. The captain made those two voyages to Cocos Island, which lies about 250 miles to the south-west of Punta Arenas, receiving £40 for the first & £50 for the second voyage. The voyages were made without the knowledge of the assured, the owners, who knew nothing of them till after the loss; but the charterer knew of them. On the second voyage to Cocos Island the *Viduco* grounded & became a total loss. The ship's expenses in respect of these two voyages greatly exceeded the two amounts received by the captain. Notice of those voyages, which were deviations, was not given to the underwriters till after the loss. In an action on the policy:—Held: (1) the reasonable explanation of the captain's conduct was that he intended an advantage to himself by the two voyages to Cocos Island; (2) both adventures were barratrous; (3) although they were deviations, they did not put an end to the policy; & the assured were entitled to recover. *Semble*: the notice of the deviation by the assured under the deviation clause was good although not given till after loss, & in fixing the amount of additional premium the parties must assume that the deviation was known to them both at the time it took place.**

Where a captain is engaged in doing that which as an ordinary man of common sense he must know to be a serious breach of his duties to his owners, & is engaged in doing that for his own benefit, then he is acting barratrously. He may

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act barratrously in other ways but if he disregards his duties to his owners & does so for his own private purposes & ends, his conduct is barratrous (HAMILTON, J.).—MENTZ, DECKER & Co. v. MARITIME INSURANCE CO., [1910] 1 K. B. 132; 79 L. J. K. B. 104; 101 L. T. 808; 11 Asp. M. L. C. 339; 15 Com. Cas. 17.

**SUB-SECT. 2.—DELAY IN PROSECUTING VOYAGE.**

See Marine Insurance Act, 1906 (c. 41), s. 48.

**Delay in commencement of adventure.]—See Sect. 12, sub-sect. 3, C. (c), ante.**

**“Touch & stay” clause.]—See Sub-sect. 1, B. (e), ante.**

**1053. Whether delay unreasonable—Question for jury.]—LANGHORN v. ALLNUTT, No. 1023, ante.**

**1054. ———.]—(1) In *assumpsit*, on a policy of insurance, the jury ought not to allow pltf. interest, unless evidence be given that he had applied to the underwriter, to settle the loss, soon after it happened, & notified to him the ground of such application. (2) Lloyd’s list is evidence against the assured, if it be shown that the broker had read it, before the policy was effected. (3) A ship stayed at a particular port, for a period of one hundred & nine days, & whether this was an unreasonable time, was held to be a question of fact for the Jury.—BAIN v. CASE (1829), 3 C. & P. 496; Mood. & M. 262, N. P.**

**1055. ———.]—HAMILTON v. SHEDDON, No. 1028, ante.**

**1056. ——— Determined by state of port.]—PHILLIPS v. IRVING, No. 1072, post.**

**1057. Exceeding period allowed in policy.]—Goods & freight were insured at & from Liverpool to Monte Video & Buenos Ayres if open, or the ship’s final port of discharge in the river Plate, with liberty to wait two months at Monte Video if needful, at a premium of five guineas *per cent.*, to return £2 *per cent.* for risk ending at Monte Video on arrival. The vessel arrived on Aug. 2 at Monte Video, which was then blockaded by an enemy’s fleet to prevent vessels passing to Buenos Ayres. The blockade did not cease till Oct. 4. The vessel afterwards sailed for Buenos Ayres, & was lost:—*Held*: the risk was at an end as soon as the vessel had stayed two months at Monte Video, & the underwriters were, therefore, discharged.—DOYLE v. POWELL (1832), 4 B. & Ad. 267; 1 Nev. & M. K. B. 678; 110 E. R. 455.**

**1058. Delay not connected with purposes of voyage.]—HAMILTON v. SHEDDON, No. 1028, ante.**

**1059. ———.]—Pltfs. effected a policy of insurance with defts. upon a ship at & from Liverpool to the west or south-west coast of Africa, “during her stay & trade there,” & back to a port of call in the United Kingdom, at £8 *8s. per cent.*, returning a percentage varying with the period of the risk, the ship being held covered at 13*s. 4d. per cent.* per month if more than twelve months out. The ship proceeded to the African coast, &, after being loaded for the return voyage, remained at a port there for some weeks for a purpose in no**

way connected with trade. She was subsequently lost on the voyage home. At the trial of an action on the policy, the judge ruled that, as the delay had not been made for a trade purpose, there had been a deviation, & directed a verdict for the defts. On the argument of a bill of exceptions tendered to this ruling:—*Held*: a proper direction.—COMPANY OF AFRICAN MERCHANTS v. BRITISH & FOREIGN MARINE INSURANCE CO. (1873), L. R. 8 Exch. 154; 42 L. J. Ex. 60; 28 L. T. 233; 21 W. R. 484; 1 Asp. M. L. C. 558, Ex. Ch.

*Annotations*:—**Consd.** A.-G. v. Smith (1918), 87 L. J. K. B. 1045. **Refd.** Gambles v. Ocean Marine Insce. of Bombay (1876), 1 Ex. D. 141.

**SUB-SECT. 3.—CAUSES EXCUSING DEVIATION OR DELAY.**

**A. Special Terms in Policy.**

See Marine Insurance Act, 1906 (c. 41), s. 49 (1) (a).

**1060. Liberty to cruise.]—A cruise is a well known expression for a connected portion of time. There are frequently articles for a month’s cruise, a six weeks cruise, etc. Such a liberty as in this case, to a letter of marque, is an excuse for a deviation (LORD MANSFIELD, C.J.).—SYERS v. BRIDGE (1780), 2 Doug. K. B. 526; 99 E. R. 335.**

*Annotation*:—**Mentd.** Maxwell v. Deare (1854), 23 L. T. O. S. 1.

**1061. Liberty to stay in port.]—DOYLE v. POWELL, No. 1057, ante.**

**1062. Liberty to touch & stay—State of freight-market.]—PHILLIPS v. IRVING, No. 1072, post.**

—*See* Sub-sect. 1, B. (e), ante.

**B. Circumstances beyond Control of Master or Employer.**

See Marine Insurance Act, 1906 (c. 41), s. 49 (1) (b).

**1063. Violence of mutinous crew.]—If the sailors force the master to go out of the course of the voyage it is not a deviation.—ELTON v. BROGDEN (1747), 2 Stra. 1264; 93 E. R. 1171.**

*Annotations*:—**Distd.** Scott v. Thompson (1805), 1 Bos. & P. N. R. 181. **Refd.** Vallejo v. Wheeler (1774), 1 Cowp. 143.

**1064. ———.]—DRISCOL v. BOVIL, No. 973, ante.**

**1065. Stress of weather.]—HARRINGTON v. HALKELD (1778), 2 Park’s Marine Insurances, 8th ed. p. 639.**

**1066. ———.]—KINGSTON v. PHELPS (1795), cited 7 Term Rep. 165; 101 E. R. 912.**

**1067. forcible detention by cruiser.]—Policy on goods on board a particular ship from A. to B. “against sea risk & fire only;” in the course of the voyage from A. to B. the ship was carried out of the course of the voyage by a king’s ship, but being afterwards released, she proceeded on the voyage insured; & while so proceeding, the goods insured sustained sea damage:—*Held*: the underwriters were liable for this loss.—SCOTT v. THOMPSON (1805), 1 Bos. & P. N. R. 181; 127 E. R. 429.**

**1068. Orders from cruiser—Without force or threats.]—The master of a merchantman while taking in his loading at a foreign port, was ordered by the captain of a King’s ship to go out to sea to examine a strange sail discovered in the offing,**

**PART II. SECT. 14, SUB-SECT. 2.**

**1053 i. Whether delay unreasonable—Question for jury.]—Whether delay in a voyage is unreasonable or not is a question for the jury.—REED v. WELDON (1869), 12 N. B. R. (1 Han.)**

458.—CAN.

**1. Whether delay unjustifiable—Question for judge.]—Whether delay in a voyage is unjustifiable or not is a question of law for the judge.—REED v. WELDON (1869), 12 N. B. R. (1 Han.) 458.—CAN.**

**PART II. SECT. 14, SUB-SECT. 3.—B.**

**1065 i. Stress of weather.]—It is not a deviation for a coasting vessel to put into an intermediate port overnight to escape threatened bad weather.—NOVA SCOTIA MARINE INSURANCE CO. v. EISENHAUR (1894), 1 Cout. Dig. 811.—CAN.**

bearing enemies' colours. Without remonstrating, & without any force or threats being employed to influence his determination he obeyed; & finding the strange sail to be a neutral he returned to port:—*Held*: this was an unexcused deviation, which, vacated a policy on goods on board the merchantman.—*PHELPS v. AULDJO* (1809), 2 Camp. 350, N. P.

**1069. Embargo.**—If a ship with goods on board insured to a foreign port, learning in the course of her voyage, that an embargo is there laid on all ships of her nation, waits at some place as near thereto as she safely can, till the embargo is removed, the goods will in the meantime be protected by the policy, while the voyage remains legal; but if she might, upon such an occasion put into a friendly port adjoining to her port of destination, & instead of doing so, sails back for her port of outfit, & is lost, she will be considered as having abandoned the voyage insured, & the underwriters will be discharged.—*BLACKENHAGEN v. LONDON ASSURANCE CO.* (1808), 1 Camp. 454, N. P.

**1070.** —.]—A vessel chartered to a port of America laden with salt, to bring home a return cargo of timber, entered the port during an embargo, under which it was permitted her, upon the notification of the embargo, to return with the cargo on board, or to discharge her cargo, & return in ballast. She discharged her cargo, remained eighteen months there, till the embargo ceased, then shipped her homeward cargo, & was lost:—*Held*: she was not bound, with relation to the underwriters on ship, to have returned with her cargo of salt, or to have sailed in ballast; & the underwriters on ship were still liable.—*SCHRODER v. THOMPSON* (1817), 7 Taunt. 462; 1 Moore, C. P. 163; 129 E. R. 185.

**Sickness.**—See No. 1093, *post*.

### C. Necessity to Comply with Warranty.

See Marine Insurance Act, 1906 (c. 41), s. 49 (1) (c).

**1071. Implied warranty of seaworthiness—Necessary repairs.**—*MOTTEUX v. LONDON ASSURANCE (GOVERNOR & CO.)*, No. 152, *ante*.

**1072.** —.]—(1) In a policy on a seeking ship, a detention for a reasonable time for the purposes of the seeking adventure must be allowed; & whether the time is reasonable is to be determined by the state of things at the port where the ship happens to be.

(2) A ship insured, with liberty to touch, stay, & trade at several ports, arrived at one of them on June 3, when some necessary repairs were done to her. On Sept. 2, she was ready to take in cargo, but, owing to the state of the freight-market & other difficulties, no cargo was put on board till Jan. 10 following:—*Held*: the delay was not unreasonable, so as to amount to a deviation.—*PHILLIPS v. IRVING* (1844), 7 Man. & G. 325; 8 Scott, N. R. 3; 13 L. J. C. P. 145; 3 L. T. O. S. 55; 135 E. R. 136.

**1073.** —.]—*BOUILLON v. LUPTON*, No. 1515, *post*.

**1074. Express warranty—Against seizure in port.**—*O'REILLY v. ROYAL EXCHANGE ASSURANCE*, No. 1083, *post*.

**1075.** — **Date of sailing.**—*BOUILLON v. LUPTON*, No. 1515, *post*.

### D. Safety of Ship or Subject-Matter Insured.

See, *now*, Marine Insurance Act, 1906 (c. 41), s. 49 (1) (d).

**1076. General rule—Master may do what is expedient for common security—Unless expressly prohibited by policy.**—A vessel may deviate somewhat from the straight line of her track to seek for convoy; & the captain, unless expressly prohibited by the terms of the policy, may always do, when insured, whatever it would be expedient for the common security to do, if uninsured.—*D'AGUILAR v. TORIN* (1816), Holt, N. P. 185, N. P.

**1077. Putting into port—Stress of weather.**—*CLASON v. SIMMONDS* (1741), cited in 6 Term Rep. at p. 533; 101 E. R. 687.

*Annotations*:—*Consd.* *Andrews v. Mellish* (1814), 5 Taunt. 496. *Refd.* *Beatson v. Haworth* (1796), 6 Term Rep. 531.

**1078.** —.]—Where a captain on a voyage, delayed by adverse winds & danger puts into a place of safety in his course & sends ashore for provisions, although he also transmits a letter at the same time, it is not a deviation & is a question to which the jury are competent.—*THOMAS v. ROYAL EXCHANGE ASSURANCE* (1814), 1 Price, 195; 145 E. R. 1375.

**1079.** — **To refit.**—*PELLEY v. ROYAL EXCHANGE ASSURANCE CO.*, No. 291, *ante*.

**1080.** — **Loading ballast.**—*GUIBERT v. READSHAW* (1781), 2 Park's Marine Insurances, 8th ed. p. 637.

**1081.** — **Policy "at & from."**—Though unnecessary delay may avoid a policy, that shall not be deemed so which is employed in necessary repairs if the policy is "at & from the place."—*SMITH v. SURRIDGE* (1801), 4 Esp. 25, N. P.

*Annotation*:—*Consd.* *Mount v. Larkins* (1831), 8 Bing. 108.

**1082.** — **To obtain provisions—Loading cargo.**—It is not an implied condition in a common marine policy on ship & freight that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay or otherwise increasing the risk of the insurers: & therefore where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course by reason of a scarcity at her lading ports, & during her justifiable stay in the port so entered for that purpose she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage:—*Held*: not to avoid the policy.—*RAINE v. BELL* (1808), 9 East, 195; 103 E. R. 547.

*Annotations*:—*Consd.* *Urquhart v. Barnard* (1809), 1 Taunt. 450. *Fold.* *Laroche v. Oswin* (1810), 12 East, 131. *Consd.* *Palmer v. Marshall* (1832), 8 Bing. 317. *Refd.* *Palmer v. Fenning* (1833), 2 Moo. & S. 624.

**1083. Putting to sea to avoid seizure—Deviation due to unseaworthiness—Warranty against seizure.**—Where a policy of insurance contains a warranty against seizure in port, if the ship, to avoid such seizure, runs to sea before she is properly loaded, & is, in consequence, obliged to go to a port out of the course of the voyage insured, the underwriters are not liable for a subsequent loss.—*O'REILLY v. ROYAL EXCHANGE ASSURANCE* (1815), 4 Camp. 246, N. P.

**1084.** — **No warranty against seizure.**—Where a policy of insurance contains no warranty against seizure in port, if the ship, to avoid such seizure, runs to sea before she is properly loaded,

### PART II. SECT. 14, SUB-SECT. 3.—C.

**1071 i. Implied warranty of seaworthiness—Necessary repairs.**—*REED v. WELDON* (1869), 12 N. B. R. (1 Han.) 458.—*CAN.*

**1071 ii.** —.]—*REED v. PHILPS* (1870), 13 N. B. R. (2 Han.) 172.—*CAN.*

### PART II. SECT. 14, SUB-SECT. 3.—D.

**g. Putting back to port—To load**

**extra ballast.**—*YEUNG KONG YUNG v. YOUNG SHING INSURANCE & INVESTMENT CO., LTD.* (1921), 16 Hong Kong L. R. 34.—*HONG KONG.*



*Sect. 14.—Deviation and delay: Sub-sect. 3, D., E., F. & G.; sub-sects. 4 & 5. Sect. 15: Sub-sects. 1 & 2, A. & B.]*

& is in consequence obliged to go to a port out of the direct course of the voyage insured, the underwriters are liable for a subsequent loss.—O'REILLY v. GONNE (1815), 4 Camp. 249, N. P.

*Annotation:—Consd. Phelps, James v. Hill, [1891] 1 Q. B. 605.*

**1085. To avoid capture.]—PELLEY v. ROYAL EXCHANGE ASSURANCE CO., No. 291, ante.**

**1086. Awaiting convoy.]—BOUILLON v. LUPTON, No. 1515, post.**

#### *E. Saving Life or Aiding Ship in Distress.*

*See, now, Marine Insurance Act, 1906 (c. 41), s. 49 (1)*

**1087. General rule—Ship may deviate to save human life—Not to save goods.]—**Deviation for the purpose of saving life is protected, & involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of "perils of the seas": &, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation. If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorised deviation. But where the preservation of life can only be effected through the concurrent saving of property, & the *bonâ fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating. In these propositions I entirely concur (COCKBURN, C.J.).—SCARAMANGA v. STAMP (1880), 5 C. P. D. 295; 49 L. J. Q. B. 674; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. L. C. 295, C. A.

*Annotations:—Refd. A.-G. v. Smith (1918), 87 L. J. K. B. 1045. Mentd. Kish v. Taylor (1910), 80 L. J. K. B. 601; Brandon v. Osborne, Garrett, [1924] 1 K. B. 548.*

**1088. Deviation to assist ship in distress.]—**(1) On a policy of insurance, with or without letter of marque & liberty to chase, capture & man "the assured cannot delay, on the voyage, merely for the purpose of conveying the prize into a port of condemnation, neither is such a liberty to be inferred from the instructions & articles given with the letter of marque, "to carry into port, etc." (2) *Semble*: it is no deviation to delay for the purpose of giving assistance to a ship in distress.—LAWRENCE v. SYDEBOTHAM (1805), 6 East, 45; 2 Smith, K. B. 214; 102 E. R. 1204.

*Annotations:—As to (1) Refd. Scaramanga v. Stamp (1880), 5 C. P. D. 295. As to (2) Consd. Scaramanga v. Stamp (1880), 5 C. P. D. 295. Refd. The Williams (1838), 6 L. T. 479; Papayanni v. Hocquard, The True Blue (1866), L. R. 1 P. C. 250.*

**1089. —.]—**It is doubtful whether deviation by a vessel to assist other vessels in distress entails the forfeiture of its insurance by the owners in all cases.—JANE (1831), 2 Hag. Adm. 338; 166 E. R. 267.

*Annotations:—Consd. Papayanni v. Hocquard, The True Blue (1866), L. R. 1 P. C. 250; Scaramanga v. Stamp (1880), 5 C. P. D. 295; The City of Chester (1884), 9 P. D. 182. Mentd. The Enchantress (1860), Lush. 93.*

**1090. — Insurance on cargo.] — THE WILLIAMS (1838), 6 L. T. 479.**

**1091. —.]—THE HOPE (1838), 3 Hag. Adm. 423; 6 L. T. 479; 166 E. R. 462.**

*Annotation:—Mentd. The Coriolanus (1890), 15 P. D. 103.*

**1092. —.]—**A policy of insurance is not rendered void by deviation to assist a vessel in distress.—THE ORBONA (1853), 1 Ecc. & Ad. 161; 6 L. T. 479; 164 E. R. 93.

*Annotation:—Consd. Scaramanga v. Stamp (1880), 5 C. P. D. 295.*

#### *F. Necessity of Obtaining Medical or Surgical Aid.*

*See Marine Insurance Act, 1906 (c. 41), s. 49 (1) (f).*

**1093. Proper provision for voyage.]—**When sickness of the master or crew is set up as an excuse for deviation, it is incumbent on pltf. to show that proper medicines & necessaries for the voyage were on board, in a case where the nature of the voyage requires that there should be a surgeon on board.—WOOLF v. CLAGGETT (1800), 3 Esp. 257, N. P.

#### *G. Barratry of Master or Crew.*

*See Marine Insurance Act, 1906 (c. 41), s. 49 (1) (g).*

*Barratry, see Sect. 20, sub-sect. 4, G., post.*

**1094. Deviation caused by fraud of master—Without knowledge of assured.]—**VALLEJO v. WHEELER (1774), 1 Cowp. 143; Lofft, 631; 98 E. R. 1012.

*Annotations:—Consd. Nutt v. Bourdieu (1786), 1 Term Rep. 323; Earle v. Rowcroft (1806), 8 East, 126; Cory v. Burr (1882), 9 Q. B. D. 463. Refd. Lockyer v. Offley (1786), 1 Term Rep. 252; Soares v. Thornton (1817), 7 Taunt. 627; Atkinson & Hewitt v. Great Western Insce. (1872), 27 L. T. 103. Mentd. Phyn v. Royal Exchange Assce. (1798), 7 Term Rep. 505; Frazer v. Marsh (1811), 13 East, 238; Trinity House v. Clark (1815), 4 M. & S. 288; Hutton v. Bragg (1816), 7 Taunt. 14; Tate v. Meek (1818), 8 Taunt. 280; Saville v. Campion (1819), 2 B. & Ald. 503; Christie v. Lewis (1821), 2 Brod. & Bing. 410; Sandeman v. Scurr (1866), L. R. 2 Q. B. 86.*

**1095. —.]—**ROSS v. HUNTER, No. 1779, post.

**1096. —.]—**MOSS v. BYROM, No. 1106, post.

**1097. Deviation caused through ignorance of master.]—**PHYN v. ROYAL EXCHANGE ASSURANCE CO., No. 1783, post.

**1098. —.]—**TAIT v. LEVI, No. 985, ante.

#### *SUB-SECT. 4.—RESUMPTION OF VOYAGE.*

*See Marine Insurance Act, 1906 (c. 41), s. 49 (2).*

**1099. General rule—Direct course & shortest time.]—**If an insured ship quit the course described in the policy, from necessity, she must pursue such new voyage of necessity in the direct course, & in the shortest time, otherwise the underwriters will be discharged.—LAVABRE v. WILSON, BIZE v. FLETCHER, LAVABRE v. WALTER (1779), 1 Doug. K. B. 284; 99 E. R. 185.

*Annotations:—Consd. Gairdner v. Senhouse (1810), 3 Taunt. 16. Refd. Phelps, James v. Hill, [1891] 1 Q. B. 605; Thorley v. Orchis S.S. Co., [1907] 1 K. B. 660.*

**1100. Ship separated from convoy—Course shaped to rejoin convoy.]—**HARRINGTON v. HALKELD (1778), 2 Park's Marine Insurances, 8th ed. p. 639.

**1101. Ship driven from loading port—Need not return to resume.]—**If a ship be driven out of her loading port into another port, & being there, she does the best she can to get to her port of destination, she is not obliged to return to the port from whence she was driven. Neither is it a deviation

if she complete her lading at the port into which she is driven. In the principal case, however, there was a custom to warrant this.—*DELANY v. STODDART* (1785), 1 Term Rep. 22 ; 99 E. R. 950.  
*Annotation* :—*Mentd.* *Hibbert v. Carter* (1787), 1 Term Rep. 745.

SUB-SECT. 5.—ARMED MERCHANTMEN IN TIME OF WAR.

**1102. Chasing enemy.]**—*JOLLY v. WALKER* (1781), 2 Park's Marine Insurances, 8th ed. p. 630, N. P.

*Annotation* :—*Consd.* *Parr v. Anderson* (1805), 6 East, 202.

**1103. Liberty "to cruise six weeks"—Six weeks successively from beginning of cruise.]**—*SYERS v. BRIDGE* (1780), 2 Doug. K. B. 526 ; 99 E. R. 335.

*Annotation* :—*Mentd.* *Maxwell v. Deare* (1854), 23 L. T. O. S. 1.

**1104. Cruising without liberty.]**—*JOLLY v. WALKER* (1781), 2 Park's Marine Insurances, 8th ed. p. 630, N. P.

*Annotation* :—*Consd.* *Parr v. Anderson* (1805), 6 East, 202.

**1105. Carrying letter of marque—Without leave of insurer—Not cruising in fact.]**—After an insurance on a ship on a trading voyage, the assured applied to the underwriters for leave to take in guns & a letter of marque, the latter of which was positively refused ; notwithstanding which the ship sailed with a general letter of marque ; this vacated the policy, although the assured did not, in fact, make use of the letter of marque for the purpose of cruising, or intend so to do, but merely took it on board for the purpose of cruising on the voyage home.—*DENISON v. MODIGLIANI* (1791), 5 Term Rep. 580 ; 101 E. R. 325.

*Annotations* :—*Consd.* *Moss v. Byrom* (1795), 6 Term Rep. 379 ; *Oswell v. Vigne* (1812), 15 East, 70.

**1106. ——— Cruising unauthorised by owner.]**—The assured upon a trading voyage taking out a letter of marque, but without a certificate which is necessary to its validity, unknown to the underwriters solely with a view to encourage seamen to enter, & without any intention of using it for the purpose of cruising, though the vessel was armed for self defence, is not such an alteration of circumstances as will avoid the policy ; & if the captain, contrary to the instructions of his owner, cruise for & take a prize, & the vessel is afterwards lost in consequence of it, it is an act of barratry, upon which the assured may recover against the underwriters, although the captain libelled the prize for the benefit of his owner as well as himself.—*MOSS v. BYROM* (1795), 6 Term Rep. 379 ; 101 E. R. 605.

*Annotations* :—*Consd.* *Earle v. Rowcroft* (1806), 8 East, 126 ; *Atkinson & Hewitt v. Great Western Insee.* (1872), 27 L. T. 103. *Refd.* *Phyn v. Royal Exchange Assee.* (1798), 7 Term Rep. 505 ; *Raine v. Bell* (1808), 9 East, 195 ; *Oswell v. Vigne* (1812), 15 East, 70.

**1107. ——— Insurance "with or without letters of marque"—Whether chasing enemy permissible—Construction according to usage.]**—Whether an insurance of a ship with or without letter of marque upon a certain voyage & commercial adventure from A. to B. enables her to chase for the purpose of hostile attack & capture any vessel she may happen to descry in the course of the voyage insured, in whatever direction or to any limit, & whether known at the commencement of such chasing to be an enemy or not ; or whether those words are to be confined to a leave to employ force only for the purpose of defence, including a liberty of attack & chase only so far as they may be fairly supposed to promote ultimate security ; must, in the absence of any legal decision as to their construction, depend upon

the received practice & known sense of commercial men, if any such received practice there be in the use of them. Therefore the cause was referred to another trial to ascertain the commercial usage & practice in that respect. But at any rate such words do not appear to authorise direct cruising out of the course of the voyage in search of prize.—*PARR v. ANDERSON* (1805), 6 East, 202 ; 2 Smith, K. B. 316 ; 102 E. R. 1264.

*Annotation* :—*Refd.* *Lawrence v. Sidebotham* (1805), 2 Smith, K. B. 214.

*Compare* No. 1102, *ante*.

**1108. ——— Direct cruising out of proper course.]**—*PARR v. ANDERSON*, No. 1107, *ante*.

**1109. ——— Liberty to "chase, capture & man"—Delay caused by escorting prize.]**—*LAWRENCE v. SYDEBOTHAM*, No. 1088, *ante*.

**1110. ——— Awaiting enemy ship to leave port.]**—Liberty given in a policy on a fishing voyage, to chase, capture, & man prizes, does not authorise the ship to lie by nine days off a port, waiting for an enemy's ship to come out, when she should have completed her cargo.—Although she lay in wait during that time within the limits of her fishing ground.—*HIBBERT v. HALLIDAY* (1810), 2 Taunt. 428 ; 127 E. R. 1144.

**1111. ——— Liberty to "see prizes into port"—Remaining in port while prize repaired.]**—Leave granted in a policy of insurance on a fishing voyage to see prizes into port, does not authorise the ship to remain in port till a prize receives necessary repairs, which she could not otherwise have had ; & at most extends to seeing the prize moored safely, & giving the necessary orders for her final destination.—*JARRATT v. WARD* (1808), 1 Camp. 263, N.P.

SECT. 15.—LEGALITY OF ADVENTURE.

SUB-SECT. 1.—IN GENERAL.

**1112. Insurance void.]**—*REDMOND v. SMITH*, No. 1127, *post*.

As to implied warranty of legality, *see* Marine Insurance Act, 1906 (c. 41), s. 41.

SUB-SECT. 2.—INSURANCE OF ENEMY PROPERTY.

A. During War.

**1113. Against capture by British.]**—*THE MARIA MAGDALENA* (1779), Marr. 247 ; 1 Eng. Pr. Cas. 20 ; 165 E. R. 57.

*See, also*, *ALIENS*, Vol. II., pp. 165, 166, Nos. 354–360 ; & *generally*, *PRIZE LAW*.

As to who is an alien enemy, *see* *ALIENS*, Vol. II., pp. 139 *et seq.*

As to licences to trade with the enemy, *see* *ALIENS*, Vol. II., pp. 178 *et seq.*

B. Before Commencement of War.

**1114. Extent of insurer's liability—Loss during hostilities—By British capture.]**—An underwriter on French property in time of peace is not liable for a loss occasioned by capture by the King's ships during hostilities which commenced between Great Britain & France subsequent to the policy being effected, & terminated prior to the action brought.—*GAMBA v. LE MESURIER* (1803), 4 East, 407 ; 1 Smith, K. B. 81 ; 102 E. R. 887.

*Annotations* :—*Consd.* *Brandon v. Curling* (1803), 4 East, 410. *Refd.* *Kellner v. Le Mesurier* (1803), 4 East, 396 ; *Driefontein Consolidated Gold Mines v. Janson*, [1901] 2 K. B. 419.

**Sect. 15.—Legality of adventure: Sub-sect. 2, B.; sub-sects. 3 & 4, A. & B.]**

**1115. ———.]—Insurance by a subject of this country upon foreign property does not cover a loss by capture in a war afterwards taking place between this country & that of the assured. Proof in bkpcy. therefore under such a policy expunged.—*Ex p. LEE* (1806), 13 Ves. 64; 33 E. R. 218, L. C.**

**Annotation:—*Reid. Rodriguez v. Speyer*, [1919] A. C. 59.**

**1116. ——— Between countries of insurer & assured.]—An insurance on goods from London to Bayonne in France, shipped on board a neutral ship on account & at the risk of Frenchmen, before the declaration of hostilities between Great Britain & France, but exported afterwards, cannot be enforced against the underwriter even after the restoration of peace to recover a loss by capture of a co-belligerent, though not stated to be an ally, during the war. Every insurance on alien property by a British subject must be understood with this implied exception that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured & assurer.**

Wherever the generality of the terms of assurance might in their actual application to the terms of any particular risk produce, if effect were given to them in their extended sense, a . . . contravention of public interest, the insurance must be construed in such a manner as to exclude the particular event or peril which could not . . . be so made the subject of a legal insurance in direct terms by a British underwriter (*LORD ELLENBOROUGH, C.J.*).—*BRANDON v. CURLING* (1803), 4 East, 410; 1 Smith, K. B. 85; 102 E. R. 888.

**Annotation:—*Consd. Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484.**

**1117. ——— Seizure before hostilities—In contemplation of war.]—Where a subject of a foreign Govt. insures treasure with British underwriters against capture during transit from the foreign state to this country, & the foreign Govt. seizes the treasure during the transit & war is declared between the foreign & the British Govts., the insurance is valid, & an action may be maintained in this country against the underwriters after the restoration of peace, though the seizure was made in contemplation of war & in order to use the treasure in support of the war. The important date is the seizure before the declaration of war. Such an insurance is not against public policy.—*JANSON v. DRIEFONTEIN CONSOLIDATED MINES, LTD.*, [1902] A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 18 T. L. R. 796; 7 Com. Cas. 268, H. L.; *affg. S. C. sub nom. DRIEFONTEIN CONSOLIDATED GOLD MINES, LTD. v. JANSON*, [1901] 2 K. B. 419, C. A.**

**Annotations:—*Consd. Robinson Gold Mining Co. v. Alliance Insce.*, [1901] 2 K. B. 919; *Ingle v. Mannheim Insce.*, [1915] 1 K. B. 227; *Robinson v. Continental Insce. of Mannheim*, [1915] 1 K. B. 155. *Reid. Arnhold Karberg v. Blythe, Green, Jourdain, Theodor Schneider v. Burgett & Newsam*, [1916] 1 K. B. 495; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307; *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541; *Ertel Bleber v. Rio Tinto Co., Dynamit Act v. Same, Vereinigte Königs & Laurahütte Act. v. Same*, [1918] A. C. 260. *Mentd. Amorduct Manufacturing Co. v. Defries* (1914), 84 L. J. K. B. 586; *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857; *Re Sutherland, Bechoff, David v. Bubna* (1915), 31 T. L. R. 248; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44; *Stevenson v. Akt. für Cartonnagen Industrie*, [1917] 1 K. B. 842; *Tingley v. Müller*, [1917] 2 Ch. 144; *Montefiore v. Menday Motor Components Co.*, [1918] 2 K. B. 241; *Naylor, Benzon v. Krainsche Industrie Gesellschaft*, [1918] 1 K. B. 331; *Orcanera Iron Ore Co. v. Fried Krupp Akt.* (1918), 87**

*T. L. Ch. 313: Rodriguez v. Speyer*, [1919] A. C.

262.

*See, also, ALIENS*, Vol. II., pp. 165, 166, Nos 354–360.

**Loss before commencement of hostilities—Suspension of right of action.]—*See ALIENS*, Vol. II., pp. 162, 166, Nos. 317, 318, 360.**

#### SUB SECT. 3.—INSURANCE OF NEUTRAL PROPERTY.

**1118. Condemnation by Court of Admiralty—Subsequent order for restoration.]—Neutral property taken by a King's ship, though the Ct. of Admlty. pronounce for good cause of seizure, but order to be restored, is lawful object of insurance.—*VISGER v. PRESCOTT* (1804), 5 Esp. 184, N.P.**

#### SUB-SECT. 4.—ADVENTURES CONTRAVENING BRITISH STATUTES

##### A. In General.

*See CONTRACT*, Vol. XII., pp. 272 *et seq.*

**1119. General rule.]—An assurance of a voyage expressly prohibited by the laws of this country is void.—*JOHNSTON v. SUTTON* (1779), Doug. K. B. 254; 99 E. R. 166.**

**1120. Trading with enemy—16 Geo. 3, c. 5.]—*VANBARTHAIS v. HALBED* (1791), 1 East, 487, n.; 102 E. R. 188.**

**Annotation:—*Distd. Hentig v. Staniforth* (1816), 5 M. & S. 122.**

**1121. Trading with East Indies—9 & 10 Will. 3, c. 44.]—The exclusive right of trading to the East Indies, granted to the East India Co. by above Act, has never been put an end to, & though such parts of that Act as inflicted penalties, etc., were repealed by 33 Geo. 3, c. 52, & though the latter Act says that no Acts or parts of Acts thereby repealed shall be pleaded or set up in bar of any action, etc., it is competent to underwriters who have subscribed policies on ships trading to the East Indies in contravention of above Act to avail themselves of the illegality of such trading in an action brought on the policies.—*CAMDEN v. ANDERSON* (1798), 1 Bos. & P. 272; 126 E. R. 900, Ex. Ch.**

**Annotations:—*Mentd. Farmer v. Russell* (1798), 1 Bos. & P. 296; *Moss v. Smith* (1850), 9 C. B. 94.**

**1122. ——— Contravention of navigation laws.]—If a Swedish ship be insured at & from her loading port in the East Indies to Gottenburgh, & part of the cargo be laden in a British port in the East Indies, the insured cannot recover, the voyage being in contravention of the navigation laws.—*CHALMERS v. BELL* (1804), 3 Bos. & P. 604; 127 E. R. 326.**

**1123. Traffic in arms & ammunition—33 Geo. 3, c. 2.]—A vessel laden with arms & powder, which had given bond to employ them in trading on the coast of Africa, in pursuance of an agreement made in England, disposed of part of the cargo on the coast of Africa, to a neutral American, bound for Charlestown:—*Held*: the voyage of the American was thereby rendered illegal, & incapable of insurance.—*GIBSON v. SERVICE* (1814), 5 Taunt. 433; 1 Marsh. 119; 128 E. R. 757.**

**Annotation:—*Reid. Stewart v. Gibson* (1840), 7 Cl. & Fin. 707.**

**1124. Slave trading.]—THE FORMIDABLE, BLYTH v. FORBES** (1844), 9 L. T. 87.



**1125. Cargo loaded on deck—Departure without clearance certificate—16 & 17 Vict. c. 107.]—**CUNARD v. HYDE, No. 1129, *post*.

**1126. Statute merely imposing penalty.]—**Insurance on provisions “from London to Helsingberg, the Sound, Copenhagen, all or either,” which provisions were intended for the supply of the British fleet & army then engaged in the expedition against Copenhagen, of which they were then in possession, but were about to evacuate it, & were consigned to merchants there, & at Elsinour:—*Held*: good; although in consequence of expected hostilities with Denmark, an Order of the King in Council had issued, prohibiting the clearing out of any British ships to a Danish port, & a clearance was in consequence taken out for Helsingberg, a Swedish & neutral port in the neighbourhood of Denmark; the adventure being legal, & not contravening the spirit of the Order in Council.

There is nothing illegal, so as to avoid a policy, in the mere circumstance of a ship taking out a clearance for a place named in the policy to which there is no intention of going. The statute of Cha. 2 [14 Cha. 2, c. 11] only gives a penalty of £100 for taking out a false clearance: but there is nothing in that to make the voyage illegal (LORD ELLENBOROUGH, C.J.).—ATKINSON v. ABBOTT (1809), 11 East, 135; 1 Camp. 535; 103 E. R. 956.

**1127. —.]—**Where a voyage is illegal, an insurance upon such voyage is invalid. This has been decided in many cases. Thus, during the war, policies effected on vessels sailing in contravention of Convoy Acts were held void. So, where the voyage was against the provisions of the East India Company Acts, or the South Sea Co. Acts, or the General Navigation Act; which statutes were made with reference to the general policy of the realm. But it appears to me that 5 & 6 Will. 4, c. 19, was passed for a collateral purpose only; its intention being to give to merchant seamen a readier mode of enforcing their contracts & to prevent their being imposed upon. The present case is undoubtedly brought within the provisions of sect. 1 of this statute by the allegations contained in the sixth plea. Sect. 4 enacts that if the master do not comply with the previous requisitions, he shall be liable to a penalty; but it is nowhere said that such non-compliance shall make the voyage illegal; the sect. merely provides a remedy against the master (TINDAL, C.J.).—REDMOND v. SMITH (1844), 7 Man. & G. 457; 2 Dow. & L. 280; 8 Scott, N. R. 250; 13 L. J. C. P. 159; 3 L. T. O. S. 162; 8 Jur. 711; 135 E. R. 183.

*Annotation*:—*Mentd.* Ritchie v. Smith (1848), 12 J. P. 822.

As to illegal wagering policies, see Part IX., Sects. 3, 4, *post*.

#### B. Privity of Assured.

**1128. Necessity for—General rule.]—**To vacate a policy of insurance for an infraction of the Convoy Act, it is not enough to show that the ship sailed without convoy by the instrumentality of an agent of the assured, unless it appear that the agent had authority from his principal for this purpose.—CARSTAIRS v. ALLNUTT (1813), 3 Camp. 497, N. P.

**1129. —.]—**By Customs Consolidation Act, 1853 (c. 107), ss. 170, 171, 172, it is enacted that, before any clearing officer permits a ship wholly or partly laden with timber to clear out from any British port in North America or Honduras, for any port in the United Kingdom, after Sept. 1, or before May 1, in any year, he shall

ascertain that the whole cargo is below deck, & give the master a certificate to that effect; & the master shall not sail without such certificate, & shall not allow any part of the cargo to be upon deck (except in specified cases of necessity); & if the master sail without the certificate, or load in the mode forbidden, he shall forfeit £100. After Sept. 1, 1856, orders were given for an insurance on cargo & freight by a ship from M., a British port in North America, to a port in the United Kingdom; & the insurance was effected thereupon. Both when the orders were given & when the insurance was effected, it was known to the persons interested in the cargo & freight, & who gave the orders, that much of the cargo was loaded on deck; they intended the ship to sail, so laden, from M. for the United Kingdom, before May 1, 1857; & they ordered the insurance to be effected with express purpose to cover the whole cargo & freight, including the portion of cargo above deck. On Sept. 10, 1856, the ship sailed, on the voyage insured, deck laden, & without a certificate to the master from the clearing officer: & the cargo was totally lost:—*Held*: (1) the whole voyage was illegal; (2) the illegality vitiated the insurance with respect to the whole cargo, not merely as to so much of it as was loaded on deck; & (3) the assured, who were privy to the illegality, could recover nothing from the underwriters.—CUNARD v. HYDE (1859), 2 E. & E. 1; 29 L. J. Q. B. 6; 6 Jur. N. S. 14; 121 E. R. 1.

*Annotations*:—*As to* (3) *Distd.* Wilson v. Rankin (1865), L. R. 1 Q. B. 162. *Apld.* Dudgeon v. Pembroke (1874), L. R. 9 Q. B. 581.

**1130. —.]—**WILSON v. RANKIN, No. 1133, *post*.

**1131. —.]—**If a master of a vessel which has not obtained a certificate enabling her to carry passengers does carry them without her owners' knowledge, her voyage is not rendered by 17 & 18 Vict. c. 104, s. 318, illegal, so as to vitiate a policy effected by her innocent owner.—DUDGEON v. PEMBROKE (1874), L. R. 9 Q. B. 581; 43 L. J. Q. B. 220; 31 L. T. 31; 22 W. R. 914; 2 Asp. M. L. C. 323; *on appeal* (1875), 1 Q. B. D. 96, Ex. Ch.; (1877), 2 App. Cas. 284, H. L.

*Annotations*:—*Mentd.* Turnbull v. Janson (1877), 36 L. T. 635; West India Telegraph Co. v. Home & Colonial Insce. (1880), 6 Q. B. D. 51; Ballantyne v. Mackinnon, [1896] 2 Q. B. 455; Trinder, Anderson v. Thames & Mersey Marine Insce., Trinder Anderson v. North Queensland Insce., Trinder Anderson v. Western, Crocker, [1898] 2 Q. B. 114; Jackson v. Mumford (1904), 9 Com. Cas. 114; Leyland Shipping Co. v. Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873; *Re* Sutro & Heilbut, Symons, [1917] 2 K. B. 348; Marten v. Vestey, [1920] A. C. 307; Whittle v. Mountain, [1920] 1 K. B. 447; British & Foreign Marine Insce. v. Gaunt, [1921] 2 A. C. 41; Samuel v. Dumas, [1924] A. C. 431.

**1132. —.]—**AUSTRALASIAN INSURANCE CO. v. JACKSON, No. 1791, *post*.

**1133. What amounts to privity—Whether implied from general authority.]—**Pltf., the owner of a ship, effected a policy on freight from a British port in North America to Liverpool. The ship sailed with a cargo of timber between Sept. 1 & May 1. The master, without the knowledge or privity of his owner, stowed a portion of the cargo on deck & sailed without any certificate from a clearing officer that the whole cargo was below deck, contrary to Customs Consolidation Act, 1853 (c. 107), ss. 170, 171, & 172. On a loss by perils insured against:—*Held*: (1) although the master had general authority from his owner to stow the cargo, no authority could be implied to load it so as to violate the statute, neither was it an act of the master which the owner must be presumed to have assented to; (2) the fact

**Sect. 15.—Legality of adventure: Sub-sect. 4, B.; sub-sects. 5, 6 & 7, A. & B.; sub-sect. 8.** insurance on the ship or her cargo is discharged. *WINDER v. WISE* (1829), *Dan. & Ll.* 238.  
16: *sub-sect. 1.* *DALGLEISH v. HODGSON*,

of the ship having sailed without the certificate did not render her unseaworthy at the commencement of her voyage so as to prevent the policy attaching; & consequently, *pltf.* was not precluded from recovering against the underwriter. —*WILSON v. RANKIN* (1865), *L. R.* 1 Q. B. 162; 6 B. & S. 208; 35 L. J. Q. B. 87; 13 L. T. 564; 14 W. R. 198; 2 Mar. L. C. 287; 122 E. R. 1173, Ex. Ch.

*Annotation:—As to (1) Apld.* *Dudgeon v. Pembroke* (1874), *L. R.* 9 Q. B. 581.

#### SUB-SECT. 5.—ADVENTURES CONTRAVENTING FOREIGN LAWS.

**1134. Contravention of foreign revenue law.]—**

*PLANCHÉ v. FLETCHER*, No. 1010, *ante*.

**1135. —.]—***LEVER v. FLETCHER* (1780), 1 *Park's Marine Insurances*, 8th ed. p. 507.

**1136. —.]—**Goods of *pltf.*s., consisting of arms & ammunition, were insured by *defts.* per steamer *Baluchistan* from London to Persian Gulf ports. The risks insured included "takings at sea, arrests, restraints, & detainments." Before the *Baluchistan* reached her destination she was stopped by an English man of war, purporting to act under an Edict issued in 1881 by the Persian Govt. by which the importation of arms & ammunition into Persia was prohibited, & the goods were confiscated. The Edict of 1881 had never been withdrawn, but after its issue the importation of arms & ammunition into Persia was carried on by *pltf.*s. & other traders openly & to the knowledge of the Persian authorities, who exacted duties on such goods. *Pltf.*s. knew that the trade was nominally prohibited but did not disclose that fact to *defts.*:—*Held*: (1) the existence of the prohibition was not a material fact, the concealment of which rendered the policy void; (2) the voyage was not an illegal voyage; & *pltf.*s. were entitled to recover a total loss caused by the confiscation of the goods.

As to the second point taken by *defts.*, viz. that the adventure was illegal because the import of arms was contrary to the law of Persia, & that, therefore, the policy in respect of it was void, I am of opinion that there is nothing in it. The import of arms was not illegal according to the law of Persia, as that law was administered in practice & enjoined; & the export of arms from England to Persia was certainly not contrary to our law (*BIGHAM, J.*).—*FRACIS, TIMES & CO. v. SEA INSURANCE CO.* (1898), 79 L. T. 28; 47 W. R. 119; 42 Sol. Jo. 634; 8 Asp. M. L. C. 418; 3 Com. Cas. 229.

**Contract made in foreign country.]—***See* *CONFLICT OF LAWS*, Vol. XI., pp. 389, 390, Nos. 646, 647.

*See, also*, Part II., Sect. 20, sub-sect. 4, D., *post*.

#### SUB-SECT. 6.—ADVENTURES CONTRAVENTING FOREIGN BELLIGERENT'S RIGHTS.

**1137. Voyage to blockaded port—Knowledge of blockade.]—**If a ship having sailed for a blockaded port before public notification of the blockade in this country, receive at any time during her voyage intelligence of the blockade, but nevertheless continue her voyage to the blockaded port, & be captured in an attempt to enter it, a policy of

<sup>1</sup> No. 1407, *post*.

**1139. —.]—Question of fact.]—**In an action on a policy on a voyage from Liverpool to a blockaded port, it was proved that the vessel sailed from G. on the voyage before the blockade was notified in this country, but afterwards put into another port in this kingdom after such notification in the London Gazette, & when the blockade might be known there. The jury found that the captain did not know of the blockade:—*Held*: knowledge by the captain was not to be presumed, on the principle that notice to a State was notice to all the subjects of that State, but it was a question of fact properly left to the consideration of the jury.—*HARRATT v. WISE* (1829), 9 B. & C. 712; *Dan. & Ll.* 234; 4 *Man. & Ry. K. B.* 521; 7 L. J. O. S. K. B. 309; 109 E. R. 264.

—.]—*See, also*, *CONTRACT*, Vol. XII., p. 268, Nos. 2196–2199.

#### SUB-SECT. 7.—PARTIAL ILLEGALITY.

##### A. Voyage.

**1140. Illegality at outset of integral voyage.]—**(1) Under the late treaty between this country & the United States of America, it is not necessary that the trade from America to our settlements in the East Indies should be direct; it may be carried on circuitously by the way of Europe. A natural born subject of this country may also be a citizen of America for the purposes of commerce, & entitled to all the advantages of an American under this treaty; the circumstance of his coming over here for a temporary purpose does not deprive him of those advantages. (2) If there be any illegality in the commencement of an integral voyage, & an insurance be effected on the latter part of the voyage, which taken by itself would be legal, still the assured cannot recover on the policy.

If there had been any infirmity in any part of the integral voyage, it would have made the whole illegal, so that the assured could not recover upon a policy on any part of it (*LORD KENYON, C.J.*).—*MARRYAT v. WILSON* (1799), 1 Bos. & P. 430; 126 E. R. 993, Ex. Ch.; *affg.* *S. C. sub nom. WILSON v. MARRYAT* (1798), 8 Term Rep. 31.

*Annotations:—As to (1) Consd.* *Bell v. Reid* (1813), 1 M. & S. 726. *Refd.* *The Indian Chief* (1801), 3 Ch. Rob. 12, 21; *The Recovery* (1807), 6 Ch. Rob. 341; *The Matchless* (1822), 1 Bag. Adm. 97; *Croker v. Hertford* (1844), 4 Moo. P. C. C. 339. *As to (2) Refd.* *Sewell v. Royal Exchange Assce.* (1813), 4 Taunt. 856.

**1141. —.]—**(1) If a ship be insured "at & from A. to B.," & there be any illegality in the traffic during her stay at A., the assured cannot recover on the policy for a loss happening between A. & B. Goods may be insured, though purchased with the proceeds of a former illegal cargo. (2) An insurance on a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure. (3) A warranty of neutrality in a policy of assurance, is not falsified by a sentence of a foreign ct. of Admty. condemning a ship for navigating contrary to the ordinances of that belligerent State to which the neutral country had not assented.—*BIRD v. APPLETON* (1800), 8 Term Rep. 562; 101 E. R. 1547.

*Annotations:—As to (3) Consd.* *Baring v. Royal Exchange Assce.* (1804), 5 Eant. 99. *Refd.* *Baring v. Claggett* (1802), 3 Bos. & P. 201; *Lothian v. Hinderson* (1803), 3 Bos.

& P. 499; *Reimers v. Druce* (1857), 23 Beav. 145; *Simpson v. Fogo* (1863), 11 W. R. 418; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414.

**1142. Illegality in any part of integral voyage.]—**MARRYAT *v.* WILSON, No. 1140, *ante*.

**1143. —.]—**BIRD *v.* PIGOU (1800), cited 2 Selwyn's N. P., 13th ed. at p. 932.

**1144. —.]—**If a master sails under a charter-party, stipulating for a voyage of which a part is illegal, *semble*: this does not prevent his insuring on, nor subject him to forfeiture for the part antecedent to the illegal act, for as he cannot be compelled to perform, nor enforce the payment of freight on the illegal part of the adventure, it may be presumed that he will abandon it.—SEWELL *v.* ROYAL EXCHANGE ASSURANCE CO. (1813), 4 Taunt. 856; 128 E. R. 568.

*Annotations:—*Reid. *A.-G. v. Wilson* (1817), 3 Price, 431. *Mentd.* *Norwich Corpn. v. Norfolk Ry.* (1855), 4 E. & B. 397.

**1145. Illegality of previous but distinct voyage—No effect on insured voyage.]—**BIRD *v.* APPLETON, No. 1141, *ante*.

**1146. Policy "to any port or ports" in certain area—Area including some enemy ports.]—**A policy "to any port or ports in the Baltic" is legal, although some of those ports were then in a state of war with this country & although no licence has been obtained, provided the ship was not sailing to such hostile port.—WRIGHT *v.* WELBIE (1819), 1 Chit. 49.

#### B. Cargo.

**1147. Policy on goods to be specified—Specification including illegal cargo.]—**Where a party insured to a certain amount, in one policy, goods to be thereafter specified; & in the specification afterwards made by him were included some goods, the exportation of which was prohibited under pain of forfeiting the goods themselves & treble their value, & which also induced a forfeiture of the ship; the policy was held to be avoided *in toto*.—PARKIN *v.* DICK (1809), 11 East, 502; 2 Camp. 221; 103 E. R. 1097.

**1148. Cargo carried under licence—Part only licensed.]—**If a vessel brings, under a licence, a cargo of enumerated goods from an hostile country hither, & also certain other goods not licensed, the insurance on the licensed goods is not thereby vitiated.—PIESCHELL *v.* ALLNUTT (1813), 4 Taunt. 792; 128 E. R. 543.

*Annotation:—*Reid. *Keir v. Andrade* (1816), 2 Marsh. 196.

**1149. —.]—**A licence is granted to A. & B. for permitting vessels bearing any flag to import certain specified articles; in order to show the legality of the voyage in an action against an insurer, it is sufficient to show that the licence has been applied to the ship & voyage in question, without further connecting pltf. with A. & B. to whom the licence was granted. If articles not specified in the licence be imported along with others, which are specified, *semble*: the licence will still enure to the protection of those articles which are specified.—BUTLER *v.* ALLNUTT (1816), 1 Stark. 222, N. P.

**1150. —.]—**A quantity of gunpowder was exported, for a part of which only, a licence had been obtained:—*Held*: the exportation of the excess only was illegal; & therefore an insurance, effected on the whole cargo, might be supported as to so much for which the licence was obtained: whether the property of the same

or of different persons.—KEIR *v.* ANDRADE (1816), 6 Taunt. 498; 2 Marsh. 196; 128 E. R. 1128.

**1151. Illegal loading of deck cargo.]—**CUNARD *v.* HYDE, No. 1129, *ante*.

#### SUB-SECT. 8.—WAIVER OF ILLEGALITY.

**1152. Duty of court—On disclosure of illegality.]**

—Where, on the trial of an action, pltf.'s case discloses that the transaction which is the basis of his claim is illegal, the ct. cannot properly ignore the illegality or give effect to the claim, even if the illegality be not pleaded or relied on by defts. The ct. will, therefore, not enforce a policy of marine insurance which is illegal under 19 Geo. 2, c. 37, s. 1, by reason of its containing a clause that the policy itself is to be deemed a full & sufficient proof of interest, although that defence is not set up by the underwriters.—GEDGE *v.* ROYAL EXCHANGE ASSURANCE CORPN., [1900] 2 Q. B. 214; 69 L. J. Q. B. 506; 82 L. T. 463; 16 T. L. R. 344; 9 Asp. M. L. C. 57; 5 Com. Cas. 229.

*Annotations:—*Reid. *Cheshire v. Vaughan* (1920), 123 L. T. 487. *Mentd.* *Kregor v. Hollins* (1913), 109 L. T. 225; *Soc. Des Hôtels Réunis (Soc. Anon.) v. Hawker* (1913), 29 T. L. R. 578.

*See* Marine Insurance Act, 1906 (c. 41), s. 41.

#### SECT. 16.—AVOIDANCE OF POLICIES.

##### SUB-SECT. 1.—ALTERATION OF POLICY.

*See* Stamp Act, 1891 (c. 39), s. 96.

**New stamp on alteration.]—***See* Sect. 3, subsect. 3, B. (b), *ante*.

**1153. Alteration with consent of insurer—In writing.]—**KAINES *v.* KNIGHTLY (1682), Skin. 54; 90 E. R. 26.

**1154. —.]—**A policy of insurance containing a warranty that the ship shall sail on or before a given day, may be altered, pending the risk, by a memorandum, whereby the underwriters in consideration of a further premium agree to cancel the warranty & to make a return of premium if the ship sail with convoy.—RIDSDALE *v.* SHEDDEN (1814), 4 Camp. 107.

**1155. —.]—**A policy is effected on pltf.'s share of goods valued at £500 but upon its turning out that pltf.'s interest was larger, the words are added in the margin of the policy on pltf.'s share of goods, say one-fifth, valued at £1,000 to which deft.'s initials were subscribed, the declaration need not notice the original stipulation.—ROBINSON *v.* TOBIN (1816), 1 Stark. 336.

**1156. Alteration without consent of insurer—Liability avoided.]—**A ship is insured for a voyage from Virginia to Rotterdam, with leave to call at a port in England; & after the underwriters had signed the policy, the destination of the voyage was altered to the port of Hull, there to discharge instead of Rotterdam, & a memorandum of this alteration was indorsed on the policy. Hull is not a port in the course between Virginia & Rotterdam, but two degrees north of that course. The ship was afterwards lost:—*Held*: the alteration of the voyage vacated the policy as to all the underwriters, except those who signed the indorsement.—LAIRD *v.* ROBERTSON (1791), 4 Bro. Parl. Cas. 488; 2 E. R. 333.

#### PART II. SECT. 15, SUB-SECT. 7.—B.

**h. Illegal loading of deck cargo.]—**THOMSON *v.* NEW ZEALAND INSURANCE CO., Mac. 121. —N.Z.



*Sect. 16.—Avoidance of policies: Sub-sects. 1 & 2, A. & B.]*

**1157.** ———.]—If the assured, after subscription by the underwriter, strikes out with a pen the time of warranty of sailing, which stood in the body of the policy, & inserts in a memorandum in the margin a different time for sailing, which the underwriter does not sign, the assured thereby destroys the policy, & the underwriter is discharged from the original contract.—*FAIRLIE v. CHRISTIE* (1817), 7 Taunt. 416; *Moore, C. P.* 114; 129 E. R. 106.

*Annotations:—Reid. Sanderson v. Symonds* (1819), 1 Brod. & Bing. 426; *Forshaw v. Chabert* (1821), 3 Brod. & Bing. 158; *Aldous v. Cornwell* (1868), L. R. 3 Q. B. 573.

**1158.** ———.]—A policy of insurance from Calmar to Portsmouth was altered with the consent of some of the underwriters, by inserting the words "or Weymouth" after Portsmouth:—*Held*: pltf. could not recover on the altered policy against an underwriter, who was ignorant of the alteration when it was made, even although upon being informed of the alteration, he said that he would not take advantage of it.—*CAMPBELL v. CHRISTIE* (1817), 2 Stark. 64, N. P.

*Annotation:—Reid. Sanderson v. Symonds* (1819), 1 Brod. & Bing. 426.

**1159.** ———.]—Policy of insurance on ship & goods, at & from Cuba to Liverpool, with liberty, "in that voyage, to proceed & sail to, & touch & stay at, any ports or places whatsoever; & with leave to discharge & take in, at any ports or places she might touch at, without prejudice to that insurance." The insured, after subscription of the policy, inserted in the body of it the words, "with leave to call off Jamaica," to which interpolation all the underwriters assented, without increase of premium, except debt., who, being out of the way, was not applied to. The captain sailed from Cuba with eight men, engaged to navigate to Liverpool, & two to Jamaica, being unable at Cuba to procure ten men, the proper complement of the crew for Liverpool. He then touched at Jamaica, for the sole purpose of landing the two men, & procuring others in their stead, & having accomplished his purpose, was lost on the voyage from Jamaica to Liverpool:—*Held*: (1) this was a material alteration of the policy, & rendered it void; (2) the ship was not, as to her crew, seaworthy for the whole voyage, as she ought to have been when she sailed from Cuba; (3) the circumstance of her having become seaworthy after her leaving Cuba, & before the loss, did not entitle pltf. to recover.—*FORSHAW v. CHABERT* (1821), 3 Brod. & Bing. 158; 6 Moore, C. P. 369; 129 E. R. 1243.

*Annotation:—As to (3) Reid. Quebec Marine Insee. v. Commercial Bank of Canada* (1870), L. R. 3 P. C. 234.

**1160.** ———.]—*Reinsurance.*—Pltf. co. issued an insurance policy on a ship, hull & machinery valued at £313,050. They then reinsured with debt. co. on the basis of the above value. During the currency of the reinsurance policy pltf. & the shipowners varied the head policy by reducing the value on which payment was to be based to £225,000. This variation was not communicated or known to defts. The ship became a total loss; pltf. paid certain sums under the head policy to the shipowners, & then claimed from

defts. on the reinsurance policy:—*Held*: as the head policy had been altered without the consent of the reinsurers the latter were not liable.—*NORWICH UNION FIRE INSURANCE SOCIETY v. COLONIAL MUTUAL FIRE INSURANCE CO.*, [1922] 2 K. B. 461; 91 L. J. K. B. 881; 128 L. T. 121; 38 T. L. R. 822; 66 Sol. Jo. 720; 16 Asp. M. L. C. 98; 28 Com. Cas. 20.

**1161.** ———.]—*Unless alteration immaterial.*—*CLAPHAM v. COLOGAN*, No. 522, ante.

**1162.** ———.]—Policy of insurance on ship, "at & from L. to her port or ports, place or places of discharge, & loading in Africa & African islands, & during her stay there, & at & from thence back to L., or her final port or place of discharge in the United Kingdom, with liberty in that voyage to proceed & sail to, & touch & stay at, any ports or places whatsoever & wheresoever as above: to sell, barter, & exchange goods, & load, unload, & reload goods, at any or all of the ports & places she may call at, or proceed to." The insured, subsequently to the execution of the policy, inserted after the words "during her stay," the words "& trade." Some of the underwriters assented to the alteration by subscribing their initials; others refused their assent. In an action against one who refused:—*Held*: the alteration was immaterial, & did not avoid the policy.—*SANDERSON v. SYMONDS* (1819), 1 Brod. & Bing. 426; 4 Moore, C. P. 42; 129 E. R. 786.

*Annotations:—Distd. Forshaw v. Chabert* (1821), 3 Brod. & Bing. 158. *Consd. Aldous v. Cornwell* (1868), L. R. 3 Q. B. 573; *Re Goodbody & Balfour, Williamson* (1899), 82 L. T. 484. *Reid. Davidson v. Cooper* (1843), 11 M. & W. 778; *Mollett v. Wackerbarth* (1847), 11 Jur. 1065; *Suffell v. Bank of England* (1882), 9 Q. B. D. 555.

**1163.** ———.]—A policy of insurance was effected on a ship from Liverpool to Africa, & during her stay there, & from thence back to Liverpool, with liberty to proceed to & stay at any ports of discharge & loading in Africa, to sell, barter, & exchange goods, & load, unload, & reload goods, at all or any of the ports she might call at & proceed to. After the execution of the policy, the assured inserted the words "sell & barter, & exchange goods," as well as the words "& trade" after those of "during her stay" & which were acquiesced in by several of the underwriters:—*Held*: the alteration was unimportant, & therefore did not avoid the policy against an underwriter who had subscribed his initials to the words "sell, barter, & exchange goods," but had not assented to the insertion of the words "& trade" although his initials were subscribed to them.—*SANDERSON v. M'CULLOM* (1819), 4 Moore, C. P. 5.

## SUB-SECT. 2.—MISREPRESENTATION.

### A. Representation of Fact.

See Marine Insurance Act, 1906 (c. 41), s. 20.

**1164. Material fact—With fraudulent intent.**—*ANON.* (1687), Skin. 327.

**1165.** ———.]—*ROBERTS v. FONNEREAU* (1742), 1 Park's Marine Insurances, 8th ed. p. 405.

**1166.** ———.]—Two actions were brought by the same pltf. against an insurance co. upon

## PART II. SECT. 16, SUB-SECT. 1.

**1161 i. Alteration without consent of insurer — Liability avoided—Unless alteration immaterial.**—Though the risk in a policy of insurance be extended, by an addition made to the policy, without the consent of the underwriter, he is nevertheless liable, if in fact the

voyage be not altered.—*YOUNG v. ALLAN* (1805), 13 Fac. Coll. 520.—*SCOT.*

## PART II. SECT. 16, SUB-SECT. 2.—A.

**1164 i. Material fact—With fraudulent intent.**—*MCCUAIG v. UNITY FIRE INSURANCE ASSOCN.* (1859), 9 C. P. 85.—*CAN.*

**1164 ii.** ———.]—*LYON v. STADACONA INSURANCE CO.* (1879), 44 U. C. R. 472.—*CAN.*

**1164 iii.** ———.]—*EISENHAUR v. PROVIDENCE WASHINGTON INSURANCE CO.* (1887), 20 N. S. R. (8 R. & G.) 48.—*CAN.*

**k. ——— Necessity for warranty**

two marine insurance policies. After issue had been joined an order was made at law staying one action until the other had been tried, on the terms of defts. at law being bound in both by the result of the one which should be tried. But pltf. at law was not to be bound. The co., who resisted payment upon the allegation that the policies had been obtained by fraud, afterwards filed a bill in equity to restrain the actions, & to have the policies delivered up & cancelled. No injunction was moved for. An order was made in the suit staying the proceedings until after the decision of the action. Ultimately the action which was tried was decided in favour of the co., on the ground that the policies had been obtained by fraud. Pltf. at law then delivered up both policies to the co. Upon the suit coming on for hearing:—*Held*: a decree must be made for cancellation of both policies; & defts. must pay the costs of the suit.—*LONDON & PROVINCIAL INSURANCE CO. v. SEYMOUR* (1873), L. R. 17 Eq. 85; 43 L. J. Ch. 120; 29 L. T. 641; 22 W. R. 201; 2 Asp. M. L. C. 169.

**1167. — By mistake.**—In a representation that a ship was seen safe on such a day & had performed two-thirds of her voyage, if it turn out that she had got as far as was represented, but was lost two days before the day mentioned, the mistake is material, & makes the policy void.—*MACDOWALL v. FRASER* (1779), 1 Doug. K. B. 260; 99 E. R. 170.

*Annotation*:—*Distd.* *Brine v. Featherstone* (1813), 4 Taunt. 869.

**1168. — — — — —**—*FILLIS v. BRUTTON* (1782), 1 Park's Marine Insurances, 8th ed. p. 414.

**1169. — — — — — No mala fides.**—*DENNISTOUN v. LILLIE*, No. 1172, *post*.

**1170. Fact not material—Acceptance of risk unaffected.**—Where the agent of a shipowner, effecting a policy on a ship, misrepresented the nature of the cargo which she was to carry, but this was not inserted in the policy, & it did not appear that the underwriter was induced by the misrepresentation to accept the risk:—*Held*: the jury were warranted in finding that the misrepresentation was not material, & it did not vitiate the policy.—*FLINN v. HEADLAM* (1829), 9 B. & C. 693; 7 L. J. O. S. K. B. 307; 109 E. R. 257; *affg.* S. C. *sub nom.* *FLINN v. TOBIN*, Mood. & M. 367, N. P.

**Neutrality of ship—Representation not amounting to warranty.**—*See* No. 1423, *post*.

**1171. Proof of misrepresentation—On whom onus lies.**—(1) In an action upon a marine policy, deft. pleaded that, before the making of the policy, the assured had falsely represented that, according to the last accounts, the ship was safe at Bermuda. Replication, *de injuria*:—*Held*: the onus of proof under that issue rested upon deft. But it being proved that at the time when that representation was made the assured had received a letter from Sydney informing him that the vessel had sailed thence for Bermuda in Dec., that it was not her time to be back yet, but that the weather was boisterous, & that the writer, one

of the owners, did not like her to be at their risk, the ct. thought that that was sufficient evidence of a false representation to render it incumbent on pltf. to rebut it by evidence of other information.

(2) Another plea stated that one of the assured in London, before the making of the policy, had received from another of the assured at Halifax a letter, informing him that "the weather was awful;" that there was some report of a brig being ashore near Liverpool, & of a schooner or brigantine being ashore about Canso adding, "I hope not the *Active*" (the ship insured); that the *Active* must be well on her way to Sydney; & that he hoped the insurance had been effected. The plea then alleged that that was material information, which ought to have been communicated, & was not. The *Active* was, in fact, lost upon Jan. 26, on her voyage from Bermuda to Sydney, & at no great distance from Liverpool, but did not appear to have been either of the vessels referred to in the above letter:—*Held*: the letter ought to have been communicated to the underwriters.

(3) Mere general apprehension, perhaps, need not be communicated (*LORD DENMAN*, L.J.).

(4) The rule is, that whatever information might affect the mind of a sensible insurer ought to be communicated to him (*COLERIDGE*, J.).—*ARCHIBALD v. STANHOPE* (1847), 10 L. T. O. S. 107.

#### B. Representation of Expectation and Belief.

*See, now*, Marine Insurance Act, 1906 (c. 41), s. 20 (5).

**1172. General rule—Representation not material.**—(1) Agents of the owners of a ship, by a letter, saying, "The *Brilliant* will sail from Nassau for Clyde on May 1, a running ship," instruct their correspondents to effect an insurance on the ship, which is done accordingly by them, showing this letter to the underwriters. There being a favourable opportunity of convoy, the ship sailed on Apr. 23. On May 11, she was captured:—*Held*: the expression of the letter was positive, & not the statement of an expectation; & the exhibition of the letter being a representation material to the risk covered by the policy, which was not true in fact or in the event, vitiated the policy.

There is a difference between the representation of an expectation & the representation of a fact. The former is immaterial; but the latter avoids the policy if the fact misrepresented be material to the risk (*LORD ELDON*, C.).

(2) In the case of a misrepresentation [of a material fact] *mala fides* is not necessary to render the contract inoperative (*LORD ELDON*, C.).—*DENNISTOUN v. LILLIE* (1821), 3 Bli. 202; 4 E. R. 579, H. L.

**1173. Unfulfilled—Whether policy avoided.**—

(1) A representation made to the first underwriter extends to all the others. (2) A representation, that the ship is expected to sail from the coast of Africa on such a day, is not material, so as to

clause.]—*ROYAL INSURANCE CO.* (1887), 20 N. S. R. (8 R. & G.) —CAN.

*Statement positive.*—If the —, when expressly questioned to the fact, says, not by way of opinion or expectation, but positively, that the vessel has not sailed when she really has, this will vitiate the policy.—*BRITISH AMERICA FIRE & CO.* (1838), 4 U. C. R.

m. — — — — —.]—*JOB BROTHERS & CO. v. MANHEIM INSURANCE CO.* (1899), 8 Nfld. L. R. 272.—NFLD.

n. — — — — — By agent.]—*DICKIE v. MERCHANTS MARINE INSURANCE CO.* (1883), 16 N. S. R. (4 R. & G.) 244.—CAN.

**1170 i. Fact not material—Acceptance of risk unaffected.**—*HARVEY & CO. v. SELIGMANN* (1883), 10 R. (Ct. of Sess.) 680; 20 Sc. L. R. 442.—SCOT.

**1170 ii. — — — — —**—An allegation that a

certain sum was the highest premium which had been paid is not a representation essential to the policy, & its falsehood does not vitiate the contract.—*HILL v. SIBBALD* (1809), 15 Fac. Coll. 303; *reversd.* (1814), 2 Dow, 263.—SCOT.

o. *What amounts to misrepresentation.*—It is a misrepresentation to say that a ship "is reported to have sailed" when it is known that she positively has sailed.—*KINLOCH v. DUGUID* (1813), 17 Fac. Coll. 108.—SCOT.



*Sect. 16.—Avoidance of policies: Sub-sect. 2, B. & C.; sub-sect. 3, A. & B. (a).]*

vitiates the policy, although it should turn out, that she actually sailed six months before.—*BARBER v. FLETCHER* (1779), 1 Doug. K. B. 305; 99 E. R. 197.

*Annotations:—As to (2) Consd. Bridges v. Hunter* (1813), 1 M. & S. 15. *Apld. Brine v. Featherstone* (1813), 4 Taunt. 869. *Distd. Dennistoun v. Lillie* (1821), 3 Bl 202.

**1174.** ———.]—In effecting a policy of insurance from Russia, to this country while the ship was on the outward voyage, the broker represented to the underwriters that a cargo was ready for her, & she was sure to be an early ship:—*Held*: this amounted only to a representation of what was expected on the part of the assured, & the underwriters were liable, although from the delay in bringing to load the cargo, the voyage home was turned from a summer to a winter risk.—*HUBBARD v. GLOVER* (1812), 3 Camp. 313, N. P.

**1175.** ———.]—(1) If an insurance broker states, by way of inference & computation, that a ship is at a certain place at the time of effecting a policy, it is not a ground of avoiding the policy, though the broker was utterly mistaken, the underwriter not taking the pains to inquire what were the facts on which the broker formed his conclusion. (2) No evidence can be received of representations made by the insurance broker to other underwriters than deft., subsequent to the first underwriter; (3) evidence of representations to the first underwriter is received more on precedent than on reason.—*BRINE v. FEATHERSTONE* (1813), 4 Taunt. 869; 128 E. R. 574.

*Annotation:—As to (1) Consd. De Wolf v. Archangel Insce.* (1874), L. R. 9 Q. B. 451.

**1176.** ———.]—**Representation made bonâ fide.**]—A representation to the underwriters at the time of effecting a policy by the owner of goods on board a ship, as to the time of her sailing, being made *bonâ fide* upon probable expectation, does not conclude him.—*BOWDEN v. VAUGHAN* (1809), 10 East, 415; 103 E. R. 831.

*Annotation:—Consd. Dennistoun v. Lillie* (1821), 3 Bl 202.

**1177.** ———.]—A policy assurance effected in July, 1858, against fire for twelve months, on a steamship, described in the policy as "now lying in Tait's Dock, Montreal, & intended to navigate the St. Lawrence & Lakes from Hamilton to Quebec, principally as a freight boat, & to be laid up for the winter in a place approved by the co." The ship never left the dock after the insurance was effected, & was destroyed by fire in June, 1859:—*Held*: as there was evidence of a reasonable & *bonâ fide* intention on the part of the insured to comply with the conditions of the policy, the policy was not avoided by the fact that the steamer never left the dock, as the above clause in the policy contained no contract or warranty that the ship should navigate as therein described.—*GRANT v. ÆTNA INSURANCE CO.* (1862), 15 Moo. P. C. C. 516; 6 L. T. 734; 8 Jur. N. S. 705; 10 W. R. 772; 1 Mar. L. C. 232; 15 E. R. 589, P. C.

**1178.** ———.]—In a policy of marine insurance the safety of a particular place as an anchorage was a material fact. The assurer knew nothing about the place. The assured also knew nothing about it, except that he had received a letter from the captain of the ship proposed to be insured, in which the captain expressed it as his opinion & that of the local pilot, that the place was a good & safe anchorage. This letter was, at the time of the making of the policy,

communicated to the assurer. In point of fact the place was not a good & safe anchorage, & the ship was lost there in consequence. The jury found that the captain honestly entertained the opinion he had expressed:—*Held*: this was not such a misrepresentation by the assured as to vitiate the policy.—*ANDERSON v. PACIFIC FIRE & MARINE INSURANCE CO.* (1872), L. R. 7 C. P. 65; 26 L. T. 130; 20 W. R. 280; 1 Asp. M. L. C. 220.

*C. Representation to One of Several Underwriters.*

**1179. Representation to first underwriter—How far made to subsequent underwriters—Material representation.**]—A representation to the first underwriter, has nothing to do with that which is the agreement, or the terms of the policy. No man who underwrites a policy, subscribes, by the act of underwriting, to terms which he knows nothing of. But he reads the agreement, & is governed by that. Matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of the first underwriter, who is a good man, & which another will therefore give faith & credit to; but not to a collateral agreement, which he can know nothing of. The absurdity is too glaring, it cannot be. By extension of an equitable relief in cases of fraud, if a man is a knave with respect to the first underwriter, & makes a false representation to him in a point that is material; as where having notice of a ship being lost, he says she was safe; that shall affect the policy with regard to all the subsequent underwriters, who are presumed to follow the first (*LORD MANSFIELD, C.J.*).

A warranty inserted in a policy of insurance must be literally & strictly complied with. A representation to the underwriter need only be substantially performed, but if false in a material point, it will avoid the policy.—*PAWSON v. WATSON* (1778), 2 Cowp. 785; 98 E. R. 1301; *sub nom. PAWSON v. EWER, PAWSON v. SNELL, PAWSON v. WATSON*, 1 Doug. 12, n.

*Annotations:—Consd. Bean v. Stupart* (1778), 1 Doug. K. B. 11. *Reid. Cornfoot v. Fowke* (1840), 6 M. & W. 358; *Smith v. Chadwick* (1882), 20 Ch. D. 27

**1180.** ———.]—*MARSDEN v. REID*, No. 12, *ante*.

**1181.** ———.]—**Mere collateral representation.**]—*PAWSON v. WATSON*, No. 1179, *ante*.

**1182.** ———.]—*BARBER v. FLETCHER*, No. 1173, *ante*.

**1183.** ———.]—*BRINE v. FEATHERSTONE*, No. 1175, *ante*.

**1184.** ———.]—The first & second underwriters upon a policy of assurance, who have paid the loss upon an undertaking made to them by the assured to repay the money, in case they failed in an action brought by them against a subsequent underwriter, seem not to be competent witnesses for deft. in that action, to prove that one of the assured when he effected the policy misrepresented to them that it was a summer instead of a winter risk; but if on the first trial of that action it does not appear whether the undertaking was made to the witnesses at the time they paid the loss or afterwards, & after the action was commenced, this ct. will send the case down to a second trial in order to ascertain that fact.

Whenever the question comes distinctly before the ct., whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark that that proposition is to be received with great qualification. It may depend upon the time & circumstances under which that communication was made; but on the mere



naked unaccompanied fact of one name standing first upon the policy, I should not hold that a communication to him was virtually made to all the subsequent underwriters (LORD ELLENBOROUGH, C.J.).—FORRESTER v. PIGOU (1813), 1 M. & S. 9; 105 E. R. 4.

*Annotations*:—**Mentd.** Doddington v. Hudson (1823), 1 Bing. 257; Hovill v. Stephenson (1829), 5 Bing. 493.

**1185. Representation to underwriter other than first—How far made to later underwriters.**—A representation made to any underwriter except the first on the policy, is not to be considered as made to subsequent underwriters.—BELL v. CARSTAIRS (1810), 2 Camp. 543; *subsequent proceedings* (1811), 14 East, 374.

**1186.** ———.]—BRINE v. FEATHERSTONE, No. 1175, *ante*.

### SUB-SECT. 3.—CONCEALMENT OR NON-DISCLOSURE.

#### A. Duty to Disclose.

See Marine Insurance Act, 1906 (c. 41), ss. 17, 18, 19; & generally, Part I., Sect. 9, sub-sect. 3, *ante*.

Insurance a contract *uberrimæ fidei*, see Part I., Sect. 2, *ante*.

**1187. Duty of assured.**—ELTON v. LARKINS, No. 1195, *post*.

**1188.** ———.]—UZIELLI v. COMMERCIAL UNION INSURANCE CO., No. 1197, *post*.

**1189.** ———.]—BATES v. HEWITT, No. 1220, *post*.

**1190.** ———.]—IONIDES v. PENDER, No. 763, *ante*.

**1191.** ———.]—ASFAR & CO. v. BLUNDELL, No. 2082, *post*.

**1192.** ———.]—(1) Valuation ought not to be lightly set aside, inasmuch as it is an agreement entered into for the specific purpose of preventing further dispute in case of a loss under the policy (MATHEW, J.).

(2) The underwriters are entitled to have such information given to them of matters within the knowledge of the assured as would enable them to say whether they would take the risk & what premium they would charge. This obligation on the assured is imperative, subject to the qualification that he is not bound to inform underwriters of matters as to which they choose to waive inquiry (MATHEW, J.).—HERRING v. JANSON (1895), 1 Com. Cas. 177.

*Annotation*:—**Generally, Refd.** Yorke v. Yorkshire Insurance, [1918] 1 K. B. 662.

**1193.** ———.]—LAING v. UNION MARINE INSURANCE CO., LTD., No. 1223, *post*.

**1194. Duty of agent of assured.**—FITZHERBERT v. MATHER, No. 124, *ante*.

#### B. What must be Disclosed.

##### (a) General Rule.

See Marine Insurance Act, 1906 (c. 41), s. 18; & generally, Part I., Sect. 9, sub-sect. 3, *ante*.

**1195. All material matter.**—(1) In a question of marine insurance, a material concealment is a concealment of facts which, if communicated to the underwriter, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium & a letter containing facts, which, if communicated, would lead to inquiry, which would produce important information, ought to be shown by the assured to the underwriter. A party is not bound, at the time of effecting a policy, to communicate the time of sailing of the ship, unless at that time it is a missing ship; neither is he bound to com-

municate any knowledge he may have of the time of sailing of another vessel from the same place, either before or at the same time as his own, unless he knows of something particular having happened to such other vessel, which might affect the insurance of his own.

(2) Where material facts are known to the assured at the time of effecting a policy, he is bound to communicate them; & the circumstance of their being contained in what are called Lloyd's Lists, which the underwriter has the power of inspecting, will not dispense with the necessity of such communication.

*Semble*: the information as to the time of sailing of ships from foreign ports, contained in the foreign lists filed in the inner room at Lloyd's does not dispense with the necessity of the assured disclosing to the underwriter at the time of insuring a letter received by him from his correspondent or the captain, announcing his intention to sail the next day, where the knowledge of that fact becomes material.—ELTON v. LARKINS (1832), 8 Bing. 198; 5 C. & P. 385; 1 Moo. & S. 323; 131 E. R. 376.

**1196.** ———.]—ARCHIBALD v. STANHOPE, No. 1171, *ante*.

**1197.** ———.]—Policy of marine insurance based on assumption that all material facts known to the owner in respect of his ship are disclosed at the time of insurance. Subsequently to an application to underwriters to insure a ship on her voyage from a port in Ireland to the port of Nassau, & previously to the terms of insurance being agreed on, the owner of the ship received information that the ship had put into an intermediate port to repair, & the owner omitted to advise the underwriters of the same:—*Held*: (1) the owner of the ship was bound to communicate to the underwriters all material facts known to the owner at the time of insurance, & during the progress of the negotiations between him & the underwriters; (2) the withholding of such facts deprived the underwriters of a fair opportunity of judging of the condition of the ship, & of calculating the risks run by them in insuring; (3) the non-disclosure of such facts, even where there was no fraudulent concealment, voided the policy.—UZIELLI v. COMMERCIAL UNION INSURANCE CO. (1865), 12 L. T. 399; 2 Mar. L. C. 218.

**1198.** ———.]—IONIDES v. PENDER, No. 763, *ante*.

**1199.** ———.]—RIVAZ v. GERUSSI, No. 585, *ante*.

**1200.** ———.]—ASFAR & CO. v. BLUNDELL, No. 2082, *post*.

**1201.** ———.]—HERRING v. JANSON, No. 1192, *ante*.

**1202.** ———.]—LAING v. UNION MARINE INSURANCE CO., LTD., No. 1223, *post*.

**1203.** ——— **What is material matter—Question for jury.**—DURRELL v. BEDERLEY, No. 120, *ante*.

**1204.** ———.]—CAMPBELL v. RICKARDS, No. 1315, *post*.

**1205.** ———.]—IONIDES v. PENDER, No. 763, *ante*.

**1206.** ——— **Dependent on circumstances of each case.**—Pltfs. claimed for a total loss on two policies of insurance on the hull & machinery of their auxiliary schooner, for a voyage from America to France & back again. The vessel completed the outward voyage safely, but was destroyed by fire on her return voyage. Defts. pleaded concealment of a material fact—namely, that the owners of the vessel had before effecting the insurance, entered into a freight engagement for the carriage in the vessel of 2,500 drums of petrol from America to France. The schooner

## INSURANCE.

**Sect. 16.—Avoidance of policies: Sub-sect. 3, B. (a), (b), (c) & (d).]** not a fact material to be communicated & pltf. & Co. v. STRAITS INSURANCE CO. (1894), 10 T. L. R. 517, C. A.

was a wooden vessel with auxiliary motor engines, which were run with fuel oil, & for this purpose would ordinarily carry in the engine-room some 300 or 400 gallons of petrol. Apart from this it was proved that petrol in iron drums was quite an ordinary & common form of merchandise to be included as part of a general cargo to be carried across the Atlantic:—*Held*: (1) the question whether disclosure must be made or not is one of degree, depending on the circumstances of each particular case; (2) on the evidence the general rule prevailing in reference to insurance upon hull was that no disclosure in reference to the nature of the cargo to be carried was either made by the assured or expected by the underwriter; (3) the evidence as to the practice in relation to the non-disclosure of the character of the cargo when effecting a policy on hull justified & required the ct. to hold that an underwriter waived any information in relation to what might be fairly described as a parcel of ordinary cargo of lawful merchandise, which the parcel of petrol in question was; (4) the disclosure that the vessel was a wooden vessel with auxiliary motor engines was a disclosure of the fact that it was proposed to carry cargo from America to France in a vessel specially & dangerously liable to fire damage, & such disclosure was, within LORD ESHER'S language in *Asfar & Co. v. Blundell*, No. 2082, *post*, a sufficient disclosure to put the underwriter on inquiry.—*MANN MACNEAL & STEEVES v. CAPITAL & COUNTIES INSURANCE CO.*, *MANN MACNEAL & STEEVES v. GENERAL MARINE UNDERWRITERS*, [1921] 2 K. B. 300; 90 L. J. K. B. 846; 124 L. T. 778; 37 T. L. R. 247; 15 Asp. M. L. C. 225; 26 Com. Cas. 132, C. A.

(b) *Apprehensions or Opinions.*

**1207. Apprehensions—Need not be disclosed.]—**ARCHIBALD v. STANHOPE, No. 1171, *ante*.

**1208. — Of foreign correspondents—Grounds for apprehension disclosed.]—**BELL v. BELL, No. 876, *ante*.

**1209. — As to ship's safety—Not well founded.]—**A person alarmed at not hearing any intelligence of his ship, stated it as a reason for insuring her. According to the usual time taken in a voyage, she could not be considered as a missing ship:—*Held*: he was not bound to express his fears to the underwriters at the time he effected the insurance.—*MORGAN v. PRYOR* (1823), 2 B. & C. 14; 3 Dow. & Ry. K. B. 215; 1 L. J. O. S. K. B. 224; 107 E. R. 288.

*Annotations*:—*Mentd.* Smallcombe v. Burges (1824), M'Cle. 45; Binns v. Tetley (1825), M'Cle. & Yo. 397; Wormald v. Mackintosh (1840), 10 L. J. Ch. 7.

**1210. Opinions—Of other underwriters.]—**A vessel was insured by pltf. with the Globe Insurance Co. in Mar. 1890. In Aug. 1890, a representative of that co. told the clerk of pltf.'s brokers that he would like to be off the risk. In Sept. pltf. insured the vessel with deft. co. without communicating to them what the agent of the insurance co. had said:—*Held*: this was

**1211. — As to material circumstances.]—**(1) The owners of a floating dock insured it against loss on a voyage by sea, the policy containing the words "seaworthiness admitted." The dock was in sound condition as a dock, but in order to make it seaworthy for a voyage it required special strengthening. It was not in fact so strengthened, the owners honestly believing that such strengthening was unnecessary, & that it was capable of being safely towed to its destination without it. The dock was lost on the voyage. In an action on the policy the underwriters contended that the fact that the dock had not been strengthened was a material circumstance the non-disclosure of which avoided the policy:—*Held*: as the underwriters knew that the subject-matter of the insurance was a floating dock & therefore not an ordinary sea-going vessel, they were by the insertion in the policy of the words "seaworthiness admitted" put on inquiry as to its construction, & in the absence of injury the owners were not bound to disclose the want of special strengthening.

(2) The question whether the dock required to be specially strengthened for the voyage was not a question of fact but of opinion, & in the circumstances the fact that the dock had not been strengthened was not a material circumstance which the owners were bound to disclose.

By material circumstance is I think meant a material circumstance of fact to the exclusion of a material circumstance of opinion (BUCKLEY, L.J.).—*CANTIERE MECCANICO BRINDISINO v. JANSON*, [1912] 3 K. B. 452; 81 L. J. K. B. 1043; 107 L. T. 281; 28 T. L. R. 561; 57 Sol. Jo. 62; 12 Asp. M. L. C. 246; 17 Com. Cas. 332, C. A.

(c) *Information Known or Presumed to be Known to Insurer.*

*See* Marine Insurance Act, 1906 (c. 41), s. 18 (3).

**1212. Non-disclosure by assured—Knowledge acquired allunde by underwriter.]—**FOLEY v. TABOR, No. 129, *ante*.

**1213. — —.]—**BATES v. HEWITT, No. 1220, *post*.

**1214. — — After slip signed—Policy issued under protest.]—**Deft., an underwriter, signed a "slip" effecting an insurance on the freight of a certain ship; at the time of his so signing pltf. knew of, but did not communicate to deft., a fact which the ct. held to be a material fact, which pltf. was bound to communicate. Deft. subsequently, at a time when he was fully acquainted with this fact, signed a policy in conformity with the terms of the "slip," but also at the same time wrote a letter of protest to pltf.'s brokers, declaring that he would resist any claim made under the policy:—*Held*: the policy was vitiated by the concealment, & the action was not maintainable.—

**PART II. SECT. 16, SUB-SECT. 3.—**  
B. (b).

**p. Apprehensions—Report of hurricane.]—**MAHONEY v. PROVINCIAL INSURANCE CO. (1869), 12 N. B. R. (1 Han.) 622.—CAN.

**q. — —.]—**A vessel was seen, five or six hours before a very heavy gale of wind came on, in such a

situation that it was conjectured she must either have reached a port in that time or have been lost in the storm. This fact & opinion was communicated to the broker, who immediately effected an insurance:—*Held*: the fact upon which the opinion was founded ought to have been communicated to the underwriters.—*BOWKER & CO. v. SMITH* (1810), 15 Fac. Coll. 571.—SCOT.

**r. — Letters giving rise thereto.]—**The insured are not bound to communicate to the underwriter letters which merely afford room for surmise or conjecture relative to the risk.—*LAMB v. SMITH* (1815), 18 Fac. Coll. 220.—SCOT.

**t. Opinions—As to material circumstances.]—**BOGLE v. SMITH (1809), 5 Pat. App. 248; *revers.*, 13 Fac. Coll. 363.—SCOT.

NICHOLSON v. POWER (1869), 20 L. T. 580; 3 Mar. L. O. 236, Ex. Ch.

*Annotation* :—*Reid*. Morrison v. Universal Marine Insce. (1873), L. R. 8 Exch. 197.

1215. ——— Policy issued without protest.]—MORRISON v. UNIVERSAL MARINE INSURANCE CO., No. 1236, *post*.

1216. Matters of common notoriety—Natural or political perils.]—CARTER v. BOEHM, No. 3, *ante*.

1217. ———.]—BATES v. HEWITT, No. 1220, *post*.

1218. Matters diminishing risk.]—CARTER v. BOEHM, No. 3, *ante*.

1219. Matters within means of knowledge—Exact cargo.]—FOLEY v. TABOR, No. 129, *ante*.

1220. ——— Identification of ship.]—A person proposing a marine insurance is bound to communicate every fact within his knowledge that is material; though, if a particular fact be known to the underwriter at the time, he cannot set up as a defence to an action on the policy that the fact was not communicated; but if a material fact be not communicated, which, though known to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; & it is not enough for the assured to show that the particulars supplied by the assured, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated.

During the American War in 1863-4, the *Georgia* screw steamer obtained notoriety as a cruiser in the service of the Confederate States; in May, 1864, she put into Liverpool, where she was dismantled, & this was also a subject of public notoriety, & as such, known to deft., an underwriter at Lloyd's; at Liverpool she was bought by pltf. at public auction, & converted by him into a merchant vessel. In Aug. 1864, pltf., through his broker in London, effected with deft. an insurance of the vessel for six months. The particulars furnished by pltf. were *Georgia*, S.S., chartered on a voyage from Liverpool to Lisbon & the Portuguese settlements on the west coast of Africa & back. The vessel sailed from Liverpool, & was immediately captured by a frigate of the United States. In an action on the policy to recover for the loss, deft. set up as a defence the concealment of the fact that the *Georgia* proposed for insurance was the late Confederate war-steamer, & therefore liable to capture by the United States. The jury found that deft. was not aware that the *Georgia* which he was insuring was the Confederate steamer, but that he had, at the time of underwriting, abundant means of identifying the ship from his previous knowledge, coupled with the particulars given by pltf.:—*Held*: deft. was entitled to the verdict.

It is also true that when a fact is one of public notoriety, as of war, or where it is one which is matter of inference, & the materials for informing the judgment of the underwriter are common to both, the party proposing the insurance is not bound to communicate what he is fully warranted in assuming the underwriter already knows. Short of these things the party proposing the insurance is bound to make known to the insurer whatever is necessary & essential to enable him to determine what is the extent of the risk against which he undertakes to insure (COCKBURN, C.J.).—BATES v. HEWITT (1867), L. R. 2 Q. B. 595; 36 L. J. Q. B. 282; 15 W. R. 1172.

*Annotations* :—*Expld*. Harrower v. Hutchinson (1869), 38 L. J. Q. B. 185. *Distd*. Gandy v. Adelaide Insce. (1871),

L. R. 6 Q. B. 746. *Consd*. *Re* Universal Non-Tariff Fire Insce., Forbes' Claim (1875), L. R. 19 Eq. 485. *Apld*. Mercantile S.S. Co. v. Tyser (1881), 7 Q. B. D. 73; London General Insce. v. General Marine Underwriter's Assocn., [1921] 1 K. B. 104.

1221. ——— Reference to charter-party.]—ASFAR & Co. v. BLUNDELL, No. 2082, *post*.

1222. Matters pertaining to knowledge of business.]—LAING v. UNION MARINE INSURANCE CO., LTD., No. 1223, *post*.

Matters pertaining to Lloyd's Lists & Registers.]—*See* Sub-sect. 3, B. (e), *post*.

Matters pertaining to trade usage.]—*See* Sub-sect. 8, B. (f), *post*.

Matters pertaining to warranties.]—*See* Sub-sect. 3, B. (g), *post*.

(d) Information Waived by Insurer.

*See* Marine Insurance Act, 1906 (c. 41), s. 18 (3) (c).

1223. General rule.]—Where a person intending to insure proposes a risk to an underwriter he is bound to describe clearly the nature of the burden of which he is desirous to be relieved & which he proposes to transfer to the underwriter; & the underwriter is entitled from the assured to all the information which will enable him to say whether he will accept the risk & at what premium he will do so. In other words, it is the duty of the assured to take proper steps to insure that he & the underwriter are *ad idem*. That general rule is subject to two qualifications. In the first place the assured is not bound to disclose what he may reasonably presume that the underwriter knows with respect to the proposed risk, for he is entitled to assume that the insurer knows his business; & in the second place he is not bound to give information which the underwriter waives or as to which the assured may reasonably infer that the underwriter is indifferent (MATHEW, J.).

Pltf. instructed B. by letter to effect a policy upon his ship from Haiphong "to Hongay, thence, coals, to Hong Kong, thence to Japan & back to Hong Kong, thence to Japan & New Zealand." Defts. subscribed a policy insuring the ship "Haiphong to any ports or places in any order in Japan while there, & thence to any ports or places in New Zealand . . . with leave to call at any ports or places in or out of the customary route in any order for all purposes. . . . Interest insured to be held covered in the event of deviation, change of voyage, or breach of warranty at a premium to be arranged." The ship proceeded from Haiphong to Hongay, where she loaded a cargo of coals for Hong Kong, & was lost between Hong Kong & Hongay. Defts. denied that they had been shown pltf.'s letter of instructions to B., & declared that Hongay was not known to them, & was a difficult & dangerous port:—*Held*: there had been no sufficient disclosure by the assured, & the loss was not covered by the policy.—LAING v. UNION MARINE INSURANCE CO., LTD. (1895), 11 T. L. R. 359; 1 Com. Cas. 11.

*Annotation* :—*Reid*. Schloss v. Stevens (1906), 75 L. J. K. B. 927.

1224. ———.]—HERRING v. JANSON, No. 1192, *ante*.

1225. Insurer put on inquiry.]—Two prizes being carried into Liverpool, the captor gave orders to effect an insurance on them in London. One of the prizes arriving on Sunday, the owner sent a despatch to his agent in London, stating that fact, & expressing fears as to the other ship. The express reached the broker on Tuesday, & on that day an entry was made at Lloyd's of the arrival of the vessel at Liverpool. On Wednesday the captor's agent effected an insurance on the other



*Sect. 16.—Avoidance of policies: Sub-sect. 3, B. (d),*

vessel at a premium of fifty guineas per cent. without communicating to the underwriters the fact of the express:—*Held*: this was not a concealment which vitiated the policy.

If the underwriter had wished to know by what means the broker acquired his information that the ship had not arrived, he should have made inquiry: but he waived the inquiry by putting no questions to him though they naturally arose from the subject (LORD MANSFIELD, C.J.).—*COURT v. MARTINEAU* (1782), 3 Doug. K. B. 161; 99 E. R. 591.

**1226.** ———.]—*ASFAR & CO. v. BLUNDELL*, No. 2082, *post*.

**1227.** ——— **Disclosure of letter—Containing reference to earlier letter.**—A ship on an African voyage, the common duration of which is several months, & sometimes extends to a twelvemonth or more, arrived on the coast in Aug. 1799, & in Feb. 1800, her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain & several of the crew, & wounded others; by means of which & a fever the crew were reduced to five, & all those sickly, & not a man to be procured at hand: that they had been plundered of their clothes, etc., & their cabin stores were exhausted, & they did not know what to do. A second letter, dated Apr. 21, 1800, from Gaboon River, mentioned their arrival there on Mar. 24, that the natives finding them weakly handed, & their goods taken from them, did as they pleased: that they had then nine men on board, but their provisions run very low: that he had mentioned certain parts of the cargo in his last letter, & expected to ship the rest & to sail at the end of the next month. An insurance was effected in Sept. 1800, on the production of the last letter only, "at & from the ship's arrival at her first place of trade on the coast of Africa, etc.":—*Held*: sufficient that the last letter truly stated the then condition & circumstances of the ship; which, though better than when the first letter was written, was yet no fraudulent concealment of the former circumstances; the second letter, both in its terms & contents, referring to a former letter, which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties in part subdued, & to the extent truly stated in the second letter, would have varied the risk; & when the underwriters, cognizant as they must be presumed to be of the common duration of such a voyage, could not fairly collect from the contents of the second letter that the first arrival of the ship on the coast was only on Mar. 24, when she was stated to have arrived in Gaboon River, & to have had much of her homeward bound cargo on board on Apr. 21, & was expected to sail with the remainder by the end of May.—*FREELAND v. GLOVER* (1806), 7 East, 457; 6 Esp. 14; 3 Smith, K. B. 424; 103 E. R. 177.

**1228.** ——— **Subject-matter of insurance—Floating dock.**—*CANTIERE MECCANICO BRINDISINO v. JANSON*, No. 1211, *ante*.

**1229.** ——— **Construction of ship.**—*MANN MACNEAL & STEEVES v. CAPITAL & COUNTIES INSURANCE CO., MANN MACNEAL & STEEVES v. GENERAL MARINE UNDERWRITERS*, No. 1206, *ante*.

**1230.** **Reinsurance policy—Agreement to terms of original policy—Without notice.**—Pltfs. insured the hull of a steamship on a time policy for £500 at a premium of 6 per cent.

The policy contained a clause that the ship had the option to navigate the Canadian lakes, & an additional premium of 3 per cent. was paid in respect thereof. Defts. reinsured £250 on the risk at the same premium of 6 per cent. but no mention was made at the time the reinsurance was effected of the option to navigate the lakes or the additional premium. Defts.' policy was stated to be "subject without notice to the same clauses & conditions as the original policy." While in the lakes the ship sustained damage in respect of which pltfs. paid £117 13s. on their original policy. Pltfs. claimed £58 16s. 6d., the proportion due from defts., but defts. repudiated liability on the ground that a material fact had been concealed from them, & their policy of reinsurance was thereby rendered invalid:—*Held*: although the option to navigate the lakes was a material fact that ordinarily should have been disclosed when the reinsurance was effected, defts. had agreed to be bound by the terms of the original policy without notice, & were therefore liable.—*PROPERTY INSURANCE CO., LTD. v. NATIONAL PROTECTOR INSURANCE CO., LTD.* (1913), 108 L. T. 104; 57 Sol. Jo. 284; 12 Asp. M. L. C. 287; 18 Com. Cas. 119.

**1231.** **Information as to cargo—Insurance effected on hull.**—*MANN MACNEAL & STEEVES v. CAPITAL & COUNTIES INSURANCE CO., MANN MACNEAL & STEEVES v. GENERAL MARINE UNDERWRITERS*, No. 1206, *ante*.

(e) *Information in Lloyd's Lists and Registers.*

**1232.** **Necessity for disclosure—Whether underwriters' knowledge presumed.**—In effecting a policy of insurance, a circumstance of intelligence, inserted in Lloyd's Lists, need not be communicated to the underwriters, however important it may be to the computation of the risk; for it is to be presumed within their knowledge, & to be taken into account.—*FRIERE v. WOODHOUSE* (1817), Holt, N. P. 572, N. P.

*Annotations*:—*Distd.* Bates v. Hewitt (1867), L. R. 2 Q. B. 595. *Refd.* Morrison v. Universal Marine Insce. (1872), L. R. 8 Exch. 40.

**1233.** ———.]—*ELTON v. LARKINS*, No. 1195, *ante*.

**1234.** ———.]—The Shipping List at Lloyd's, stating the time of a vessel's sailing, is *prima facie* evidence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents, from having access to it in the course of his business; but where the insurer, in a letter written for the purpose of effecting the insurance, made a false statement & concealment as to the time of the vessel's sailing, & the underwriter, relying upon that representation, did not in fact look at the list, but acted upon the representation in making the insurance:—*Held*: the underwriter was not bound by the contents of the list, so as to render the misrepresentation & concealment by which he was misled immaterial, & it was the duty of the judge to have pointed out to the jury that misrepresentation & concealment.—*MACKINTOSH v. MARSHALL* (1843), 11 M. & W. 116; 12 L. J. Ex. 337; 7 L. T. 45; 152 E. R. 739.

*Annotation*:—*Refd.* Bates v. Hewitt (1867), L. R. 2 Q. B. 595.

**1235.** ———.]—*ECCLES v. HARVEY* (1844), 4 L. T. O. S. 99.

**1236.** ———.]—Pltf.'s insurance broker effected an insurance with deft.'s on the chartered freight of pltf.'s ship *Cambria* without disclosing to deft.'s certain information in his possession, which it was material that they should know. In so doing he acted in good faith, supposing, from

inquiries that he had made, that the information was incorrect. The information not disclosed by the broker had appeared in Lloyd's List, which is a daily newspaper containing hundreds of entries relating to shipping in all parts of the world, & circulating among shipowners, underwriters & insurance brokers; defts. were in fact subscribers to this newspaper:—*Held*: the broker was not entitled to assume a knowledge by the underwriters of the contents of Lloyd's List.

It is impossible to say that there is any rule of law, or any principle or authority, which affects the underwriters with knowledge of what is contained in Lloyd's Lists. No doubt some knowledge may be assumed in the underwriters. . . . But to hold that the underwriter is bound to carry in his head all that is contained in Lloyd's List relating to a ship in which he has no interest, rather than to hold the owner of the ship bound to disclose it, would be to put a difficult & needless burden on the underwriter (BRAMWELL, B.).—MORRISON v. UNIVERSAL MARINE INSURANCE CO. (1872), L. R. 8 Exch. 40; 42 L. J. Ex. 17; 27 L. T. 791; 21 W. R. 196; *reversd.* on other grounds (1873), L. R. 8 Exch. 197, Ex. Ch.

*Annotation*:—Mentd. Marsden v. Sambell (1880), 43 L. T. 120.

1237. ———.]—On Sept. 25, 1918, pltfs. effected with defts. a policy of reinsurance upon the cargo of the steamship *Vigo*, "lost or not lost," which pltfs. had themselves previously insured. On the night of Sept. 24 it was known at Lloyd's that part of the cargo had been destroyed by fire on board the *Vigo*. The fact was posted on the casualty board at Lloyd's in the morning of Sept. 25, & a casualty slip containing the information was at the same time sent to Lloyd's to their subscribers, including pltfs. At 10 o'clock on Sept. 25 pltfs. instructed their brokers to effect the reinsurance policy at Lloyd's. They did it at 4 o'clock on the same afternoon. Pltfs., although they received the casualty slip, did not read it, & did not, in fact, know of the casualty. Defts. when they wrote the risk were equally ignorant of it. In an action upon the policy:—*Held*: defts. were entitled to judgment on the ground of non-disclosure of a material circumstance. Pltfs. ought in the ordinary course of business to have known of the casualty in time to recall their instructions to their brokers to effect the reinsurance. They had no right to neglect the casualty slips in a case where they were already on a risk on the ship. Defts., on the other hand, if they had looked at the slips, could not be expected to have always present to their minds information about a vessel which at the time they got the information would have no interest for them at all.—LONDON GENERAL INSURANCE CO. v. GENERAL MARINE UNDERWRITER'S ASSOCN., [1921] 1 K. B. 104; 89 L. J. K. B. 1245; [124 L. T. 67; 36 T. L. R. 887; 15 Asp. M. L. C. 94; 26 Com. Cas. 52.

1238. ———.]—*Degradation of ship's class in register.*—REDMAN v. WILSON (1844), 7 L. T. 45.

1239. ———.]—By the rules of Lloyd's Register, a ship classed in it A. 1, for seven years, in order to retain that position is required to undergo a half time survey in the fourth year, the result of which is reported to the committee. If the survey is satisfactory to the committee, the ship retains her class, & the letters "H. T.," with the date of the survey, are placed opposite the entry of her name, etc. If the report is not satisfactory, she is degraded from her class; & if the survey is not had, or is declined by the owner, she is struck out of the register. The time for the half time survey is not strictly observed.

Every subscriber has a copy of the register; & in the case of London subscribers, the books are sent weekly to Liverpool for correction, when they are posted up & returned the next day. Pltf. was the owner of the bark *Annie*, which was classed in the register in Nov. 1865, as A. 1 for seven years. In Oct. 1869, she was lying for repairs at Liverpool, & Lloyd's surveyor informed pltf. by letter that the *Annie* was due for half time survey, & requested to know when she would be ready for survey; pltf. replied that he had decided not to continue the *Annie* in Lloyd's book. On Oct. 28, pltf.'s agent in London, pursuant to his directions, applied to defts. to know at what rate they would insure the *Annie* for twelve months; defts. were subscribers to Lloyd's Register, & their underwriter referred to the entry in the register as to the *Annie*, & asked pltf.'s agent whether that was the ship he wished to insure, to which he replied "Yes." She then stood as A. 1, for seven years from 1865. The underwriter gave the rate of insurance as of a ship classed A. 1, & on Nov. 15 the ship was initialled for insurance, & a policy was insured & dated Dec. 1, 1869. On Nov. 16, the *Annie* was struck out of Lloyd's register, & notice was given to pltf. on Nov. 17. On Nov. 23, defts.' copy of the register was returned to them with the entry as to the *Annie* struck through. On Dec. 31, she was wrecked & became a total loss. An action having been brought on the policy, defts. pleaded concealment. At the trial, on the above facts, the judge refused to direct a verdict for defts. on that plea, but reserved the point; & he left to the jury the questions, 1. "Was the fact that pltf. had resolved not to continue the ship on the register, & had so stated to the surveyor, material?" To which the jury answered "No." 2. "Ought the underwriter, on Nov. 15 to have known that the continuance of the class must depend on whether the ship had been then lately surveyed & passed, or would within a few days be surveyed & passed, or repaired; & if 'yes,' ought the knowledge to have put the underwriter to ask whether she had been surveyed or was about to be surveyed?" To this the jury answered "Yes"; & a verdict was thereupon entered for pltf. On a rule to enter a verdict for defts., & for a new trial:—*Held*: (1) the case was rightly left to the jury; & there had been no misdirection; the verdict ought not to be disturbed.

(2) *Prima facie*, we should think that every underwriter who relies upon the classification of a ship in Lloyd's register, as determining the rate of insurance, ought to be acquainted with the rules & practice which give the classification its value (MELLOR, J.).—GANDY v. ADELAIDE INSURANCE CO. (1871), L. R. 6 Q. B. 746; 40 L. J. Q. B. 239; 25 L. T. 742; 1 Asp. M. L. C. 188.

(f) *Circumstances Covered by Trade Usage.*

*See, generally*, Sect. 3, sub-sect. 5, *ante*.

**Presumption that insurer acquainted with usage.]**

—*See* Sect. 3, sub-sect. 5, C., *ante*.

**1240. African trade—Common duration.]**—FREELAND v. GLOVER, No. 1227, *ante*.

**1241. ——— Mutual co-operation or trading—Usage not complete.]**—Insurance on a ship engaged in the African wood & ivory trade, without stating her co-operation with another ship. This mutual co-operation or trading proved to have occasionally prevailed in African voyages, but the usage not so complete as to render it unnecessary to communicate the fact expressly to



*Sect. 16.—Avoidance of policies: Sub-sect. 3, B. (f), (g), (h), (i) & (j).]*

the underwriters:—*Held*: this was a concealment of a material fact, & fatal to the policies.—*TENNANT v. HENDERSON, HENDERSON v. FETTES* (1813), 1 Dow. 324; 3 E. R. 716, H. L.

*Annotation*:—*Refd.* *Tate v. Hyslop* (1885), 15 Q. B. D. 368.

**1242. East India trade—Risk of detention.]—***SALVADOR v. HOPKINS, HEATON v. RUCKER*, No. 302, *ante*.

**1243. Jamaica trade—Transshipment of cargo.]—***STEWART v. BELL*, No. 847, *ante*.

**1244. Newfoundland trade—Length of time of usage.]—***NOBLE v. KENNOWAY*, No. 41, *ante*.

**1245. — Intermediate voyage.]—***OUGIER v. JENNINGS* (1800), 1 Camp. 505, n., N. P.

*Annotations*:—*Consd.* *Mount v. Larkins* (1831), 8 Bing. 108. *Refd.* *Phillips v. Irving* (1844), 7 Man. & G. 325; *De Wolf v. Archangel Insce.* (1874), L. R. 9 Q. B. 451.

**1246. — Usage general but not uniform.]—**According to the usage of the Newfoundland trade, when ships arrive on the coast they are either employed for some time in fishing, called banking, or they make an intermediate voyage in the American seas, before beginning to take in their homeward cargo, during which they are protected by a separate policy. Therefore, in effecting a policy "lost or not lost at & from Newfoundland to a port in Europe" although the ship is to be employed in banking, it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking or intermediate voyage ends, & they are bound to know the nature & circumstances of the branch of trade to which the policy relates. If the usage is general, it makes no difference for this purpose, that it is not uniform.—*VALLANCE v. DEWAR* (1808), 1 Camp. 503, N. P.

*Annotations*:—*Consd.* *Mount v. Larkins* (1831), 8 Bing. 108; *Palmer v. Marshall* (1831), 8 Bing. 79. *Refd.* *De Wolf v. Archangel Insce.* (1874), L. R. 9 Q. B. 451.

**1247. Oporto trade—Place of loading.]—***KINGSTON v. KNIBBS* (1808), 1 Camp. 508, n., N. P.

*Annotation*:—*Refd.* *Lang v. Anderdon* (1824), 3 B. & C. 495.

**1248. Deck cargo—Carboys of vitriol.]—**Policy "on forty carboys of vitriol." They were carefully stowed on deck; but caught fire, & were necessarily thrown overboard during the voyage: carboys of vitriol are sometimes stowed on the deck, & sometimes bedded in sand in the hold, where they are considered safer:—*Held*: the underwriters in this case were liable, although there was no communication to them that the carboys were to be stowed on deck.

If there is a usage to carry vitriol on deck, the underwriters are bound to take notice of it without any communication, & all they can require is that these carboys should be properly stowed in the usual manner (*LORD ELLENBOROUGH, C.J.*).—*DA COSTA v. EDMUNDS* (1815), 4 Camp. 142; *subsequent proceedings*, 2 Chit. 227.

*Annotations*:—*Consd.* *Gould v. Oliver* (1837), 4 Bing. N. C. 134; *Milward v. Hibbert* (1842), 3 Q. B. 120; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41.

**1249. — Bales of wool.]—***BRITISH & FOREIGN MARINE INSURANCE CO. v. GAUNT*, No. 527, *ante*.

**1250. Cesser clause in time policy on freight.]—***THE BEDOUIN*, No. 1687, *post*.

*(g) Circumstances Covered by Warranties, etc.*

*See Marine Insurance Act, 1906 (c. 41), s. 18 (3).*

**1251. Circumstances affecting seaworthiness of ship—Covered by implied warranty.]—***SHOOLBRED v. NUTT* (1782), 1 Park's Marine Insurances, 8th ed. p. 493; 1 Marshall on Marine Insurances, 3rd ed. p. 474.

*Annotations*:—*Appld.* *Haywood v. Rodgers* (1804), 4 East, 590. *Mentd.* *Bird v. Appleton* (1800), 1 East, 111.

**1252. — — —.]—**As an assured impliedly warrants the ship insured to be seaworthy, whatever forms an ingredient in seaworthiness is not necessary to be disclosed by the assured to the underwriter, in the first instance, unless information upon the subject be particularly called for; & then the assured must disclose truly what he knows in the respect required. Therefore where the assured of a ship had received a letter from his captain informing him that he had been obliged to have a survey on the ship at Trinidad, on account of her bad character; but the survey which accompanied the letter gave the ship a good character:—*Held*: the non-disclosure of such letter & survey to the underwriters did not vacate the policy; though it appeared in evidence that such circumstance, if known, would have enhanced the premium of insurance.—*HAYWOOD v. RODGERS* (1804), 4 East, 590; 102 E. R. 957; *sub nom.* *HEYWARD v. RODGERS*, 1 Smith, K. B. 289.

*Annotations*:—*Refd.* *Freeland v. Glover* (1806), 7 East, 457; *Harrower v. Hutchinson* (1870), L. R. 5 Q. B. 584; *Asfar v. Blundell*, [1895] 2 Q. B. 196.

**1253. — — — Efficiency of master.]—***THAMES & MERSEY MARINE INSURANCE CO. v. GUNFORD SHIP CO., SOUTHERN MARINE MUTUAL INSURANCE ASSOCN. v. GUNFORD SHIP CO.*, No. 765, *ante*.

*(h) Name of Ship.*

**1254. Ships known to be in danger.]—**An insurance was effected on goods on board ship or ships from the Canary Islands to London; & at the time the assured's agent, who effected the policy, knew that one of the ship or ships was named the *President*; & at the same time there was a paper of communication stuck up at Lloyd's, that the *Howard*, . . . arrived off Dover from Teneriffe: sailed 24th ult.; on the 27th, off the Salvages, fell in with the *President*, . . . from Lanzarette, deep & leaky": but the agent did not communicate his knowledge of the ship's name to the underwriters:—*Held*: the policy was thereby avoided, though the intelligence afterwards turned out to be false.—*LYNCH v. DUNSFORD* (1811), 14 East, 494; 104 E. R. 691, Ex. Ch.; *affg.* *S. C. sub nom.* *LYNCH v. HAMILTON* (1810), 3 Taunt. 37.

*Annotations*:—*Consd.* *Rickards v. Murdock* (1830), L. & Welsb. 132. *Appld.* *Leigh v. Adams* (1871), 25 L. T. 566. *Refd.* *Blackburn, Low v. Vigors* (1887), 12 App. Cas. 531.

**1255. — — —.]—**Pltf. was accustomed to insure at Lloyd's upon floating policies quantities of cochineal shipped for him from the Canaries; he declared the name of the ship upon receipt of each bill of lading. He received information that a large quantity would be shipped in the *Candida*, & by the same mail an anonymous letter reached Lloyd's containing a statement that the owners intended to lose that ship on her next voyage, in order to make the underwriters pay. A notice of this letter was openly affixed to a board at

PART II. SECT. 16, SUB-SECT. 3.—  
B. (g).

**1251 l. Circumstances affecting seaworthiness of ship—Covered by implied warranty.]—**In marine insurance, the seaworthiness of a vessel is a matter of

warranty, & it is not necessary to communicate any circumstances as to a vessel's previous history, in so far as these affect her seaworthiness.—*BAKER & ADAMS v. SCOTTISH SEA INSURANCE CO.* (1856), 18 Dunl. (Ct. of

Sess.) 691; 28 Sc. Jur. 293.—SCOT.

*a. — — —.]—*STANDARD MARINE INSURANCE CO. v. WHALEN PULP & PAPER CO. (1922), 68 D. L. R. 269; 64 S. C. R. 90; [1922] 3 W. W. R. 211; *affg.*, 68 D. L. R. 181.—CAN,



Lloyd's; & pltf. was aware of the contents of the letter, but considered them unworthy of credit. At this time pltf. reasonably expected that the bills of lading by the *Candida* would be the next to be declared by him, & in that case they would be covered by policies previously made. He entered into the policy now sued upon without communicating to the underwriter his intelligence of a cargo to be shipped by the *Candida*, or the contents of the anonymous letter. By accident the bills of lading of the *Candida* came to pltf. after those of later shipments, & this policy was declared upon the *Candida*:—*Held*: pltf. had been guilty of a concealment which invalidated the policy.—*LEIGH v. ADAMS* (1871), 25 L. T. 566; 1 Asp. M. L. C. 147.

**1256. Assured's knowledge of name.]**—Pltf. while in London received orders to insure goods shipped on board one of a line of steamers between Jamaica & Liverpool. The steamer had then started on her voyage. He insured the goods with deft. by a valued policy upon every kind of goods & merchandise "by any steamer" from Liverpool to Jamaica. At the time of effecting the insurance he did not disclose the name of the vessel to the insurers, although he had the bills of lading in his possession. Evidence was given to show that, according to the practice of underwriters, the insurance of goods "by any steamer" would indicate that the voyage had not commenced at the date of the insurance, & that from the non-discharge of the name of the vessel it would be inferred that the assured did not himself know it:—*Held*: it was for the jury to say whether the non-disclosure of the name of the vessel had a material influence upon the underwriters in assessing the premium or in accepting the risk, & upon their finding this question in the affirmative, the underwriters would be entitled to a verdict.—*FOWLER v. GRAVES* (1865), 13 L. T. 476; 2 Mar. L. C. 295, N. P.

*Annotation*:—*Expld.* Harrower v. Hutchinson (1870), 10 B. & S. 469.

**1257. —.**—Where an assured expects, but is not certain, that goods will come by a particular ship, the name of such ship is not a material fact the non-disclosure of which prevents the policy from attaching; nor in such a case is there any usage of underwriters at Lloyd's compelling the assured to disclose it.—*KNIGHT v. COTESWORTH* (1883), 1 Cab. & El. 48, N. P.

(i) *Nationality of Assured.*

**1258. Non-disclosure vitiates policy.]**—Upon a policy effected after the declaration of war by America, but before it was known in England, in which it was not stated in the policy, nor communicated to the underwriter, that the assured was an American subject, & the loss happened in consequence of a seizure by the American Govt.:—*Held*: the action could not be maintained, even after the war had terminated.—*CAMPBELL v. INNES* (1821), 4 B. & Ald. 423; 106 E. R. 992.

*Annotation*:—*Reid.* Aubert v. Gray (1862), 3 B. & S. 169.

**1259. — Ship nominally registered in name of British owner.]**—A Greek subject, resident in Scotland, purchased a foreign ship at Hull, his intention being ultimately to sell her to a syndicate of Greeks in Samos. He gave his own name as purchaser, but thereafter transferred the vessel to an impecunious British subject, who was registered as owner. A subsequent agreement between these parties bore that the British subject agreed to sell the vessel to the Greek on her arrival at Samos, & also stipulated that during the voyage the vessel should be managed by the Greek, who

should receive no remuneration as manager, but should be entitled to the freight, & should be liable for all disbursements except the expenses of insurance. The vessel was insured by the transferee, & the cargo by the Greek in question & another Greek as consignors thereof. The Greek's interest in the vessel was not disclosed to the insurers, & she was represented as sailing under the British flag & with a British crew. When the insurance was effected, Greek-owned vessels were uninsurable, or only insurable at exceptionally heavy premiums. The ship sank, & the assured sued for payment under their policies in respect of a total loss:—*Held*: the contract of insurance was void & the insurers were entitled to *absolutor*, in respect (1) that there had been misrepresentation, in that the representation that the vessel was sailing under the British flag implied that she was entitled to be registered as a British ship, & in the circumstances, that was not true in fact; (2) that there had been concealment of a material fact, in that the Greek interest in the vessel, in view of the attitude of underwriters towards Greek-owned ships, was a fact material to the risk which should have been disclosed to the insurers, & in the circumstances, there was nothing to put on the insurers a duty to make inquiry for themselves into the true fact of her ownership.—*THE SPATHARI* (1925), 69 Sol. Jo. 776; [1925] S. C. (H. L.) 6, H. L.

*Compare* No. 3251, *post*.

(j) *Matters Relating to Cargo.*

**1260. Cargo carried on deck.]**—*BLACKETT v. ROYAL EXCHANGE ASSURANCE CO.*, No. 23, *ante*.

**1261. —.**—In an action upon a policy of insurance defts. pleaded that the fact that the ship insured was to carry a deck cargo was not disclosed, & on their behalf it was contended that such concealment avoided the policy:—*Held*: it would not avoid the policy entirely, but only as regarded the cargo carried on deck.—*CLARKSON v. YOUNG* (1870), 22 L. T. 41; 3 Mar. L. C. 335, N. P.

**1262. —.**—A policy of marine insurance in the ordinary Lloyd's form upon a motor car from London to Messina in Sicily in the body of it insured the car in express terms against the usual perils of navigation, & also included the Institute Cargo Clauses, clause 4 of which provided that the assured should be "Held covered, at a premium to be arranged, in case of . . . any omission or error in description of the interest." The car, which was packed in a case, was carried on the deck of the steamer "at shipper's risk," according to the bill of lading. During the voyage the car was seriously damaged by the waves. No notice was given to the underwriters that the car was carried on deck. Evidence was given that it would have been very difficult to insure the car against "on deck" risks, & that it could only have been so insured at a very high premium:—*Held*: the policy did not, by virtue of its containing clause 4 of the Institute Cargo Clauses, cover "on deck" risks, inasmuch as the assured can only avail himself of that clause where he or his agents within a reasonable time after they have become aware of the error, have given notice thereof to the underwriters, & here no notice of the fact that the car was carried on deck was given to the underwriters.—*HOOD v. WEST END MOTOR CAR PACKING CO.*, [1917] 2 K. B. 38; 86 L. J. K. B. 831; 116 L. T. 365; 61 Sol. Jo. 252; 14 Asp. M. L. C. 12, C. A.

*Annotation*:—*Distd.* Armour v. Leopold Walford (London), [1921] 3 K. B. 473.

*Sect. 16.—Avoidance of policies: Sub-sect. 3, B. (j), (k), (l), (m), (n) & (o).]*

**1263. State in which goods shipped—Liability to fire Loss from other cause.]—**BOYD v. DUBOIS, No. 1589, *post*.

**1264. ———.]—**CARR v. MONTEFIORE, No. 13, *ante*

**1265. ——— Damaged cotton—Insured “on deck.”]**—Pltfs., who had insured a cargo of damaged cotton, reinsured the same with deft., but did not inform him that it was damaged cotton. The slip contained the terms, “cotton on deck, f.p.a. & c., including jettison & washing overboard.” When the policy of reinsurance was tendered to deft. for signature it differed from the slip, for, instead of the words “f.p.a. & c. etc.,” it was “f.p.a., etc., as in original policy,” & in that policy the risk was described as “f.p.a., but including risk of jettison & washing overboard,” but he signed it without inquiry or objection. The quantity of cotton insured “on deck” amounted to £7,500:—*Held*: the instructions being to insure such a quantity “on deck” clearly showed that it was damaged cotton, & that, under the circumstances, there was no concealment, also, although an attempt had been made to establish that the course of business was to say that cotton was damaged, no such course of business was established.—BRITISH & FOREIGN MARINE INSURANCE CO., LTD. v. STURGE (1897), 77 L. T. 208; 13 T. L. R. 526; 8 Asp. M. L. C. 303; 2 Com. Cas. 241.

**1266. Incorrect definition of cargo.]—**A clause in a policy of marine insurance provided that “in the event of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged”:—*Held*: “interest insured” must be taken to mean “subject-matter insured”; & the fact that the assured knew that the subject-matter insured was incorrectly defined did not deprive him of the benefit of the clause if he honestly believed that the correct definition was not a matter which it was material for the underwriters to know.—HEWITT BROTHERS v. WILSON, [1915] 2 K. B. 739; 84 L. J. K. B. 1337; 113 L. T. 304; 31 T. L. R. 333; 13 Asp. M. L. C. 111; 20 Com. Cas. 241, C. A.

**1267. Nature of cargo—Insurance on hull.]—**MANN MACNEAL & STEEVES v. CAPITAL & COUNTIES INSURANCE CO., MANN MACNEAL & STEEVES v. GENERAL MARINE UNDERWRITERS, No. 1206, *ante*.

(k) *Valuation of Ship and Cargo.*

**Valued policies—Effect of overvaluation.]—**See Sect. 10, sub-sect. 4, *ante*.

**Floating policies—Effect of undervaluation.]—**See Sect. 7, sub-sect. 2, *ante*.

(l) *Time of Sailing.*

**1268. If circumstance material.]—**RATCLIFFE v. SHOOLBRED (1780), 1 Park’s Marine Insurances, 8th ed. p. 413.

**1269. ———.]—**The concealment of letters, stating that the vessel is about to sail early the next month, is a material concealment, & avoids the policy.—SHIRLEY v. WILKINSON (1781), 3 Doug. K. B. 41; 99 E. R. 529.

**PART II. SECT. 16, SUB-SECT. 3.—**  
**B. (i).**

**1268 i. If circumstance material.]—**Where a party insuring a vessel omits to mention to the underwriters that she has then sailed, the omission, though the insured know the fact, will not vitiate the policy, unless the vessel be at the time of the insurance what is

called a “missing ship.”—PERRY v. BRITISH AMERICA FIRE & LIFE ASSURANCE CO. (1838), 4 U. C. R. 330.—CAN.

**1268 ii. ———.]—**EISENHAUR v. PROVIDENCE WASHINGTON INSURANCE CO. (1887), 20 N. S. R. (8 R. & G.) 48.—CAN.

**1268 iii. ———.]—**GILLESPIE v. DOU-

**1270. ———.]—**It is clear that the underwriter ought to be acquainted with every circumstance respecting the ship’s time of sailing, & her probable arrival, inasmuch as the premium sustains so considerable an advance when the ship is deemed a missing ship (LORD KENYON, C.J.).—M’ANDREW v. BELL (1795), 1 Esp. 373, N. P.

**1271. ———.]—**WEBSTER v. FOSTER (1795), 1 Esp. 407, N. P.

**1272. ———.]—**Action on a policy on goods from Berderygge to London, effected by the consignees on Dec. 13, without communicating a letter received by them the day before, but dated Nov. 30, informing them that the captain would sail the next day, & directing them, if he should not be arrived, to effect the insurance as low as possible:—*Held*: a material concealment, though the ship did not in fact sail until Dec. 24.—WILLES v. GLOVER (1804), 1 Bos. & P. N. R. 14; 127 E. R. 362.

*Annotations:—*Reid. Bridges v. Hunter (1813), 1 M. & S. 15; Morrison v. Muspratt (1827), 12 Moore, C. P. 231.

**1273. ———.]—**It is not necessary to disclose to the underwriter on a policy at & from London, whether the ship has sailed or not.

If the underwriter wanted to know whether the ship had sailed, he ought to have inquired (*per* CUR.).—FORT v. LEE (1811), 3 Taunt. 381; 128 E. R. 151.

*Annotation:—*Reid. Mann Macneal & Steeves v. Capital & Counties Insce., Same v. General Marine Underwriters, [1921] 2 K. B. 300.

**1274. ———.]—**Where pltfs. effected a policy of assurance on wines, from Oporto to London on Nov. 12, at which time they were in possession of two letters from their correspondents at Oporto; the first of which dated Oct. 11, stated thus: “We are loading the wines on the *Stag*, Captain Wheatley, who pretends to sail after to-morrow;” the other dated Oct. 13, inclosed the bills of lading, which were filled up “with convoy;” which letters pltfs. did not communicate to the underwriters:—*Held*: it was a material concealment.—BRIDGES v. HUNTER (1813), 1 M. & S. 15; 105 E. R. 6.

*Annotation:—*Reid. Gladstone v. King (1813), 1 M. & S. 35.

**1275. ———.]—**It is not necessary to communicate to the underwriter the fact & time of a ship’s sailing, unless circumstances render it material to the probability of her safety.—FOLEY v. MOLINE (1814), 5 Taunt. 430; 1 Marsh. 117; 128 E. R. 756.

**1276. ———.]—**MACKINTOSH v. MARSHALL, No. 1234, *ante*.

(m) *Reports as to Safety.*

**1277. A material circumstance — Although doubtful.]—**A merchant having a doubtful account of his ship, insured his ship without acquainting the insurers what danger the ship was in:—*Held*: a fraudulent insurance; & the ct. relieved against the policy.—DE COSTA v. SCANDRET (1723), 2 P. Wms. 170; 24 E. R. 680, L. C.

**1278. ——— Although incorrect.]—**If a material circumstance of danger is concealed from an insurer, the policy is void, although the loss does

GLAS (1803), 13 Fac. Coll. 251; 17 Mor. Dict. 7095.—SCOT.

**PART II. SECT. 16, SUB-SECT. 3.—**  
**B. (m).**

**1277 i. A material circumstance — Although doubtful.]—**MORISON v. GIBBON (1811), 16 Fac. Coll. 148.—SCOT.

not happen by its intervention.—**SEAMAN v. FONEREAU** (1743), 2 Stra. 1183; 93 E. R. 1115.

*Annotations*:—**Folld.** Lynch v. Hamilton (1810), 3 Taunt. 37. **Refd.** Cornfoot v. Fowke (1840), 6 M. & W. 358.

**1279.** ———.]—**ARCHIBALD v. STANHOPE**, No. 1171, *ante*.

**1280.** ——— **Grounding of ship.**]—Pltf., who was the agent in London of some foreign owners of the steamship *B*, being instructed to cause the ship to be insured by a time policy for a year, from Jan. 21, 1857, employed H. & Co., insurance brokers, to effect the insurance. On Jan. 15 H. & Co. applied to deft. to become an insurer. On that day pltf. received a letter from the captain of the ship informing him that the vessel had been aground & had received some very heavy blows, & had made her way in a sinking state to the port of Carthage, where she then was. On the same day pltf. communicated this letter to H. & Co., but H. & Co. did not communicate it to deft. On Jan. 16, deft. agreed to become an insurer for £3,000, & debited H. & Co. for the premium. On Jan. 22, pltf., finding that no notice of the accident had reached London, sent an extract from the captain's letter to Lloyd's. Deft., who was then for the first time informed of the fact that the ship had been on shore, wrote to H. & Co. as follows:—"Understanding that the ship *B* has been on shore, I do not consider that my risk commences until the vessel has been surveyed & repaired." This letter was not answered by H. & Co. The debit of H. & Co. in the books of deft. remained till after the loss. The ship was surveyed & repaired & reported to be perfectly tight, & in a condition to undertake a voyage of any description on Apr. 23. After several intermediate voyages she was totally lost on Oct. 9, 1857:—**Held**: the concealment of the information received from the captain, that the ship had been on shore, was a concealment of a material fact which vitiated the policy.—**RUSSELL v. THORNTON** (1860), 6 H. & N. 140; 30 L. J. Ex. 69; 2 L. T. 574; 6 Jur. N. S. 1080; 8 W. R. 615; 158 E. R. 59, Ex. Ch.

*Annotation*:—**Mentd.** Holland v. Russell (1861), 1 B. & S. 424.

**1281.** ——— **Repair of ship.**]—**UZZELLI v. COMMERCIAL UNION INSURANCE CO.**, No. 1197, *ante*.

(n) *Time Ship Last Heard of.*

**1282. If circumstance material.**]—Where a ship had sailed from Elsinour on her voyage home six hours before the owner, who followed in another vessel on the same day & having met with rough weather on his passage, arrived first, & then caused an insurance to be effected on his own ship:—**Held**: these circumstances were material to be communicated to the underwriter, & it was not sufficient to state merely that the ship insured was "all well at E. on July 26," the day of her sailing.—**KIRBY v. SMITH** (1818), 1 B. & Ald. 672; 106 E. R. 247.

**1283.** ———.]—**RICKARDS v. MURDOCK**, No. 1314, *post*.

**1284.** ———.]—A policy of insurance on a ship called the *King George*, at & from Malaga to London, warranted to sail on Oct. 10, was effected on Nov. 3 following. The insurer communicated to the underwriters that the *King George*, & another vessel called the *Fruiter*, both sailed from Malaga on Oct. 10, & the underwriters knew that the *Fruiter* had arrived at London some days before; but the insurer knew also that the captain of

the *Fruiter* had seen the *King George* off Oporto on Oct. 21, when they had parted company by reason of a gale coming on; & this fact he did not communicate to the underwriters. The *King George* was lost in a storm, at the entrance of the Channel, on Oct. 25. In an action on the policy, the jury having found for pltf., & that the fact not communicated was not a material one, the ct. granted a new trial.—**WESTBURY v. ABERDEIN** (1837), 2 M. & W. 267; Murph. & H. 49; 6 L. J. Ex. 83; 1 Jur. 201; 150 E. R. 756.

**1285.** ———.]—In an action on a policy on the ship *Jessie* "at & from Mazagan to the United Kingdom," it appeared that the ship arrived at Mazagan on Dec. 27, 1873, & that the last news the assured, pltf., had of her was a letter from her captain, dated Jan. 9, 1874, & received on Jan. 21, in which the captain said he had had a fine passage out & had commenced loading, but was delayed by bad weather, & would write again before sailing. The ship had, it afterwards appeared, lost an anchor by bad weather while at Mazagan, & the captain had made a protest on Jan. 3, but he did not mention the fact in this letter. Pltf. insured on Feb. 27, without communicating to the underwriters the letter of Jan. 9, but through his brokers gave them this information: "I do not know when she sailed, I have not had the sailing letter yet." The *Jessie*, after leaving Mazagan, was lost by the perils insured against. At the trial the sole defence relied upon was that the non-disclosure of the letter was the concealment of a material fact, & avoided the policy.—The judge left to the jury the questions: (a) Was the ship an overdue ship at the time of the insurance? (b) Was any material fact concealed, & if so, what? (c) Was there any misrepresentation, and if so, was it fraudulent? The jury answered all the questions in the negative, & a verdict was entered for pltf.:—**Held**: on a rule for a new trial on the ground of misdirection, & on a motion to enter judgment for defts., on the ground that the loss of the anchor was a particular average loss under the policy which ought to have been communicated, & that pltf. was responsible for the neglect of the captain in not communicating it; (1) judgment could not be entered for defts., as the point as to the anchor had not been distinctly taken at the trial, & if it had, questions relating to it ought to have been left to the jury; & (2) the particular average loss was an exception out of the policy, but the innocent non-communication of it by the agent of the assured did not avoid the policy; but there must be a new trial, for it did not appear that the question had been distinctly put to the jury whether the contents of the letter of Jan. 9, & the fact that it was the last letter from the ship, would have influenced the mind of a reasonable underwriter, if communicated.—**STRIBLEY v. IMPERIAL MARINE INSURANCE CO.** (1876), 1 Q. B. D. 507; 45 L. J. Q. B. 396; 34 L. T. 281; 24 W. R. 701; 3 Asp. M. L. C. 134.

*Annotation*:—**Consd.** Blackburn, Low v. Vigors (1887), 12 App. Cas. 531.

(o) *Other Cases.*

See Marine Insurance Act, 1906 (c. 41), s. 18.

**1286. Change of master.**]—Captain of a ship insured may be changed without notice to insurers.—**ANON.** (1699), 12 Mod. Rep. 325; 88 E. R. 1354, N. P.

**1287. Port of loading.**]—Concealment of the true port of loading will vitiate a policy of



**Sect. 16.—Avoidance of policies: Sub-sect. 3, B. (o),**

insurance.—*HODGSON v. RICHARDSON* (1764), as reported in 1 Wm. Bl. 463; 96 E. R. 268.

*Annotations*:—*Consd.* *Nonnen v. Kettlewell* (1812), 16 East, 176. *Refd.* *Spitta v. Woodman* (1810), 2 Taunt. 416; *Cornfoot v. Fowke* (1840), 6 M. & W. 358.

**1288.** —J—Pltfs., in 1861, effected with deft. a policy of assurance on bone & bone ash on board a certain vessel, at & from Buenos Ayres, & port or ports of loading in the province of Buenos Ayres, to port or ports of call & discharge in the United Kingdom. Pltfs. knew, at that time, that the vessel was going from Buenos Ayres to L., a port in the province, to complete her cargo; but this fact was not communicated to deft., & he did not know that L. was a port in the province. L. was a place where a trade in hides, bone, & bone ashes was carried on between that place & Buenos Ayres; but vessels could not clear from L. to Europe, but had to return to Buenos Ayres to obtain a clearance. There was no artificial port, but only a roadstead protected by natural headlands, forming a kind of bay. L. was unknown, in 1861, to underwriters as a place of loading; & if underwriters, on a policy as above, had been informed that the vessel was going to load there, they would have required a higher premium than deft. charged. The vessel went from Buenos Ayres to L., but being unable to get cargo, she left that place to return to Buenos Ayres, & was lost on her way thither:—*Held*: (1) the non-communication of the fact that the vessel was going to L. to complete her cargo was a concealment of a material fact which vitiated the policy; (2) L. was a port of loading within the policy.—*HARROWER v. HUTCHINSON* (1870), L. R. 5 Q. B. 584; 10 B. & S. 469; 39 L. J. Q. B. 229; 22 L. T. 684; 3 Mar. L. C. 434, Ex. Ch.

*Annotation*:—*Appld.* *Tate v. Hyslop* (1885), 15 Q. B. D. 368.

**1289. Nature of employment of ship—Yacht used for trade.]—**Policy on yacht void owing to misrepresentation & concealment as to the yacht being employed as a trading vessel.—*THE TEAZER, OFFOR v. GRAY* (1853), 5 L. T. 774.

**1290. Knowledge acquired by assured after slip signed—Slip initialled subject to ratification.]—***CORY v. PATTON*, No. 329, *ante*.

**1291.** —J—A proposal for insurance on freight was made & accepted on Mar. 11. On Mar. 16 the ship was lost. On Mar. 17 the assured, with knowledge of the loss, but without communicating it to the insurers, demanded a stamped policy. The insurers then for the first time required to be informed as to the amount of the insurance upon the hull, & inserted in the policy, which the assured accepted, the following warranty,—"Hull warranted not insured for more than £2,700 after Mar. 20." The vessel was then insured for an additional £500 in an insurance club, by the rules of which all ships belonging to members were insured from Mar. 20, in one year to Mar. 20 in the following year, "& so on from year to year unless ten days' notice to the

contrary be given," & in the absence of notice the managers of the club were to "renew each policy on its expiration":—*Held*: the risk having been accepted by the insurers on Mar. 11, the addition on Mar. 17 of a term for their benefit, & not affecting the risk, did not prevent the policy from being one drawn up in respect of the risk accepted on Mar. 11, & therefore, upon the authority of *Cory v. Patton*, No. 329, *ante*, the concealment of the loss was not a concealment of a material fact so as to avoid the policy.—*LISHMAN v. NORTHERN MARITIME INSURANCE CO.* (1875), L. R. 10 C. P. 179; 44 L. J. C. P. 185; 32 L. T. 170; 23 W. R. 733; 2 Asp. M. L. C. 504, Ex. Ch. *Annotation*:—*Refd.* *Fisher v. Liverpool Marine Insce.* (1873), L. R. 8 Q. B. 469.

**1292. Option in charterparty—To cancel for delay.]—***MERCANTILE S.S. CO., LTD. v. TYSER*, No. 1683, *post*.

**1293. Arrangement with lighterman for limited liability—Policy including "risks on crafts & lighters"—Notice to solicitor of underwriter.]—**On policies of marine insurance on goods, which included risks on crafts & lighters, underwriters to the knowledge of pltfs. charged a higher rate of premium where the insurance was with no recourse against lightermen (which meant where the lighterage was done on the terms that the liability of the lightermen was to be less than that of common carriers, namely, for negligence only), than they charged where there was such recourse & the liability of the lightermen was to be that of common carriers. Pltfs. effected with deft., a Lloyd's underwriter, a policy of marine insurance on goods which included risk on craft & lighters, & was not with no recourse against lightermen. At the time of effecting such policy pltfs. had an arrangement with one H., by which he was to do all pltfs.' lighterage on the terms that he was only to be liable for negligence:—*Held*: if pltfs. intended that the goods so insured should be landed under such arrangement with H., it was a fact which a prudent & experienced underwriter would take into consideration in estimating the premium, & therefore a jury would be justified in finding that the non-communication of it to deft. was the concealment of a material fact which vitiated the policy.

A mere disclosure of the existence of such arrangement to deft.'s solr. is not notice of it to deft.—*TATE v. HYSLOP* (1885), 15 Q. B. D. 368; 54 L. J. Q. B. 592; 53 L. T. 581; 1 T. L. R. 532; 5 Asp. M. L. C. 487, C. A.

*Annotations*:—*Consd.* *The Bedouin*, [1894] P. 1. *Mentd.* *Price v. Union Lighterage Co.* (1903), 8 Com. Cas. 155.

**1294. Minute detail of fact disclosed.]—***ASFAH & CO. v. BLUNDELL*, No. 2082, *post*.

**1295. Prohibition against importation—Prohibition never acted upon.]—***FRACIS, TIMES & CO. v. SEA INSURANCE CO.*, No. 1136, *ante*.

**1296. In policy of reinsurance—Usual clause in original policy.]—***CHARLESWORTH v. FABER*, No. 715, *ante*.

**1297. Additional insurances on disbursements, etc.—P.p.l. Policies.]—***THAMES & MERSEY MARINE INSURANCE CO. v. GUNFORD SHIP CO.*,

*BISSETT* (1810), 15 Fac. Coll. 617.—*SCOT*.

*d. Co-operation of another ship as tender.]—*Where no mention was made that another vessel was to co-operate as a tender:—*Held*: this co-operation ought to have been disclosed, as it changed the risk from the ordinary one of a single ship, & prolonged materially the length of the voyage.—*TENNANT v. HENDERSON*,

**PART II. SECT. 16, SUB-SECT. 3.—**  
**B. (o).**

**1290 i. Knowledge acquired by assured after slip signed.]—***KASAM HAJI MITHA v. BRITISH & FOREIGN MARINE INSURANCE CO.* (1899), 1 L. R. 23 Bom. 737.

*b. Nationality of ship.]—*An insurer is under no obligation to disclose the nationality of a vessel, where there is no representation or warranty

required respecting it by the policy, & no circumstances within his knowledge attaching to the national character of the vessel exposing her to detention & capture.—*WEST v. SEAMAN* (1885), Cass. Dig. 2nd ed. 388.—*CAN*.

*c. Accident prior to commencement of risk.]—*It is not necessary to inform underwriters of an accident sustained by the ship previous to the commencement of the risk.—*SMITH v.*

SOUTHERN MARINE MUTUAL INSURANCE ASSOCN. v. GUNFORD SHIP CO., No. 765, *ante*.

1298. —.]—BRITISH STANDARD S.S. CO. v. WORLD MARINE INSURANCE CO. (1912), *Times*, July 10.

*Annotation*:—*Reid*. Pickersgill v. London & Provincial Insce. & Ocean Marine Insce. (1912), 107 L. T. 305.

1299. Name of assured.]—GLASGOW ASSURANCE CORPN., LTD. v. SYMONDSON (WILLIAM) & Co., No. 383, *ante*.

1300. Arrangement with consignor—For date certain at foreign port.]—Pltfs., three shipowning cos., ran in combination a line of steamers between the United Kingdom & Australia, advertising the dates when the various steamers were expected to arrive at the various Australian ports. The steamers were not chartered, but pltfs.' shipping agents, who had control of large quantities of refrigerated & other cargo in Australia, made contracts with pltfs. to load such cargo on their steamers. By one of these contracts Messrs. B. & Co. of Sydney agreed that all refrigerated cargo owned or controlled by them should, so far as there was available space, be shipped on pltfs.' steamers. By another contract pltfs.' agreed with Messrs. J. & Co. of Hobart to have one of their steamers, the *Ayrshire*, at Hobart on or about Mar. 20, 1910, ready to load 40,000 cases of apples. Pltfs. effected with defts. a policy of insurance "upon freight of frozen meat &/or apples &/or other refrigerated produce valued at £15,000. Chartered or as if chartered . . . Clauses as attached. Of the ship or the vessel called *Ayrshire* . . . at & from any port or places . . . in the United Kingdom to any ports or places . . . in Australia &/or Tasmania . . ." The risks included perils of the sea. The policy contained a time penalty clause as follows: "Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise, but this clause only to apply in cases where the vessel is fulfilling a special charter containing a cancelling date." The apple season at Hobart is confined to the months of Mar. & Apr. The fact that by the contract with J. & Co. pltfs. had agreed to have the *Ayrshire* at Hobart on or about Mar. 20, 1910, was not known to defts.

The *Ayrshire* started on her advertised voyage outward on Jan. 1, 1910. On Jan. 2 she met with a peril of the sea & was incapacitated from continuing the voyage. The greater part of the cargo which the *Ayrshire* would have loaded was taken by the steamer next in order on the advertised list, the rest being taken by another vessel in which pltfs. were interested. On Mar. 17 the *Ayrshire* set sail & reached Australian waters early in June, when she loaded & earned freight upon a full cargo. Pltfs. lost the amount of freight which could have been earned by one extra homeward sailing. As to the contracts with B. & Co. & J. & Co.:—*Held*: (1) the effect of each of these contracts was to give pltfs. an insurable interest in "freight as if chartered" within the meaning of the policy. (2) As to B. & Co.'s contract:—*Held*: there was no loss of this freight. (3) As to J. & Co.'s contract:—*Held*: there was a loss of the freight; (4) this contract was not

a special charter containing a cancelling date within the meaning of the policy; but (5) there was non-disclosure of a material circumstance within Marine Insurance Act, 1906 (c. 41), s. 18, in that defts. were not informed that the *Ayrshire* was due to arrive at Hobart on or about Mar. 20, 1910; & (6) this non-disclosure avoided the policy.

(7) The words "as if chartered," . . . cover the case of a charterparty expected at the date of the policy, but only executed after that date; they cover, or may cover, the benefit that the shipowner derives from carrying his own goods, although it has been held that the word "freight" itself is enough to describe this benefit; & they cover the case of other people's goods being carried without a charterparty—that is to say, either under a bill of lading or, if there is no actual bill of lading, under that promise to pay which is implied from the fact that the goods are shipped & carried (HAMILTON, J.).

(8) There has been a discussion as to how far concealment is a matter of law, & how far it is a matter of fact, but it is well settled now that evidence is admissible on the subject; & unless I can be satisfied, as a matter of law, that the point in question could not be material, it is a matter upon which I must be guided by the evidence as to whether it was material to a reasonable underwriter, with a view either to his taking the risk, or to the premium he would charge for taking it, to be apprised of the fact in connection with this insurance that the Hobart apple contract specified a date about which the vessel had to arrive (HAMILTON, J.).—SCOTTISH SHIRE LINE, LTD. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., LTD., [1912] 3 K. B. 51; 81 L. J. K. B. 1066; 107 L. T. 46; 56 Sol. Jo. 551; 12 Asp. M. L. C. 253; 17 Com. Cas. 240.

*Annotation*:—*Generally*, *Reid*. Yorke v. Yorkshire Insce., [1918] 1 K. B. 662.

1301. Nationality of charterer—Subsequent outbreak of war.]—ASSOCIATED OIL CARRIERS, LTD. v. UNION INSURANCE SOCIETY OF CANTON, LTD., No. 2093, *post*.

1302. Unusual risk—Though policy covering "all losses."—General words in a marine insurance policy which, taken by themselves, are as a mere matter of construction wide enough to cover an unusual risk not connected with marine or war risk, do not cover that unusual risk unless at the time when the underwriter initialled the slip or subscribed the policy the assured brought that unusual risk to the underwriter's attention in such a way that he had his mind directed to it.—CHESHIRE (T.) & CO. v. THOMPSON (1919), 35 T. L. R. 317; 24 Com. Cas. 198, C. A.

*Annotation*:—*Reid*. Cheshire v. Vaughan, [1920] 3 K. B. 240.

Intention to deviate.]—See No. 1000, *ante*.

#### C. By Agent of Assured.

See Marine Insurance Act, 1906 (c. 41), s. 19.

1303. Knowledge of clerk.]—STEWART v. DUNLOP (1785), 4 Bro. Parl. Cas. 483; 2 E. R. 330, H. L.

*Annotation*:—*Reid*. Blackburn v. Vigors (1886), 17 Q. B. D. 553.

HENDERSON v. FETTES (1813), 1 Dow, 324; 5 Pat. App. 736; 3 E. R. 716, H. L.; *affg.*, 16 Fac. Coll. 518.—SCOT.

e. Ship sailing without convoy.]—Where parties procured insurances to be effected upon a representation that there was a chance of the vessel's sailing with convoy, knowing at the time that the vessel was to be a running ship, &

before the last insurance was effected that she had in fact sailed without convoy, but not communicating these facts to the underwriters:—*Held*: a concealment of fact material to the risk, & the policies were void.—*REID* & CO. v. HARVEY (1816), 4 Dow, 97; 6 Pat. App. 197; 3 E. R. 1102, H. L.; *affg.*, 17 Fac. Coll. 407.—SCOT.

f. Change of ship's nationality.]—Failure to mention the change of nationality to the underwriters, some of whom had a year before insured the vessel as a British ship:—*Held*: a concealment of a material fact which voided the policy.—HUTCHINSON & CO. v. ABERDEEN SEA INSURANCE CO. (1876), 3 R. (Ct. of Sess.) 682; 13 Sc. L. R. 456.—SCOT.



*Sect. 16.—Avoidance of policies: Sub-sect. 3, C. & D.; sub-sects. 4 & 5. Sect. 17.]*

**1304. Knowledge of master.]**—Where pltfs. on Oct. 25, 1811, effected an insurance on ship at & from her port of loading to her port of discharge, & it appeared that on July 25 preceding, the ship whilst in her port of loading was driven on a rock by a storm, but got off without appearing to have suffered material damage; & the captain afterwards wrote a letter to pltfs. without communicating the accident; which letter reached them on Oct. 5; & the ship afterwards arrived at her port of discharge, where the captain made a protest detailing the accident, & stating that the planks of her bottom must have been chafed, & her bottom otherwise injured by striking on the rock:—*Held*: pltfs. could not recover as for an average loss arising from the accident; for the captain was bound to communicate the accident, & for want of such communication, the antecedent damage was an implied exception out of the policy; & the policy not being made void, pltfs. could not recover back the premium.—*GLADSTONE v. KING* (1813), 1 M. & S. 35; 105 E. R. 13.

*Annotations*:—*Consd.* *Lindenau v. Desborough* (1828), 3 Man. & Ry. K. B. 45. *Folld.* *Proudfoot v. Montefiore* (1867), L. R. 2 Q. B. 511; *Stribley v. Imperial Marine Insee.* (1876), 1 Q. B. D. 507. *Consd.* *Blackburn, Low v. Vigors* (1887), 12 App. Cas. 531.

**1305. General agent—Knowledge withheld from assured — Insurance effected by assured.]** — *PROUDFOOT v. MONTEFIORE*, No. 5, *ante*.

**1306. — — — — —.]**—*BLACKBURN, LOW & Co. v. VIGORS*, No. 1308, *post*.

**1307. Agents to effect policy.]**—*LYNCH v. DUNSFORD*, No. 1254, *ante*.

**1308. — Not effecting policy sued upon.]**—Pltfs. instructed a broker to reinsure an overdue ship. Whilst acting for pltfs. the broker received information material to the risk but did not communicate it to them & pltfs. effected a reinsurance for £800 through the broker's London agents. Afterwards pltfs. effected a reinsurance for £700, lost or not lost, through another broker. The ship had in fact been lost days before pltfs. tried to reinsure but neither pltfs. nor the last named broker knew it, & both he & pltfs. acted throughout in good faith:—*Held*: (1) the knowledge of the first broker was not the knowledge of pltfs.; (2) pltfs. were entitled to recover upon the policy for £700.

A broker is employed to effect a particular insurance. While so employed he receives material information—he does not effect the insurance & he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavoured to procure an insurance? (*LORD HALSBURY, C.*).

There is nothing unreasonable in imputing to a shipowner who effects an insurance . . . all the information with regard to his own property which the agent to whom the management of that property is committed possessed at the time & might in the ordinary course of things have communicated to his employer. In such a case it may be said that the knowledge of the agent is the knowledge of the principal. But the case is different when the agent whose knowledge it is sought to impute to the principal is not the agent to whom the principal looks for information but an agent employed for the special purpose of effecting the insurance. It is quite true that the

insurance would be vitiated by concealment on the part of such an agent just as it would be by concealment on the part of the principal. But that is not because the knowledge of the agent is to be imputed to the principal but because the agent of the insured is bound, as the principal is bound, to communicate to the underwriters all material facts within his knowledge. Concealment of these facts is a breach of duty on his part to those with whom his principal has placed him in communication (*LORD MACNAGHTEN*).—*BLACKBURN, LOW & Co. v. VIGORS* (1887), 12 App. Cas. 531; 57 L. J. Q. B. 114; 57 L. T. 730; 36 W. R. 449; 3 T. L. R. 837; 6 Asp. M. L. C. 216, H. L.

*Annotations*:—*As to* (1) *Distd.* *Blackburn v. Haslam* (1888), 21 Q. B. D. 144. *Consd.* *Re Halifax Sugar Refining Co.* (1890), 7 T. L. R. 163. *Folld.* *Wilson v. Salamandra Assce. of St. Petersburg* (1903), 88 L. T. 96; *Pickersgill v. London & Provincial Marine & General Insee.*, [1912] 3 K. B. 614.

**1309. — Acting as intermediate agent.]**—Pltfs., underwriters in Glasgow, employed there a firm of insurance brokers to reinsure a ship which was overdue. The brokers received information tending to show that the ship, as was the fact, was lost. Without communicating this information to pltfs., they telegraphed in pltfs.' name to their own London agents, stating the rate of insurance premium which pltfs. were prepared to pay. Communications followed between pltfs. & the London agents, & the London agents, through a firm of London insurance brokers, effected a policy of reinsurance at a higher rate of premium, which policy was underwritten by deft.:—*Held*: the policy was void on the ground of concealment of material facts by the agents of the assured.—*BLACKBURN v. HASLAM* (1888), 21 Q. B. D. 144; 57 L. J. Q. B. 479; 59 L. T. 407; 36 W. R. 855; 4 T. L. R. 577; 6 Asp. M. L. C. 326, D. C.

*Annotation*:—*Folld.* *Wilson v. Salamandra Assce. of St. Petersburg* (1903), 88 L. T. 96.

**1310. Agent of underwriters—Reinsurance policy — Agent resident abroad.]**—Pltfs., who were underwriters at Lloyd's, reinsured a risk on goods by a certain steamer on a voyage to a port abroad. At the time of the reinsurance the ship had arrived & the cargo had been partly discharged & examined by Lloyd's surveyor at the port & found damaged, but this fact was not known to pltfs.:—*Held*: the knowledge of Lloyd's agent at the port abroad could not be treated as the knowledge of pltfs., & they were therefore entitled to recover on the policy.—*WILSON v. SALAMANDRA ASSURANCE CO. OF ST. PETERSBURG* (1903), 88 L. T. 96; 19 T. L. R. 229; 9 Asp. M. L. C. 370; 8 Com. Cas. 129.

#### D. Evidence.

*See, generally*, as to evidence of experts, *EVIDENCE*, Vol. XXII., pp. 508 *et seq.*

**1311. Whether admissible—Broker.]**—*CARTER v. BOEHM*, No. 3, *ante*.

**1312. — Underwriter.]**—*DURRELL v. BEDERLEY*, No. 120, *ante*.

**1313. — — — — —.]**—The opinion of one conversant in the business of insurance as a matter of judgment, whether the communication of particular facts would have enhanced the premium is admissible evidence; but he cannot be asked what he himself would have done in the particular case.—*BERTHON v. LOUGHMAN* (1817), 2 Stark. 258, N. P.

*Annotation*:—*Apld.* *Chapman v. Walton* (1833), 10 Bing. 57.

**1314. — — — — —.]**—A merchant resident at Sydney shipped goods for England on board the



ship *C.*, & by another ship, that sailed after her, wrote to an agent in England, & desired him, if he received that letter before the *C.* arrived, to wait for thirty days, in order to give every chance for her arrival, & then effect an insurance on the goods. The letter was received, & the agent having waited more than thirty days, employed a broker to effect an insurance, & handed the letter to him. The broker told the underwriters when the *C.* sailed, & when the letter ordering the insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it, before the insurance was effected. The *C.* never arrived. In an action on the policy, no fraud was imputed to pltf.; but several underwriters were called for deft., who stated, that in their opinion the matters not communicated were material; & the jury being of opinion that a material part of the letter had been concealed, found a verdict for deft.:—*Held*: the evidence of the underwriters' opinion was properly received, & even without it the jury would have been bound to find that the part of the letter not communicated to the underwriters was material, & consequently, the policy was void.

I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject-matter of the inquiry (LORD TENTERDEN, C.J.).—*RICKARDS v. MURDOCK* (1830), 10 B. & C. 527; L. & Welsb. 132; 5 Man. & Ry. K. B. 418; 8 L. J. O. S. K. B. 210; 109 E. R. 546.

*Annotations*:—*Consd.* Campbell v. Rickards (1833), 5 B. & Ad. 840. *Foll.* Chapman v. Walton (1833), 10 Bing. 57. *Refd.* Hitchin v. Groom (1848), 17 L. J. C. P. 145; Rowley v. L. & N. W. Ry. (1873), L. R. 8 Exch. 221. *Mentd.* Crisp v. Griffiths (1835), 5 Tyr. 619; Solly v. Nelsh (1835), 1 Gale, 227; Gibbons v. Mottram (1843), 6 Man. & G. 692.

**1315.** ———.]—(1) The opinion of underwriters as to the materiality of communicating information as to a particular fact previously to the effecting of a policy, is not admissible in evidence.

(2) The materiality of such a communication is a question for the jury not for the ct.—*CAMPBELL v. RICKARDS* (1833), 5 B. & Ad. 840; 2 Nev. & M. K. B. 542; 2 L. J. K. B. 204; 110 E. R. 1001.

*Annotation*:—*Generally*, *Mentd.* Hitchin v. Groom (1848), 5 C. B. 515.

**1316.** ———.]—*ECCLES v. HARVEY* (1844), 4 L. T. O. S. 99.

**1317.** ———.]—*SCOTTISH SHIRE LINE, LTD. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., LTD.*, No. 1300, *ante*.

#### SUB-SECT. 4.—BY DEVIATION OR DELAY.

*See, generally*, Sect. 14, *ante*.

#### SUB-SECT. 5.—BY ABANDONMENT OF VOYAGE.

*See* Sect. 13, sub-sect. 1, *ante*.

### SECT. 17.—RECTIFICATION OF POLICIES—MISTAKE.

*See, generally*, Part I., Sect. 10, *ante*.

**1318.** Policy differing from slip—Whether rectified in accordance with slip.]—Pltfs. underwriters, having executed to defts. iron merchants, a policy of marine insurance on a cargo which suffered loss, filed a bill for a rectification of the policy so as to

make it conformable to that which they said was the real contract between the agents, in proof of which they produced in evidence the slip which was signed by their agent when presented at Lloyd's by a clerk of deft.'s insurance broker. Defts. denied that they ever entered, or intended to enter, into any contract other than expressed by the policy:—*Held*: as the slip formed no contract, & there was no binding agreement between the parties until the policy was signed & the premium paid, the bill must be dismissed with costs.—*MACKENZIE v. COULSON* (1869), L. R. 8 Eq. 368.

*Annotations*:—*Refd.* Cory v. Patton (1872), L. R. 7 Q. B. 304; Spalding v. Crocker (1897), 13 T. L. R. 396; Lovell & Christmas v. Wall (1911), 104 L. T. 85; Schofield v. Clough, [1913] 2 K. B. 103.

**1319.** ———.]—*Reinsurance*.]—*THE AIK-SHAW* (1893), 9 T. L. R. 605.

*Annotations*:—*Refd.* Crocker v. Sturge, [1897] 1 Q. B. 330; Empress Assee. Corpn. v. Bowring (1905), 11 Com. Cas. 107.

**1320.** ———.]—*SPALDING v. CROCKER*, No 906, *ante*.

**1321.** ———.]—*EMANUEL & CO. v. ANDREW WEIR & CO.*, No. 788, *ante*.

**1322.** ———.]—*MAIGNEN & CO. v. NATIONAL BENEFIT ASSURANCE CO., LTD.* (1922), 38 T. L. R. 257.

**1323.** Evidence of mistake—Sufficiency.]—*SPALDING v. CROCKER*, No. 906, *ante*.

**1324.** ———.]—*Effect of absence of evidence*.]—In the winding up of a reinsurance co., claims were made under (A): a class of policy which was issued by the co. by way of reinsurance on a printed form adapted to marine insurance, to insure the payment of a sum of money in respect of a total loss "in the event of peace not being declared between Great Britain & Germany on or before Mar. 31, 1918." To that policy was attached a detachable p.p.i. slip, which expressly stipulated as follows: "This slip is no part of the policy, & is not to be attached thereto, but is to be considered as binding in honour on the underwriters; the assured, however, having permission to remove it from the policy should they so desire. In the event of claim it is hereby agreed that this policy shall be deemed sufficient proof of interest. Full interest admitted." (B) a class of marine policy to reinsure a ship therein named against marine risks, such policy having attached thereto a p.p.i. slip similar in all respects to that which was attached to the peace policies, which slip in some cases remained attached & in others had been detached at the date of the claim thereunder. Upon an application by the co. to have it determined by the ct., whether claims under either of those classes of policy ought to be admitted:—*Held*: (1) as to the peace policies: (a) as the losses insured against were not incident to any marine adventure, those policies did not come within the definition of a contract of marine insurance in Marine Insurance Act, 1906 (c. 41), s. 1; (b) although they were policies of insurance within the meaning of Life Assurance Act, 1774 (c. 48), & were not mere wagers, yet, having regard to the description of the subject-matter of the insurance, the existence of the p.p.i. & f.i.a. clauses & the absence of proof of an insurable interest in the original assured, notwithstanding payment by the reassured under the original policy, the policies were by way of gaming & wagering & illegal & void under the above mentioned Act of 1774; (c) the premiums paid thereunder were irrecoverable; (2) as to the marine policies: (d) the p.p.i. slip, having been attached to the policies at the time of signing & issuing the

**Sect. 17.—Rectification of policies—Mistake.** *Sect. 18: Sub-sects. 1, 2 & 3, A. & B. (a) i.]*

same, formed part of those policies in spite of the stipulation to the contrary on the slip, & consequently such policies were void by Marine Insurance Act, 1906 (c. 41), s. 4, whether the slip remained attached to or was detached from the policy at the date of the claim thereunder; (e) even assuming the voluntary liquidator occupied the position of an officer of the ct., he was not bound by any principle of equity or honourable dealing to admit claims under those policies which the Legislature had declared void; (f) as the "long slips" presented to the insurance co. by the assured's broker as the closing instructions contained instructions for the insertion of a p.p.i. clause, in the absence of evidence of a mutual or even a unilateral mistake, those policies ought not to be rectified by striking out the p.p.i. clause on the ground that the "short slip" did not stipulate for a p.p.i. clause; (g) the consideration for the payment of the premium having wholly failed, claims for premiums paid thereunder ought by Marine Insurance Act, 1906 (c. 41), s. 84, to be allowed by the liquidator. Accordingly, the ct. declared that none of the claims under either of the two classes of policy, except in respect of the premiums on the marine policies, ought to be admitted.—*Re LONDON COUNTY COMMERCIAL REINSURANCE OFFICE*, [1922] 2 Ch. 67; 91 L. J. Ch. 337; 127 L. T. 20; 38 T. L. R. 399; 15 Asp. M. L. C. 553.

*Annotation:—As to (2) Rejd. Edwards v. Motor Union Insce.*, [1922] 2 K. B. 249.

**SECT. 18.—WARRANTIES—EXPRESS.**

**SUB-SECT. 1.—IN GENERAL.**

*See Part I., Sect. 7, ante; Marine Insurance Act, 1906 (c. 41), ss. 33–35.*

**SUB-SECT. 2.—NECESSITY FOR STRICT COMPLIANCE.**

*See Marine Insurance Act, 1906 (c. 41), s. 33 (3).*

**1325. General rule.]—DE HAHN v. HARTLEY**, No. 86, *ante*.

**1326. Whether material to risk or not.]—KENYON v. BERTHON** (1778), 1 Doug. K. B. 12, n.; 99 E. R. 10.

*Annotation:—Mentd. Behn v. Burness* (1862), 1 B. & S. 877.

**1327. —.]—**In a policy of marine insurance, *primâ facie* all the words which the policy contains, except parts of the general form inapplicable to the particular transaction, are words of contract. Words qualifying the subject-matter of the insurance *primâ facie* are words of warranty constituting a condition which must be complied with, whether it is material to the risk or not. In considering whether words in a policy were intended by the parties to be a warranty regard must be had to the nature of the transaction, & the known course of business & forms in which

similar transactions are carried out but not to the particular facts found to have occurred at the inception of the transaction or during the negotiations.—**YORKSHIRE INSURANCE Co., LTD. v. CAMPBELL**, [1917] A. C. 218; 86 L. J. P. C. 85; 115 L. T. 644; 33 T. L. R. 18, P. C.

*Annotations:—Rejd. Dawsons v. Bounin*, [1922] 2 A. C. 413; *Parman v. Union Assce. Soc.* (1923), 39 T. L. R. 424.

**1328. Performance unavoidably prevented.]—NELSON v. SALVADOR**, No. 1344, *post*.

**SUB-SECT. 3.—SUBJECT-MATTER OF.**

**A. Safety of Ship.**

*See, now, Marine Insurance Act, 1906 (c. 41), s. 38.*

**1329. Ship warranted "well" on given day.]—**Goods were insured from the lading of them on board the ship "lost or not lost," & warranted well on a particular day; the ship was lost on that day before the policy was underwritten:—*Held*: the underwriter was liable; for the warranty is complied with, if the ship were safe at any time of that day.—**BLACKHURST v. COCKELL** (1789), 3 Term Rep. 360; 100 E. R. 620.

**1330. Ship warranted "in port" on given day.]—KENYON v. BERTHON** (1778), 1 Doug. K. B. 12, n.; 99 E. R. 10.

*Annotation:—Rejd. Behn v. Burness* (1862), 1 B. & S. 877.

**1331. — Policy "at & from" A. to B.]—**In an action on a policy on a ship at & from A. to B., with a warranty that the ship was "in port" on a given antecedent day, it is not sufficient that she was safe in some other port than A. on that day: the meaning of this policy is, that she was safe in the port of A.—**COLBY v. HUNTER** (1827), 3 C. & P. 7; Mood. & M. 81, N. P.

*Annotation:—Rejd. Behn v. Burness* (1862), 1 B. & S. 877.

**B Time of**

**(a) "To Sail."**

**i. On or Before Given Date.**

**1332. Ship sailing before day named—To join convoy.]—**If a ship, insured at & from Jamaica, warranted to have sailed on or before a particular day, with a return of premium in case of convoy, sail, on or before the day, from her port of lading with all her cargo & clearances on board, to the usual place of rendezvous at another part of the island, for the sale of joining convoy there ready; it is a compliance with the warranty, though she be afterwards detained there by an embargo, beyond the day. Though such place of rendezvous be out of the direct course of the voyage, it is no deviation.—**BOND v. NUTT** (1777), 2 Cowp. 601; 98 E. R. 1262.

*Annotations:—Consd. Tyrie v. Fletcher* (1777), 2 Cowp. 666; *Bermon v. Woodbridge* (1781), 2 Doug. K. B. 781; *Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471. *Rejd. Earle v. Harris* (1780), 1 Doug. K. B. 357; *Thellusson v. Fergusson* (1780), 1 Doug. K. B. 360; *Moir v. Royal Exchange Assce.* (1815), 3 M. & S. 461; *Lang v. Anderdon* (1824), 3 B. & C. 495; *Brown v. Tayleur* (1835), 1 Har. & W. 578.

**1333. —.]—THELLUSSON v. FERGUSON**, No. 995, *ante*.

**1334. —.]—**On a warranty to sail from

**ZEALAND** (1886), 4 N. Z. L. R. 343 (S. C.).—**N.Z.**

**PART II. SECT. 18, SUB-SECT. 3.—A.**

**1329 i. Ship warranted "well" on given day.]—ANCHOR MARINE INSURANCE Co. v. KEITH** (1884), 9 S. C. R. 483.—**CAN.**

**PART II. SECT. 18, SUB-SECT. 2.**

**1325 i. General rule.]—MOORE v. PROVINCIAL INSURANCE Co.** (1873), 23 C. P. 383.—**CAN.**

**1325 ii. —.]—BROOKS - SCANLON O'BRIEN Co., LTD. v. BOSTON INSURANCE Co.**, [1919] 2 W. W. R. 129.—**CAN.**

**1325 iii. —.]—**A warranty in a policy of marine insurance that the vessel should be towed in & out of a certain port is absolute, & non-compliance therewith is not excused by the barratry of the master.—**WILSON, HARRAWAY & Co. v. NATIONAL FIRE & MARINE INSURANCE Co. OF NEW**

Jamaica, on or before a day certain, if the ship departs from her port on that day, with all her cargo & clearances on board, & proceeds to the place of rendezvous in the island, expecting to find convoy & proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, although the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready.—*EARLE v. HARRIS* (1780), 1 Doug. K. B. 357; 99 E. R. 229.

**1335.** ———.]—A ship being insured at & from Surinam, & all or any of the West India Islands to London, a warranty to sail on or before Aug. 1 is satisfied by the ship sailing from Surinam, her last port of loading, before Aug. 1, & going into Tortola on Aug. 4, to seek convoy, though she did not sail from Tortola, which is one of the West India Islands, direct for London till afterwards.—*WRIGHT v. SHIFFNER* (1809), 11 East, 515; 2 Camp. 247; 103 E. R. 1102.

*Annotation* :—*Refd.* *Moir v. Royal Exchange Assce.* (1815), 3 M. & S. 461.

**1336.** ——— **Detained within harbour by adverse winds.**]—*GRAHAM v. BARRAS*, No. 1340, *post*.

**1337.** ——— **With everything ready for performance of voyage.**]—Goods were insured at & from Demerara to London in ship or ships warranted to sail from Demerara on or before Aug. 1, 1823. Small ships take in & discharge the whole of their cargoes in the river of Demerara; but there is a shoal off the coast about ten miles out at sea, & large ships usually discharge & take in part of their cargoes on the outside of the shoal. Goods covered by the policy were laden on board a small vessel that completed her cargo in the river, & on Aug. 1, the captain having obtained his clearance, set sail, proceeded down the river, & about two miles out to sea, & then anchored, the tide being low. On Aug. 3 he crossed the shoal, & on Aug. 8 the vessel was lost by perils of the sea :—*Held* : the vessel sailed from Demerara on Aug. 1 within the meaning of the policy, & the warranty was thereby satisfied.

It is clear that a warranty to sail, without the word *from*, is not complied with by the vessel's raising her anchor, getting under sail, & moving onwards, unless at the time of the performance of these acts she has everything ready for the performance of the voyage & such acts are done at the commencement of it, nothing remaining to be done afterwards (*ABBOTT, C.J.*).—*LANG v. ANDERDON* (1824), 3 B. & C. 495; 5 Dow. & Ry. K. B. 393; 3 L. J. O. S. K. B. 62; 107 E. R. 817.

*Annotations* :—*Apld.* *Pittegrew v. Pringle* (1832), 3 B. & Ad. 514. *Refd.* *Graham v. Barras* (1834), 5 B. & Ad. 1011; *Sea Insce. v. Blogg*, [1898] 1 Q. B. 27. *Mentd.* *Roelandts v. Harrison* (1854), 23 L. J. Ex. 169; *Van Baggen v. Baines* (1854), 9 Exch. 523.

**1338. Ship dropping down river before day named—Ready for sea.**]—A policy of assurance on freight & goods, per ship named, at & from Portneuf to London, warranted to sail on or before Oct. 28 & on Oct. 26 the ship dropped down from Portneuf with an incomplete crew for the voyage, & on Oct. 28 reached Quebec, which was the nearest place where she could obtain a clearance, & there completed her crew, & on Oct. 29 obtained her clearance, & sailed the next day :—*Held* : the

dropping down from Portneuf to Quebec on Oct. 26 was not a compliance with the warranty.—*RIDSDALE v. NEWNHAM* (1815), 3 M. & S. 456; 105 E. R. 681.

*Annotations* :—*Consd.* *Bouillon v. Lupton* (1863), 15 C. B. N. S. 113. *Refd.* *Lang v. Anderdon* (1824), 3 B. & C. 495; *Hudson v. Bilton* (1856), 2 Jur. N. S. 784. *Mentd.* *Van Baggen v. Baines* (1854), 9 Exch. 523; *Thompson v. Gillespy* (1855), 5 E. & B. 209.

**1339.** ———.]—Pltf. effected an insurance on freight, etc., by a ship, subject to certain regulations, which provided that vessels should not sail from ports in Ireland after Sept. 1; & that the time of clearing at the custom house should be deemed the time of sailing, provided the ship were then ready for sea. Pltf.'s ship being in the port of Sligo, dropped down the river before Sept. 1, in readiness for sea, except that she had not her full quantity of ballast, there being a bar at the mouth of the river, which the ship could not have crossed with that quantity on board. Boats were in waiting on the outside on Sept. 1, to ship the remainder of the ballast, & the vessel crossed the bar on that day, but stuck in doing so, & the master, to ascertain what damage she had received, put into an adjacent port without taking the rest of his ballast, which was not done till Sept. 4, & the vessel proceeded upon her voyage on Sept. 8 :—*Held* : the ship's dropping down the river, & crossing the bar, without her full ballast, was not a sailing; & until the ballast was completed she was not ready for sea within the rule referred to by the policy.—*PITTEGREW v. PRINGLE* (1832), 3 B. & Ad. 514; 110 E. R. 186.

*Annotations* :—*Folld.* *Graham v. Barras* (1834), 5 B. & Ad. 1011. *Consd.* *Bouillon v. Lupton* (1863), 15 C. B. N. S. 113. *Refd.* *Roelandts v. Harrison* (1854), 2 C. L. R. 995. *Mentd.* *The Lady Clermont* (1870), 23 L. T. 283.

**1340.** ———.]—A ship was insured from Apr. 1, 1831, to Jan. 1, 1832, warranted not to sail foreign after the times limited in certain club rules. The rules or warranties of the club limited the times of sailing to different parts of the world, & by a distinct warranty (the ninth) it was declared, that the time of clearing at the custom house should be deemed the time of sailing, provided the ship was then ready for sea. The vessel insured was bound for the Bay of Fundy, from Dublin, & the last day for sailing, by the rules, was Sept. 1. She cleared out on Aug. 31, & dropped down the Liffey on Sept. 1, with an incomplete crew, though a full complement was engaged before the ship cleared out, to a place within the port of Dublin, where she lay at anchor the rest of the day. During that day the whole crew came on board, & on Sept. 2, she proceeded on her voyage, having been prevented from doing so on Sept. 1 by an unfavourable wind. She was afterwards lost :—*Held* : (1) the policy must be construed as incorporating the ninth article of warranty, & not merely the several directions as to the times of sailing; (2) the ship did not actually sail till after Sept. 1, & she was not ready for sea at the time of clearing out, the whole crew not being then on board; (3) the words in the ninth article of warranty, "provided the ship is then ready for sea," if incorporated with the policy, must be limited to the point of time at which the clearances were obtained, & as the vessel was not

#### PART II. SECT. 18, SUB-SECT. 3.— B. (a) 1.

**1336 i. Ship sailing before day named—Detained within harbour by adverse winds.**]—A vessel insured for a voyage from C. to S., left the wharf at C. on Dec. 3, with the *bona fide* intention of commencing her voyage. After proceeding a short distance she was

obliged, by stress of weather, to anchor within the limits of the harbour of C. & remained there until Dec. 4, when she proceeded on her voyage :—*Held* : this was a compliance with a warranty in the policy of insurance to sail not later than Dec. 3, but a breach of a warranty to sail from the port of C. not later than Dec. 3.—*ROBERTSON v.*

*PUGH* (1888), 15 S. C. R. 706.—CAN.

**g. Ship not sailing by day named—Underwriters not liable.**]—*DUNCAN & CO. v. BRITISH AMERICA INSURANCE CO.* (1871), 1 P. E. I. 370.—CAN.

**h. ———.]—STIRLING & ROBERTSON v. GODDARD (1822), 1 Sh. So. App. 238.—SCOT.**



# INSURANCE.

2 C. L. R. 995; *Sharp v. Gibbs* (1857), 1 H. & N. 801.

**1341.** ———.]—A policy of insurance contained a warranty "not to sail for British North America after Aug. 15." The vessel, on the morning of Aug. 15, was cleared at the custom house of Dublin, & ready for sea. She was then lying in the custom house dock, which opens into the river Liffey, which forms part of Dublin harbour. She was afterwards, on the same day, hauled out of dock & warped down the river Liffey about half a mile, towards the mouth of the harbour, which was some miles distant, for the purpose of proceeding on her voyage to Quebec, in North America. At the time of so moving the vessel, the master & crew knew it to be impossible to get to sea that day. The next day she was warped a little further down the river, & on Aug. 17, when the wind changed, she got to sea. The jury having found that the master & crew fully intended to sail for Quebec on Aug. 15, if it had been possible, & did all they could, & used every means & exertion so to do, & that they intended by so doing to put themselves in a better situation for the prosecution of the voyage, & not merely & solely to fulfil the warranty:—*Held*: the vessel was in the prosecution of her voyage on Aug. 15, & the warranty not to sail for British North America after that day, had been complied with.—*COCKRANE v. FISHER* (1835), 1 Cr. M. & R. 809; 149 E. R. 1307; *sub nom. FISHER v. COCHRAN*, 5 Tyr. 496; 4 L. J. Ex. 328, Ex. Ch.

*Annotation*:—*Refd. Sea Insco. v. Blogg*, [1898] 2 Q. B. 398.

**1342. Ship not sailing by day named—Owing to embargo.**—If a ship warranted to sail on or before a particular day, be prevented from sailing on the day by an embargo, the warranty is not complied with.—*HORE v. WHITMORE* (1778), 2 Cowp. 784; 98 E. R. 1360.

**1343. Ship not breaking ground by day named.**—*ROGERS v. ROYAL EXCHANGE ASSURANCE CO.* (1787), 2 Park on Marine Insurances, 7th ed. p. 497. *Annotations*:—*Refd. Moir v. Royal Exchange Assce.* (1815), 1 Marsh. 570; *Fisher v. Cochran* (1835), 4 H. J. Ex. 328.

**1344. Proceeding along moorings short distance—Ready for sea.**—Warranty to sail on or before a day certain is not complied with by being ready to sail & proceeding a short distance along the moorings; nor is strict performance dispensed with by an unavoidable necessity preventing it.—*NELSON v. SALVADOR* (1829), Dan. & Ll. 219; Mood. & M. 309.

*Annotation*:—*Refd. Fisher v. Cochran* (1835), 5 Tyr. 496.

*Compare Nos. 1338–1341, ante.*

## ii. After Given Date.

**1345. Ship sailing before day named—To load cargo at named port—Sailing thence after day named.**—*VEZIAN v. GRANT* (1779), Marshall on Marine Insurances, 4th ed. 284; 2 Park on Marine Insurances, 7th ed. p. 485, N. P.

**1343 i. Ship not breaking ground by day named.**—Where a policy covered a vessel during her voyage from port A. to port B., with a stipulation that the vessel should leave A. before Oct. 1; & on Sept. 30 she made ready for sea & took up two anchors, but could not take up two remaining, owing to stress

of weather, & was unable to leave until Oct. 2, & was lost on Oct. 4:—*Held*: the vessel was not in prosecution of the voyage on Sept. 30, & the warranty to sail on that day being broken, the insurance could not be recovered.—*WARREN v. THOMAS* (1851), 3 Nfld. L. R. 168.—*NFLD.*

## (b) "To Sail from."

**1348. Anchoring two miles out to sea.**—*LANG v. ANDERDON*, No. 1337, *ante*.

**1349. Loss before arrival at terminus a quo—Warranty never operative.**—Declaration on a policy of insurance, whereby a ship was insured "at & from New York to Quebec, during her stay there, thence to the United Kingdom; the said ship being warranted to sail from Quebec on or before Nov. 1, 1853." Averments, that on Oct. 15, 1853, the said ship sailed from New York on her voyage to the United Kingdom by way of Quebec, & whilst on such voyage & before her arrival at Quebec, struck on certain rocks, & was totally lost. Breach: non-payment of the sum insured. Plea: that, during the whole of Nov. 1, 1853, the vessel was at sea, proceeding on her voyage between New York & Quebec; that the loss took place several days after Nov. 1, 1853, & whilst the vessel was still proceeding on the voyage between New York & Quebec; that the vessel did not sail from New York until Oct. 15, & the time between that day & Nov. 1 was not, at that season of the year, reasonably sufficient to enable the vessel to comply with the warranty of sailing from Quebec on or before Nov. 1, 1853. On demurrer:—*Held*: according to the true construction of the warranty there was no limitation of time as respected the voyage between New York & Quebec; but as to the voyage from Quebec to the United Kingdom the underwriters were not responsible, unless the vessel sailed from Quebec on or before Nov. 1, 1853; & therefore the plea was bad.—*BAINES v. HOLLAND* (1855), 10 Exch. 802; 3 C. L. R. 593; 24 L. J. Ex. 204; 156 E. R. 665.

**1350. Voyage in different stages—Requiring different equipments.**—*BOUILLON v. LUPTON*, No. 1515, *post*.

*See, also, Nos. 1513–1518, post.*

## (c) "To Depart."

**1351. What is sufficient compliance—Leaving port on or before day—Detention in harbour after setting sail.**—Policy of assurance on ship at & from Memel to the ship's port of discharge in England, warranted to depart on or before a particular day:—*Held*: this warranty required not only that the ship should set sail on the voyage, but that she should be out of the port on or before the day; & therefore where she set sail on the voyage before the day, but was detained within the harbour by adverse winds until after the day, this was not a compliance with the warranty.—*MOIR v. ROYAL EXCHANGE ASSURANCE CO.* (1815), 3 M. & S. 461; 105 E. R. 683.

*Annotations*:—*Mentd. Van Baggen v. Baines* (1854), 9 Exch. 523; *Postlethwaite v. Freeland* (1880), 5 App. Cas. 599.

**k. Statement in application amounts to a warranty.**—The statement in the application as to the time of sailing is properly inserted as a warranty.—*ROYAL CANADIAN INSURANCE CO. v. PUGH* (1887), 20 N. S. R. (3 R. & G.) 133; 8 C. L. T. 378.—*CAN.*

*C. Sailing with Convoy.*

**1352. Meaning of.]**—In a policy of insurance, the words "warranted to depart with convoy" mean, that the ship shall depart with convoy for the voyage; & therefore if a ship without fraud depart with convoy, & they are separated by stress of weather, & the ship insured is lost during the separation, without any default in the captain, the terms of the policy are complied with, & the underwriters liable.—*JEFFERIES v. LEGENDRA* (1691), Carth. 216; Holt, K. B. 465; 3 Lev. 320; 4 Mod. Rep. 58; 2 Salk. 443; 1 Show. 320; 89 E. R. 599.

*Annotations*:—**Expld.** Mead v. Davison (1835), 3 Ad. & El. 303. **Refd.** Gordon v. Morley, Campell v. Bordieu (1747), 2 Stra. 1265. **Mentd.** Nantes v. Thompson (1802), 2 East, 385; Pritchard v. Merchant's & Tradesman's Mutual Life-Assee. Soc. (1858), 3 C. B. N. S. 622; Britain S.S. Co. v. R., British India Steam Navigation Co. v. Green & Liverpool & London War Risks Insee., [1919] 2 K. B. 670.

**1353. —.]**—In a policy of insurance, "sailing with convoy," means "sailing with convoy for the voyage."—*LILLY v. EWER* (1779), 1 Doug. K. B. 72; 99 E. R. 50.

*Annotations*:—**Expld.** Eden v. Parkison (1781), 2 Doug. K. B. 732. **Mentd.** Anderson v. Pitcher (1800), 2 Bos. & P. 164.

**1354. Ship sailing with convoy—Separated by necessity—Without wilful default of master.]**—*JEFFERIES v. LEGENDRA*, No. 1352, *ante*.

**1355. —.]**—*HARRINGTON v. HALKELD* (1778), 2 Park's Marine Insurances, 8th ed. p. 639.

**1356. —.]**—*WALTHAM v. THOMPSON* (1801), Marshall on Marine Insurances, 4th ed. 294.

**1357. —.]**—**Return to port—Sailing thence without convoy.]**—A vessel which sails with convoy, & is driven back by weather into her port of clearance, may lawfully sail thence again with her cargo on the voyage, without waiting for the next convoy from the same port, or joining convoy from any other port.—*LAING v. GLOVER* (1813), 5 Taunt. 49; 128 E. R. 604.

**1358. Departure from place of having convoy.]**—*LETHULIER'S CASE*, No. 313, *ante*.

**1359. —.]**—*VICTORIN v. CLEEVE* (1746), 2 Stra. 1250; 93 E. R. 1162.

*Annotations*:—**Consd.** Anderson v. Pitcher (1800), 2 Bos. & P. 164. **Refd.** Hibbert v. Pigou (1783), 3 Doug. K. B. 224; Webb v. Thomson (1797), 1 Bos. & P. 5; Sanderson v. Busher (1814), 4 Camp. 54, n.

**1360. —.]**—A ship may go to the general convoy at the hazard of the underwriters.—*GORDON v. MORLEY*, *CAMPBELL v. BORDIEU* (1747), 2 Stra. 1265; 93 E. R. 1171.

**1361. —.]**—Policy on the ship *Elizabeth*, from Tortola to London, with warranty to sail with convoy for the voyage. The commander of the convoy sent a ship to bring up the merchantmen from Tortola, the usual mode of conveying ships from that place, but the ship so sent was not to form part of the convoy for the remainder of the voyage. The *Elizabeth* sailed with the ship so sent, but was lost before she joined the commander of the convoy:—**Held**: the warranty was complied with.—*MANNING v. GIST* (1782), 3 Doug. K. B. 74; 99 E. R. 545.

**1362. —.]**—**Convoy to other destinations available on way to rendezvous.]**—Where there is a warranty in a policy of insurance that the ship shall sail with convoy, she may sail without convoy from her loading port to the place of rendezvous for convoy for the voyage, although there be convoy for ships on other destinations between the loading port & place of rendezvous.—*WARWICK v. SCOTT* (1814), 4 Camp. 62, N. P.

**1363. Ship without sailing orders—Under pro-**

**tection of convoy.]**—*VERDON v. WILMOT* (1744), 2 Park's Marine Insurances, 7th ed. p. 500, n. *Annotation*:—**Consd.** Anderson v. Pitcher (1800), 2 Bos. & P. 164.

**1364. —.]**—*VICTORIN v. CLEEVE* (1746), 2 Stra. 1250; 93 E. R. 1162.

*Annotations*:—**Consd.** Anderson v. Pitcher (1800), 2 Bos. & P. 164. **Refd.** Hibbert v. Pigou (1783), 3 Doug. K. B. 224; Webb v. Thomson (1797), 1 Bos. & P. 5; Sanderson v. Busher (1814), 4 Camp. 54, n.

**1365. —.]**—**Under protection of ship not appointed as convoy.]**—Sailing under the protection of an armed ship, not appointed by Govt. as the convoy, is not a compliance with a warranty to depart with convoy. The general rule is, that in order to constitute a sailing with convoy, sailing orders must be obtained.—*HIBBERT v. PIGOU* (1783), 3 Doug. K. B. 224; 99 E. R. 624.

*Annotations*:—**Distd.** D'Eguino v. Bewicke (1795), 2 Hy. Bl. 551. **Consd.** Anderson v. Pitcher (1800), 2 Bos. & P. 164. **Refd.** Webb v. Thomson (1797), 1 Bos. & P. 5; Cohen v. Hinekey (1808), 1 Taunt. 249.

**1366. —.]**—Sailing orders are necessary to the performance of a warranty to depart with convoy unless particular circumstances exempt the insured from the general rule.—*WEBB v. THOMPSON* (1797), 1 Bos. & P. 5; 126 E. R. 746.

*Annotation*:—**Consd.** Anderson v. Pitcher (1800), 2 Bos. & P. 164.

**1367. —.]**—*FRANCE v. KIRWAN* (1798), Park's Marine Insurances, 7th ed. p. 502; 1 Marshall on Marine Insurances, 4th ed. 292, n.

*Annotation*:—**Refd.** Anderson v. Pitcher (1800), 2 Bos. & P. 164.

**1368. —.]**—A warranty to depart with convoy is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained.—*ANDERSON v. PITCHER* (1800), 2 Bos. & P. 164; 126 E. R. 1216.

*Annotations*:—**Mentd.** Maxwell v. Deare (1854), 23 L. T. O. S. 1; Sweeting v. Pearce (1859), 6 Jur. N. S. 753.

**1369. Sailing with convoy appointed—Different ships.]**—*SMITH v. READSHAW* (1781), 2 Park's Marine Insurances, 8th ed. p. 708.

**1370. —.]**—**Convoy appointed for part only of voyage.]**—A policy of insurance is effected on a ship, on a voyage from A. to C. warranted to depart with convoy for the voyage. The convoy appointed is to B. a port in the course & near to C. This is a compliance with the warranty, & the underwriters are liable, the ship being captured in the passage from B. to C. The term convoy, in a policy, means such a convoy as shall be appointed by government.—*D'EGUINO v. BEWICKE* (1795), 2 Hy. Bl. 551; 126 E. R. 697.

**1371. Changing convoy—Usage.]**—*DE GAREY v. CLAGGET* (1795), 2 Park's Marine Insurances, 8th ed. p. 708.

**1372. Ship sailing without convoy—Neglect of insured.]**—*TAYLOR v. WOODNESS* (1764), 2 Park's Marine Insurances, 8th ed. p. 707.

**1373. —.]**—**Hostilities ceasing—No convoy appointed.]**—Deft. having chartered a ship put her up at Lloyd's, with notice that she would sail with the first convoy. Pltfs. shipped goods on board, & insured them with a warranty that the ship should sail with convoy. Before the ship sailed the preliminaries of peace were gazetted, & hostilities on the part of the King's subjects were forbidden, & ships taken by the various powers within certain limits & certain times were to be restored. Govt. appointed no convoy, & the ship sailed without, but with French, Spanish, & American passports. No notice was given by deft. to pltfs. that the ship was about to sail without convoy. The ship was run down & lost the day after she sailed. In an action against deft. for breach of his contract,

*Sect. 18.—Warranties—Express: Sub-sect. 3, C., D., E. & F. (a).]*

whereby pl'ts. were deprived of the benefit of their policy:—*Held*: pl'ts. were entitled to recover.—*PHILIPS v. BAILLIE* (1784), 3 Doug. K. B. 374; 99 E. R. 703.

*D. Course of Voyage.*

**1374. Voyage to prohibited destination.]**—A marine policy was made subject to certain rules, one of which was that ships were not to sail from any of the ports following, between the times set opposite thereto, that is to say, from any port on the east coast of Great Britain between Oct. 5 & Apr. 5 to any port in the Belts between Dec. 20 & Feb. 15. Pl'tf.'s vessel sailed, on Feb. 8, for F., a port in the Belts, & was lost. In an action by the assured against the insurer:—*Held*: (1) the rule amounted to a warranty, & not to an exception, & pl'tf. was not entitled to recover in respect of the loss; (2) the word "to" as used in this rule meant "towards."—*COLLEDGE v. HARTY* (1851), 6 Exch. 205; 20 L. J. Ex. 146; 16 L. T. O. S. 372; 155 E. R. 515.

*Annotations*:—*As to* (2) *Consd.* *Roelandts v. Harrison* (1854), 23 L. J. Ex. 169. *Refd.* *Provincial Insee. of Canada v. Ledue* (1874), L. R. 6 P. C. 224; *Simpson S.S. Co. v. Premier Underwriting Asscn.* (1905), 92 L. T. 730.

**1375. —.]**—*PROVINCIAL INSURANCE CO. OF CANADA v. LEDUC*, No. 1435, *post*.

**1376. — Loss before reaching prohibited area.]**—*SIMPSON S.S. CO., LTD. v. PREMIER UNDERWRITING ASSOCN., LTD.*, No. 801, *ante*.

*E. "Free from Capture," etc.*

**1377. "In port or ports"—Capture in open road outside harbour.]**—If a ship be warranted free of capture or seizure in port or ports, a capture by an enemy's ship while the vessel insured is lying in an open road, outside of an harbour, is not within the warranty.—*BROWN v. TIERNEY* (1809), 1 Taunt. 517; 127 E. R. 934.

*Annotations*:—*Consd.* *Dalglish v. Brooke* (1812), 15 East, 295. *Apld.* *Levy v. Vaughan*, *Levy v. Buck* (1812), 4 Taunt. 387. *Distd.* *Cockey v. Atkinson* (1819), 2 B. & Ald. 460. *Refd.* *Hunter v. Northern Marine Insee.* (1888), 13 App. Cas. 717.

**1378. — Capture in place not within limits of port.]**—A warranty in a policy of insurance against capture in port does not protect the underwriters from a loss happening by capture in a place which is not within the limits of any port, although it may be within the headlands at the mouth of a river. Therefore where a ship insured from Rotterdam to London & "warranted free from capture in port," was captured while lying at anchor near Ghoree, in the river Maes, the underwriters were held liable.—*BARING v. VAUX* (1810), 2 Camp. 541, N. P.

*Annotation*:—*Distd.* *Jarman v. Coape* (1811), 2 Camp. 613.

**1379. — Question for jury.]**—Whether a vessel warranted free of capture in port, be in a port or not at the time of her capture, is purely a question of fact for the jury.—*REYNER v. PEARSON* (1812), 4 Taunt. 662; 128 E. R. 491.

*Annotation*:—*Refd.* *Reyner v. Hall* (1813), 4 Taunt. 725.

**1380. "In ship's port of discharge"—Capture in open sea outside port—By force issuing from port.]**—A warranty against capture in the ship's port

of discharge, does not include capture in the open sea on the outside of the port by a force issuing from the port of discharge.—*MELLISH v. STANFORTH* (1811), 3 Taunt. 499; 128 E. R. 198.

**1381. — Ship anchored in roads of port.]**—If goods insured are warranted free from capture & seizure in the port of discharge, & the goods being destined to Pillau are seized while the ship is lying at anchor in Pillau Roads, this is a seizure in the port of discharge within the meaning of the warranty.—*MAYDHEW v. SCOTT* (1811), 3 Camp. 205, N. P.

**1382. — —.]**—Under a policy of insurance on goods from London to any ports or places in the Baltic, backwards & forwards, etc.; with leave to touch, stay, & trade at all places for all purposes, & to take in & discharge goods wheresoever the ship might touch at; & in case it should be found dangerous to enter such ports & places, or the captain was not allowed to discharge the cargo, with leave to return, etc., until he found a port which he could enter with safety: the insurance to continue until the ship & goods arrived at as above; upon the ship until moored at anchor twenty-four hours in safety, & upon the goods until the same should be there discharged & safely landed: at a premium of 14 guineas, to return £7 per cent. for arrival: with warranty of the goods free from capture or seizure in the ship's ports of discharge:—*Held*: (1) the ship having arrived in the outer Road of Pillau, which is a bar harbour, where large ships like this are obliged to discharge part of their cargoes into lighters to enable them to go over the bar into the inner harbour, where they discharge the remainder; & the captain having anchored two miles & a quarter further out than ships usually lie for this purpose; but which difference was negatived by the verdict of the jury as material to the object of inquiry; & having gone on shore to report his ship & cargo, & obtain permission to discharge his cargo, & to give directions for it; & having returned in five or six days, when he was accompanied by Prussian soldiers & a pilot, who took possession of the ship & cargo, & discharged part of it into a lighter in the place where the ship remained at anchor, & afterwards carried her over the bar into the inner harbour, where the goods were finally confiscated; this was an arrival in the captain's elected port of discharge, so as to discharge the underwriters from the loss by seizure there, within the meaning of the policy; (2) the assured were entitled to a return of £7 per cent. premium "for arrival," in circumstances which discharged the underwriters from any loss.—*DALGLEISH v. BROOKE* (1812), 15 East, 295; 104 E. R. 856.

*Annotations*:—*As to* (1) *Consd.* *Keyser v. Scott* (1812), 4 Taunt. 660. *Distd.* *Levy v. Vaughan*, *Levy v. Buck* (1812), 4 Taunt. 387. *Refd.* *Levin v. Newnham* (1813), 4 Taunt. 722; *Whitwell v. Harrison* (1848), 2 Exch. 127.

**1383. — Capture in open river—Ship waiting to discharge clandestinely.]**—If by a policy of insurance the ship is warranted "free of capture & seizure in her port or ports of discharge," & she is taken in an open river not within the limits of any regular port, waiting for an opportunity there to discharge her cargo in a clandestine manner, the place where she is taken is to be considered her

**PART II. SECT. 18, SUB-SECT. 3.—D.**

**1374 i. Voyage to prohibited destination.]**—*RICHARD S.S. CO., LTD. v. CHINA MUTUAL INSURANCE CO.* (1907), 42 N. S. R. 240; 4 E. L. R. 269.—*CAN.*

**1376 i. — Loss before reaching prohibited area.]**—A vessel, insured under

a time policy with a clause prohibiting her entering certain waters after Oct. 1, set sail after that date from the end of the wharf at C., bound for M., & stranded about a quarter of a mile from the end of the wharf, but before she had cleared the harbour:—*Held*: in view of the proved intention to enter the prohibited waters, manifested by

the unequivocal overt act of setting sail from the wharf at C. bound for M., the risk insured against did not attach.—*ROBERTSON v. STAIRS* (1875), 10 N. S. R. (1 R. & C.) 345.—*CAN.*

**1376 ii. — —.]**—*MORAN v. TAYLOR* (1884), 24 N. B. R. 39.—*CAN.*



port of discharge within the meaning of the policy, & the underwriters are not liable for the loss.—*JARMAN v. COAPE* (1811), 13 East, 394; 2 Camp. 613; 104 E. R. 422.

*Annotations*:—*Expld.* *Dalglish v. Brooke* (1812), 15 East, 295. *Consd.* *Levy v. Vaughan*, *Levy v. Buck* (1812), 4 Taunt. 387.

**1384. — Capture two & a half miles from port.]**—Where goods insured were warranted free from seizure in the port of discharge, the captain having arrived within about two miles & a half from the harbour of the place to which he was destined, cast anchor & made a signal for a pilot; a pilot boat in consequence came out with douaniers on board, who carried him into the harbour, where the cargo was seized & condemned:—*Held*: this was a seizure in her port of discharge within the meaning of the warranty.—*OOM v. TAYLOR* (1812), 3 Camp. 204, N. P.

**1385. — Capture three miles outside roadstead.]**—A policy contained a warranty by the assured against confiscation by the govt. in the ship's port of discharge. A vessel destined to discharge at Pillau, anchored two German miles from Pillau, three English miles without the roadstead where vessels unload in order to come over the bar into the inner harbour; & was captured at her moorings by soldiers coming off in a boat from Pillau:—*Held*: this loss was not within the warranty.—*LEVY v. VAUGHAN*, *LEVY v. BUCK* (1812), 4 Taunt. 387; 128 E. R. 380.

**1386. — Ship moored outside harbour.]**—If a vessel is taken at her moorings, being neither within the *caput portus*, nor within that part of a haven where ships unload, the underwriter is not discharged by a warrant against "capture in the ship's port of destination."—*KEYSER v. SCOTT* (1812), 4 Taunt. 660; 128 E. R. 490.

*Annotations*:—*Consd.* *Levin v. Newnham* (1813), 4 Taunt. 722. *Distd.* *Colby v. Hunter* (1827), 3 C. & P. 7. *Refd.* *Whitwell v. Harrison* (1848), 2 Exch. 127.

**1387. — Capture eight miles from shore.]**—*LEVIN v. NEWNHAM* (1813), 4 Taunt. 722; 128 E. R. 514.

**1388. — Question for jury.]**—Whether the place where a vessel casts anchor is within her port of discharge, is a fact for the jury, not a question of law.—*LEVIN v. NEWNHAM* (1813), 4 Taunt. 722; 128 E. R. 514.

**1389. "Free from confiscation"—Whether risk of seizure covered.]**—A warranty in a policy of insurance, freeing the underwriter from loss by confiscation of the govt. in the ship's port of discharge, does not apply to a case where, upon the arrival of the ship in the Roads of Pillau within the Prussian dominions, she was boarded by two different parties, one of Prussian soldiers, & the other the crew of a French privateer, who disputed the possession of her, but agreed to take her into Pillau, in order to settle their claims; upon which the Prussian Govt. referred the matter to the French Govt. at Paris, where the ship was condemned as prize to the French captors, & afterwards given up to them. For the terms of the warranty import something more to be done on behalf of the local govt. of the port of discharge than the mere act of seizure by or with the permission of such local government.

If underwriters wish to guard against such a risk generally, they insert a clause to be free from seizure, generally, in the port of discharge, according to the common practice in these cases, & not merely to be free from confiscation, which is of more confined meaning (*LORD ELLENBOROUGH, C.J.*).—*LEVIN v. ALLNUTT* (1812), 15 East, 267; 104 E. R. 845.

**What amounts to capture, seizure, etc.]**—See Sect. 20, sub-sect. 4, B.-F., *post*.

### *F. Neutrality.*

#### *(a) In General.*

See Marine Insurance Act, 1906 (c. 41), ss. 36 & 37; PRIZE LAW.

**1390. Effect of breach—Policy void.]**—False warranty in a policy of insurance will vitiate it, though the loss happens in a mode not affected by that falsity.—*WOOLMER v. MUILMAN* (1763), 1 Wm. Bl. 427; 3 Burr. 1419; 96 E. R. 243.

**1391. Meaning of warranty—Owned by neutral national.]**—A warranty on a policy of insurance of a ship being American does not mean that she is American built, but that she is the property of an American subject.—*WILSON v. BACKHOUSE* (1797), Peake, Add. Cas. 119, N. P.

See, also, No. 1401, *post*.

**1392. — Ship entitled to privileges of neutral flag.]**—A warranty in a policy of insurance, that the ship is American property means that the ship is entitled to all the privileges of an American flag: & if she has no passport on board, which is required by the treaty between France & America, the warranty is not complied with, & the assured cannot recover against the underwriter, though in fact the ship suffers no inconveniences in the voyage from the want of the passport.—*RICH v. PARKER* (1798), 7 Term Rep. 705; 2 Esp. 615; 101 E. R. 1210.

*Annotations*:—*Consd.* *Baring v. Clagett* (1802), 3 Bos. & P. 201. *Refd.* *Bell v. Carstairs* (1811), 14 East, 374.

See, also, No. 1401, *post*.

**1393. What is sufficient compliance—Neutrality at commencement of risk.]**—Under a warranty in a policy of insurance, that the ship & cargo are neutral property, it is sufficient that they are neutral when the risk commences.—*EDEN v. PARKISON* (1781), 2 Doug. K. B. 732; 99 E. R. 468.

*Annotations*:—*Refd.* *Furtado v. Rogers* (1802), 3 Bos. & P. 191. *Mentd.* *Robertson v. Harris*, [1900] 2 Q. B. 117.

**1394. — — —.]**—If goods be insured from A. to B. in a neutral ship, it is sufficient to charge the underwriters, that the ship was neutral when she sailed. 16 Geo. 3, c. 5, which subjected to forfeiture all American ships, & all other ships with their cargoes trading to any port of the colonies, does not extend to the property of Americans on board any other ship not trading to one of those ports: so that an insurance of the property of Americans in a Dutch ship from Amsterdam to St. Eustatia is not prohibited by that Act. If a ship or cargo, insured, be taken & condemned as prize, it is not necessary for the insured to make any claim or appeal, before they call on the underwriters.—*TYSON v. GURNEY* (1789), 3 Term Rep. 477; 100 E. R. 686.

*Annotation*:—*Refd.* *Furtado v. Rogers* (1802), 3 Bos. & P. 191.

Compare No. 1406, *post*.

**1395. — Ship properly documented—According to regulations of belligerent states.]**—*BARZILLAI v. LEWIS*, No. 1404, *post*.

**1396. — — — As required by treaty.]**—*RICH v. PARKER*, No. 1392, *ante*.

**1397. — — —.]**—Art. 25 of the treaty of Feb. 1778, between France & America, which requires the vessels of the two allies, in case either is at war, to be furnished with a passport expressing (*inter alia*) the place of habitation of the commander of the vessel, is not complied with by a passport granting leave to G. D. commander of the ship called the M. V. of the town of P., of the burthen of, etc.; such description of place being applicable only to the ship as the last antecedent,

*Sect. 18.—Warranties—Express: Sub-sect. 3, F. (a) & (b).]*

which is further described by her burden in a continuing sentence; & therefore, *pltf.* was held not entitled to recover upon a policy of insurance on such ship warranted American, which had been captured by the French & condemned as prize.—*BARING v. CHRISTIE* (1804), 5 East, 398; 1 Smith, K. B. 462; 102 E. R. 1122.

**1398. ——— Necessity for proof of treaty.]**—(1) The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average loss & total loss, or to money expended & labour bestowed about the defence, safeguard, & recovery of the ship, to a much greater amount than the subscription; & it shall be recoverable as an average loss.

(2) A register is not a document required by the law of nations as expressive of a ship's national character.

(3) If *deft.* on a policy would impugn *pltf.*'s right to recover for a loss by capture, on the ground that the condemnation appears by the sentence of a foreign *ct.* to have proceeded on the want of certain documents, not required by the law of nations, which *pltf.* ought to have provided, it is for *deft.* to show by evidence, the foreign law or treaty which renders such documents necessary.—*LE CHEMINANT v. PEARSON, LE CHEMINANT v. ALLNUTT* (1812), 4 Taunt. 367; 128 E. R. 372.

*Annotations:—As to (1) Distd. Aitchison v. Lohre* (1879), 4 App. Cas. 755. *Refd. Stewart v. Steele* (1842), 5 Scott, N. R. 927; *Kemp v. Halliday* (1866), 6 B. & S. 723.

*See, also, Nos. 1404–1423, post.*

**1399. ——— Enemy supercargo—In contravention of ordinance of belligerent state—Assured & insurer both unaware of ordinance.]**—A Portuguese ship was insured & warranted neutral. She carried an English supercargo, a fact which was not known to the underwriter, & which was contrary to a French *ordonnance*. On this ground she was captured, & condemned as a prize:—*Held*: the underwriter was liable.—*MAYNE v. WALTER* (1782), 3 Doug. K. B. 79; 99 E. R. 548.

*Annotations:—Consd. Geyer v. Aguilar* (1798), 7 Term Rep. 681. *Fold. Pollard v. Bell* (1800), 8 Term Rep. 434. *Consd. Siffken v. Lee* (1807), 2 Bos. & P. N. R. 484. *Refd. Barzillai v. Lewis* (1782), 3 Doug. K. B. 126; *Calvert v. Bovill* (1798), 7 Term Rep. 523; *Baring v. Clagett* (1802), 3 Bos. & P. 201; *Lothian v. Henderson* (1803), 3 Bos. & P. 499; *Dalglish v. Hodson* (1831), 9 L. J. O. S. C. P. 138.

**1400. ——— Forfeiture of neutrality—After commencement of risk.]**—*GARRELS v. KENSINGTON*, No. 1406, *post*.

**1401. ——— Neutral owner—Trading in belligerent country.]**—An American who resides with his family in England, is so far considered as a British subject, that if a ship of his is warranted to be American property, it is not to be deemed so, & if captured the owner cannot recover.—*TABBS v. BENDELACK* (1801), 3 Bos. & P. 207, n.; 4 Esp. 108; 127 E. R. 114.

*Annotation:—Mentd. R. v. Bjornsen* (1865), 13 W. R. 664.

**1402. ——— Enemy cargo—Carried to enemy country.]**—*BARKER v. BLAKES*, No. 2315, *post*.

**1403. Proof of warranty—What is *prima facie* evidence.]**—*ARCANGELO v. THOMPSON*, No. 1799, *post*.

(b) *Effect of Sentence of Foreign Prize Courts.*

*See, generally, PRIZE LAW.*

**1404. Whether conclusive against neutrality—Grounds of condemnation not stated.]**—A ship warranted Dutch, & sailing under a Dutch name, with a Dutch sea brief, was captured by the French, & condemned by sentence of the French

*Ct. of Admlty.* as English property, & by an English name, the sentence not stating the particular grounds of condemnation:—*Held*: this sentence was conclusive evidence that the ship was not Dutch. *Semble*: the parties warranting a ship to be neutral are bound to see that she is documented according to the regulations of the belligerent States.—*BARZILLAI v. LEWIS* (1782), 3 Doug. K. B. 126; cited in 8 Term Rep. at p. 441; 99 E. R. 573.

*Annotations:—Consd. Pollard v. Bell* (1800), 8 Term Rep. 434; *Siffken v. Lee* (1807), 2 Bos. & P. N. R. 484. *Refd. Rich v. Parker* (1798), 7 Term Rep. 705; *Baring v. Clagett* (1802), 3 Bos. & P. 201.

**1405. ———.]**—Where goods were insured, warranted neutral, on board the *Thetis*, a Tuscan ship, & the ship & goods were captured by the Spaniards, & condemned as a "good & lawful capture":—*Held*: this sentence was conclusive evidence that the goods were not neutral.—*SALOUCCI v. WOODMASS* (1784), 3 Doug. K. B. 345; 99 E. R. 688; *subsequent proceedings, sub nom. SALUCCI v. JOHNSON* (1785), 4 Doug. K. B. 224.

*Annotations:—Expld. Calvert v. Bovill* (1798), 7 Term Rep. 523. *Consd. Baring v. Clagett* (1802), 3 Bos. & P. 201. *Refd. Lothian v. Henderson* (1803), 3 Bos. & P. 499.

**1406. ——— Condemnation on ground of breach of neutrality—Forcible rescue after capture.]**—A warranty of Danish property, Denmark being then a neutral power, in a policy of insurance on ship & goods, was holden to be conclusively disproved by a sentence of a *ct. of Admlty.* condemning the ship & cargo because the master & crew had broken their neutrality in the course of the voyage insured, by forcibly rescuing the ship which had been seized & carried into port by a belligerent power, for the purpose of search. Any forfeiture of neutrality by the wilful act of the assured, or of the master, etc., after the commencement of the voyage insured, is a breach of such a warranty.—*GARRELS v. KENSINGTON* (1799), 8 Term Rep. 230; 101 E. R. 1361.

**1407. ———.]**—(1) The sentence of a foreign *ct. of Admlty.* condemning a vessel for attempting to violate a blockade, is not conclusive unless the fact upon which the condemnation proceeded appears upon the face of the sentence, free from doubt & ambiguity; it cannot be collected by mere inference, nor can it be left in uncertainty whether the vessel was condemned upon one ground, which would be a just ground of condemnation by the law of nations, or on another ground, which would only amount to a breach of the municipal regulations of the condemning country.

(2) A ship was destined to a port which was notified to be under blockade:—*Held*: the voyage was not illegal in its inception, as the vessel might have sailed for the purpose of inquiring whether the blockade existed.—*DALGLEISH v. HODGSON* (1831), 7 Bing. 495; 5 Moo. & P. 407; 9 L. J. O. S. C. P. 138; 131 E. R. 192.

*Annotations:—As to (1) Refd. Simpson v. Fogo* (1863), 1 New Rep. 422; *Hobbs v. Henning* (1865), 17 C. B. N. S. 791; *Castrigue v. Inrie* (1870), L. R. 4 H. L. 414; *Frails, Times v. Carr* (1900), 82 L. T. 698. *Generally, Mentd. De Mora v. Concha* (1885), 29 Ch. D. 268.

**1408. ——— Simulated papers.]**—An assured upon a policy on ship, not having leave to carry simulated papers, cannot recover for a loss by capture, if it appear by the sentence of the foreign prize *ct.* that one of the causes stated for the condemnation was the carrying of simulated papers.—*OSWELL v. VIGNE* (1812), 15 East, 70; 104 E. R. 771.

**1409. ——— Assented to by insurer.]**—American goods in an American ship, having been insured on a voyage from America to



the Baltic, with liberty to carry simulated papers, & having been captured & condemned by a Danish sentence, which, after suggesting a doubt as to the English character of the owner, stated that the positive contradiction which the documents contained concerning the property of the ship & cargo rendered it impossible to acknowledge them as neutral; & the Prize Ct. of Appeal afterwards alleging as grounds of confirmation, that the ship's documents were not in due order: the sea passport, ordering that, before it could be considered of value, the captain must take his oath before the officer appointed for that purpose: but that though the passport was made out as if the captain had appeared before A., the notary public, & taken his oath, yet that neither the notary's name or seal of office was under the document, & therefore that the sea-letter was to be looked upon as a blank, & no credit could be given to it as a public document; that the ship had false documents, which it exemplified by the journal; the documents disagreed with regard to their contents, which it exemplified by the bills of lading & letters on board; that a person on board, who seemed to be interested in the ship & cargo, had been set on shore in England; that false French certificates *d'origine* were found on board:—*Held*: taking the whole together, the ground of condemnation was the having on board simulated papers, which, mixed with other circumstances, led to the conclusion that the ship & cargo were hostile British, & not neutral American property; & the not having a sea passport on board, verified in the manner stated in the sentence, was only a circumstance to show that the ship carried simulated papers; even if such a passport were required by any treaty between the United States & Denmark, which did not appear: & consequently, the loss was attributable to a cause which the underwriter had sanctioned by the leave to carry simulated papers; & not from the ship's not being properly documented, as an American ship ought to be; for which the assured, as owner of the ship, as well as of the goods insured, would have been answerable. Neither was the condemnation on the ground that the papers had not been properly simulated; so as to attribute the loss to the mere negligence of the assured in the mode of exercising the liberty reserved to them; supposing that would have varied the case.—*BELL v. BROMFIELD* (1812), 15 East, 364; 104 E. R. 882.

**1410.** ——— *Infraction of treaty—Ship improperly documented.*—By the sentence of a French Ct. of Admty., it appeared that the ship insured warranted American had been condemned as enemy's property, for want of having on board a *role d'equipage* or list of the crew, such as is required by marine ordinance of France & adjudged by the ct. there to be requisite within the meaning of the treaty of commerce between France & America:—*Held*: conclusive evidence against the warranty of neutrality, though in fact the ship was American.—*GEYER v. AGUILAR* (1798), 7 Term Rep. 681; 101 E. R. 1196.

*Annotations*:—*Consd.* *Lothian v. Henderson* (1803), 3 Bos. & P. 499. *Refd.* *Baring v. Clagett* (1802), 3 Bos. & P. 201; *Hobbs v. Henning* (1865), 17 C. B. N. S. 791; *De Mora v. Concha* (1885), 29 Ch. D. 268.

**1411.** ——— *Policy of insurance on a ship warranted American.* To negative this warranty, a sentence of condemnation of a French ct. at St. Domingo was given in evidence, which began thus: "Condemnation of the English ship *Mount Vernon*. Extract from the books of the office of the provisional tribunal respecting

prizes established at St. Domingo. We F. P. Judge," etc., & after stating that the circumstances of papers having been thrown overboard, the captain & the supercargo having abandoned the ship, the captain being a Portuguese without a certificate of his naturalisation, & the United States, in their last treaty with England, having suffered to be added to the articles which had before been considered as contraband of war, staves, etc., were sufficient motives to condemn the ship, condemned the same as property belonging to the captor:—*Held*: this sentence was conclusive evidence that the ship was not American.—*BARING v. CLAGETT* (1802), 3 Bos. & P. 201; 127 E. R. 111.

*Annotations*:—*Consd.* *Lothian v. Henderson* (1803), 3 Bos. & P. 499; *Baring v. Christie* (1804), 5 East, 398.

**1412.** ——— *Policy of Insurance on goods on board the Catherine, an American vessel.* After the policy was effected, doubts having arisen whether the policy contained a warranty, the underwriters signed an agreement, that in case of capture or seizure, the assured, before they claimed for a loss, must produce proofs of the ship being American bottom, & by bills of lading show that the cargo had been shipped on account & risk of A., upon which they would settle by granting bills at four months for the amount of their subscriptions; in full dependence that the insured would use their best endeavours to recover the property as for account of the shippers:—*Held*: on proof being produced that the ship was American bottom, & the cargo shown by bills of lading to have been shipped on account & risk of A., the assured were entitled to recover on a loss by capture, notwithstanding the production by the underwriters of any French sentence of condemnation to falsify the warranty.

(2) A sentence of condemnation in a French Ct. of Admty. is admissible evidence in an action here between the assured & underwriters of a policy of insurance containing a warranty of neutrality.

(3) It seems that the sentence of a foreign Ct. of Admty. condemning a ship warranted neutral, in which the consideration leading to the judgment proceeded on the want of a document not required by the law of nations, but which adjudges "lawful prize all the goods & effects which compose the cargo of the ship, since the whole, owing to the captain not being provided with proper & regular dispatches & papers, is to be deemed the property of the enemies of the French Republic," is conclusive evidence against the warranty of neutrality.—*LOTHIAN v. HENDERSON* (1803), 3 Bos. & P. 499; 127 E. R. 271, H. L.

*Annotations*:—*As to* (2) *Consd.* *Hobbs v. Henning* (1865), 17 C. B. N. S. 791; *Castrigue v. Imrie* (1870), L. R. 4 H. L. 414. *Refd.* *De Mora v. Concha* (1885), 29 Ch. D. 268. *As to* (3) *Expld.* *Bolton v. Gladstone* (1804), 5 East, 155. *Consd.* *Hobbs v. Henning* (1865), 17 C. B. N. S. 791; *Castrigue v. Imrie* (1870), L. R. 4 H. L. 414. *Refd.* *De Mora v. Concha* (1885), 29 Ch. D. 268.

**1413.** ——— *Where a foreign Ct. of Prize professes to condemn a ship & cargo on the ground of an infraction of treaty, in not being properly documented, etc., as required by the treaty between the captors & captured; such sentence is conclusive in our cts. against a warranty of neutrality of such ship & cargo in an action upon a policy of insurance against the underwriter: although inferences were drawn in such sentence from *ex p.* ordinances in aid of the conclusion of such infraction of treaty.*—*BARING v. ROYAL EXCHANGE ASSURANCE CO.* (1804), 5 East, 99; 102 E. R. 1007.

*Annotation*:—*Refd.* *Von Tungeln v. Dubois* (1809), 2 Camp. 151.



*Sect. 18.—Warranties—Express: Sub-sect. 3, F. (b), G. & H.;*

**1414. — Breach of ordinance to which neutral state had not assented.]**—A warranty of neutrality in a policy of insurance is not falsified by a sentence of a foreign Ct. of Admlty. condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented.—*POLLARD v. BELL* (1800), 8 Term Rep. 434; 101 E. R. 1474.

*Annotations:—Apld. Bird v. Appleton* (1800), 3 Term Rep. 562. *Expld. Lothian v. Henderson* (1803), 3 Bos. & P. 499. *Consd. Castrique v. Imrie* (1870), L. R. 4 H. L. 414. *Refd. Baring v. Clagett* (1802), 3 Bos. & P. 201; *Reimers v. Druce* (1857), 23 Beav. 145; *Hobbs v. Henning* (1865), 17 C. B. N. S. 791.

**1415. — — — — —.]**—*BIRD v. APPLETON*, No. 1141, *ante*.

**1416. — — — — —.]**—*PRICE v. BELL*, No. 1580, *post*.

**1417. — Condemnation as enemy property.]**—*KINDERSLEY v. CHASE* (1801), 2 Park's Marine Insurances, 8th ed. p. 743, P. C.

*Annotations:—Consd. Baring v. Clagett* (1802), 3 Bos. & P. 201. *Expld. & Apld. Bolton v. Gladstone* (1809), 2 Taunt. 85. *Consd. De Mora v. Concha* (1885), 29 Ch. D. 268. *Refd. Lothian v. Henderson* (1803), 3 Bos. & P. 499.

**1418. — — — — —.]**—Sentence of condemnation of a prize, taken by a French privateer & carried into Spain, by a French ct. sitting there, Spain being then a belligerent ally of France in the war against Great Britain, is valid; & such condemnation, proceeding on the ground of the property being enemy's & British, is conclusive in an action on a policy against the underwriter by the assured who had insured it as Danish, which in fact it was, Denmark being then neutral.—*ODDY v. BOVILL* (1802), 2 East, 473; 102 E. R. 450.

**1419. — — — — —.]**—If it can be discerned on the face of the sentence of a foreign ct. of prize, that the ct. condemned on the ground that the property was enemy's property, the sentence is conclusive evidence in the cts. here that the property was not neutral.

Although it appears on the face of the sentence that the prize ct. attained that conclusion through the medium of rules of evidence & rules of presumption established only by the particular ordinances of their own country, & not admissible on general principles.—*BOLTON v. GLADSTONE* (1809), 2 Taunt. 85; 127 E. R. 1008; *previous proceedings* (1804), 5 East, 155.

*Annotations:—Refd. Von Tungeln v. Dubois* (1809), 2 Camp. 151; *De Mora v. Concha* (1885), 29 Ch. D. 268.

**1420. — Condemnation on grounds not pointing to absence of neutrality.]**—The sentence of a foreign Ct. of Admlty. that a ship warranted neutral is lawful prize is not conclusive evidence that the ship is not neutral if the grounds of the sentence appear & do not show a breach of neutrality.—*SALUCCI v. JOHNSON* (1785), 4 Doug. K. B. 224; 99 E. R. 852.

*Annotations:—Consd. Calvert v. Bovill* (1798), 7 Term Rep. 523. *Expld. Garrels v. Kensington* (1799), 8 Term Rep. 230. *Consd. Pollard v. Bell* (1800), 8 Term Rep. 434. *Refd. Geyer v. Aguilar* (1798), 7 Term Rep. 681; *Phyn v. Royal Exchange Assce.* (1798), 7 Term Rep. 505.

**1421. — — — — —.]**—In an action on a policy of insurance on goods warranted American, on board a ship from London to Virginia, a sentence of a foreign ct., which after reciting that "forasmuch as the true destination of the vessel was for the English islands, having been hired & loaded at London, & having on board eighty barrels of gunpowder, declares the ship & cargo a good prize," is not conclusive evidence against the warranty of neutrality; because the special grounds as-

signed for the sentence do not necessarily lead to such a conclusion.—*CALVERT v. BOVILL* (1798), 7 Term Rep. 523; 101 E. R. 1111.

*Annotations:—Consd. Dalgleish v. Hodgson* (1831), 7 Bing. 495. *Refd. Hobbs v. Henning* (1865), 17 C. B. N. S. 791.

**1422. — Sentence reversed on appeal.]**—If a ship warranted neutral be condemned as prize by a French Ct. of Admlty., & a ct. of appeal afterwards reverse such sentence, but refuse to give damages or costs, on account of the muster-roll not expressing the place of nativity of the crew according to an ordinance of France, & it be proved that the ship was otherwise properly documented as a neutral, the assured may recover for the detention, notwithstanding such refusal of the ct. of appeal to allow damages or costs.—*SIFFKEN v. LEE* (1807), 2 Bos. & P. N. R. 484; 127 E. R. 718.

**1423. — Mere representation not amounting to warranty.]**—If a ship insured is merely represented as neutral a sentence of a foreign Ct. of Admlty., condemning her for a violation of the laws of neutrality, is not evidence to falsify the representation.—*VON TUNGELN v. DUBOIS* (1809), 2 Camp. 151, N. P.

Conclusiveness of prize court judgments, generally, see *CONFLICT OF LAWS*, Vol. XI., pp. 465, 466.

#### G. Against Contraband of War.

**1424. What constitutes breach—Part of cargo contraband.]**—Whilst war was existing between the United States of America & the so-called Confederate States goods were insured on a voyage from London to Matamoras by a policy which contained a warranty against contraband of war. Matamoras was a neutral port belonging to Mexico, but the intention of the assured from the beginning was to send the goods on to the Confederate States by transshipping them at Matamoras, & conveying them across the river which divided Mexico from the territory then in the possession of the Confederate States. Some of the goods which were so insured consisted of artillery harness:—*Held*: such goods were contraband of war, & there was therefore a breach of the said warranty, which avoided the whole insurance.—*SEYMOUR v. LONDON & PROVINCIAL MARINE INSURANCE CO.* (1872), 41 L. J. C. P. 193; 27 L. T. 417; 1 Asp. M. L. C. 423; *affd.* (1873), 42 L. J. C. P. 111, n., Ex. Ch.; *subsequent proceedings, sub nom. LONDON & PROVINCIAL INSURANCE CO. v. SEYMOUR* (1873), L. R. 17 Eq. 85.

**1425. — Transport of belligerent soldiers.]**—*Semble*: the term "contraband of war," in its natural sense, & in the absence of special circumstances, or of something in the context pointing to another meaning, is applicable to goods only, & not to persons; & therefore the transport of military officers of a belligerent State as passengers on board a neutral ship is not a breach of a warranty against "contraband of war" in a policy of marine insurance.—*YANGTSE INSURANCE ASSOCN. v. INDEMNITY MUTUAL MARINE ASSURANCE CO.*, [1908] 2 K. B. 504; 77 L. J. K. B. 995; 99 L. T. 498; 24 T. L. R. 687; 52 Sol. Jo. 550; 11 Asp. M. L. C. 138; 13 Com. Cas. 283, C. A.

#### H. Other Cases.

**1426. "Seamen"—Persons belonging to ship's company.]**—*BEAN v. STUPART*, No. 91, *ante*.

**1427. "Guns"—Implied warranty as to gun crews.]**—Warranty that a ship had twenty guns. It is no breach of the warranty, that she had only twenty-five men, & that it required sixty men to

man twenty guns.—*HIDE v. BRUCE* (1783), 3 Doug. K. B. 213; 99 E. R. 619.

**1428. Ship insured in "lawful trade"—Loss through barratry of master—Smuggling.]—***HAVELOCK v. HANCILL*, No. 1787, *post*.

**1429. Warranty as to ship's "licence"—What is sufficient compliance.]—**An insured vessel is warranted to carry a French licence, it is not sufficient to show that the captain of the vessel in 1813, before the vessel sailed from Dantzic, received a document which purported to be a French licence, without showing that he received it from some officer or person in authority under the French govt.; but proof that after the arrival of the vessel at Bourdeaux, she was allowed to remain there for upwards of a month after an inspection of the French licence & other documents by the officer of the French govt. is *prima facie* evidence that the document is genuine.—*EVERTH v. TUNNO* (1816), 1 Stark. 508, N. P.; *subsequent proceedings* (1817), 1 B. & Ald. 142.

**1430. Insurance on cargo being wine—Not warranty that whole cargo declared.]—**A voyage to a Prussian port is not illegal as being a trading with an enemy, although our commerce is entirely excluded from the ports of Prussia, & there be no diplomatic intercourse between the two countries. A policy of insurance is not vitiated by giving leave to the ship to proceed to any port in a particular sea in which there are both hostile & neutral ports, unless it can be shown that it was intended the ship should in fact proceed to one of the former. An insurance is declared, to be "on the cargo, being 1,031 hhds. wine"; this does not amount to a warranty that the wine constitutes the whole cargo, & that no other goods shall be taken on board.—*MULLER v. THOMPSON* (1811), 2 Camp. 610, N. P.

*Annotations:—Mentd.* *Gill v. Dunlop* (1816), 2 Marsh. 440; *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484.

**1431. "Iron"—Whether includes steel.]—**A policy of insurance on a ship contained a clause "Warranted no iron, or ore, or phosphate cargo, exceeding the net registered tonnage." In an action on the policy against the underwriters:—*Held*: the warranty was broken by shipping a quantity of steel in excess of the net registered tonnage.—*HART v. STANDARD MARINE INSURANCE Co.* (1889), 22 Q. B. D. 499; 58 L. J. Q. B. 284; 60 L. T. 649; 37 W. R. 366; 5 T. L. R. 229; 6 Asp. M. L. C. 368, C. A.

*Annotation:—Mentd.* *Sanday v. British & Foreign Marine Insco.*, [1915] 2 K. B. 781.

**1432. Part value "warranted uninsured"—Breach—"Honour" policies on disbursements.]—***RODDICK v. INDEMNITY MUTUAL MARINE INSURANCE Co.*, No. 566, *ante*.

**1433. ——— Policy to cover probable deficiencies—Insolvency of first insurer.]—**A warranty in a time policy that a vessel shall not be insured beyond a named amount means that it shall not be effectively insured to a larger amount; such a warranty is not broken by the owner taking out a new policy to cover the probable deficiency upon a policy effected with an underwriter who becomes insolvent, although the total nominal amount insured is thereby made to exceed the amount limited by the warranty.

A time policy upon hull & machinery of a steamship valued at £12,000 contained a proviso, "Warranted £2,400 uninsured." The owner effected time policies to the total amount of £9,600, one of the policies being effected with a syndicate to the amount of £5,000. During the currency of the policies the syndicate stopped

payment, & eventually the large majority of its members became insolvent. The owner, estimating that the syndicate policy was not effective for more than £2,000, took out further policies upon the ship for £3,000. The ship was lost, & the total amount that the owner could in the most favourable event recover upon all the policies was less than £9,600:—*Held*: there had been no breach of the warranty.—*GENERAL INSURANCE Co. OF TRIESTE (ASSICURAZIONI GENERALI) v. CORY*, [1897] 1 Q. B. 335; 66 L. J. Q. B. 313; 13 T. L. R. 130; 2 Com. Cas. 58.

**1434. "Mining timber"—How construed—Decision of German Prize Court.]—**A marine insurance policy containing a "free of capture & seizure" clause also contained the warranty, "no mining timber carried." The vessel carried timber described as "sleepers." The shorter lengths were adapted for use in the construction of small tramways such as those used in collieries, & the longer lengths were prepared for use as sawn timber & could be used in mines, though this was not their primary use. The German Govt. had published a decree declaring mining lumber to be absolute contraband & all kinds of lumber except mining lumber to be conditional contraband. The vessel was captured as a prize by German warships, & a German prize ct. condemned both ship & cargo, holding that the smaller sleepers were to be used for supporting tramway rails in mines & the larger sleepers for keeping up the roof in mines & that the latter at least must be considered mining timber & absolute contraband. In an action on the policy:—*Held*: timber not specially put on the market for use in mining was not mining lumber within the decree in the contemplation of the parties or mining timber within the warranty, & the decision of the German ct. was not binding on the question of the meaning of "mining timber" in the warranty, & pl'ts. were entitled to recover.—*AKT. GRENLAND v. JANSON* (1918), 35 T. L. R. 135.

**Warranty against contraband of war.]—***See* Sub-sect. 3, G., *ante*.

#### SUB-SECT. 4.—CONSTRUCTION OF.

**1435. No ambiguity or uncertainty—Admission of extrinsic evidence.]—**(1) Where a warranty or condition in a policy of marine insurance is expressed in clear terms evidence will not be admitted to show that it is to be construed contrary to the apparent meaning of those terms, although the desired construction may be that which has ordinarily been put upon it by persons making use of that form of policy.

Where a ship is insured on a time policy at & from Montreal, to trade between the Island of Newfoundland, Nova Scotia, Cuba, etc., & Quebec & Montreal, & the policy contains a stipulation in the following words: "Not allowed under this policy to enter the Gulf of St. Lawrence before Apr. 25, nor to be in the said Gulf after Nov. 15; nor to proceed to Newfoundland after Dec. 1, or before Mar. 15, without payment of additional premium, & leave first obtained, war risk & sealing voyages excepted"; the policy is not to be construed as declaring that the vessel may proceed from any of the ports named in the policy to Newfoundland on or before Dec. 1; notwithstanding it might have to pass through the Gulf after Nov. 15; but under that clause the vessel is neither to be in the Gulf after Nov. 15; nor to proceed to Newfoundland from any port after

**Sect. 18.—Warranties—Express: Sub-sect. 4. Sect. 19: Sub-sect. 1, A. (a) & (b) i.]**

Dec. 1; & if the ship enters the Gulf after Nov. 15, she commits a breach of warranty within the words of the policy, & the underwriters are not liable for any loss occurring in consequence of that breach, unless they accept abandonment with a knowledge of the breach.

(2) When notice of abandonment of a ship is given to underwriters, mere silence on their part will not operate as an acceptance of abandonment; but if the underwriters, on a loss occurring, & after notice of abandonment duly given, take possession of a ship by their agent, take her to a place of safety, repair her, & detain her in their custody for an unreasonable time without giving notice to the assured that they are acting on his behalf & that they do not accept the abandonment, their acts will amount to a constructive acceptance of abandonment; nor will the fact that the insurers think fit to libel the ship in the Admty. Ct. for salvage reward affect their liability, if the assured has not interfered in the salvage suit nor taken any steps to assert his continued ownership.

A warranty in a time policy upon a ship for certain voyages, that the ship shall not proceed to or be at certain places after given dates, has not the effect of leaving the ship totally uninsured by the policy if, in breach of the warranty, she proceeds to, or is at those places after those dates, so as to preclude recovery in all cases; & if the underwriters, after a loss occurs whilst the ship is upon a voyage in breach of the warranty, duly accept abandonment, they will be estopped from setting up that there was no loss within the policy or the breach of warranty.

(3) A shipowner whose ship is mortgaged may, if he remains in possession, insure his ship to the full amount of her value.—*PROVINCIAL INSURANCE CO. OF CANADA v. LEDUC* (1874), L. R. 6 P. C. 224; 43 L. J. P. C. 49; 31 L. T. 142; 22 W. R. 929; 2 Asp. M. L. C. 538, P. C.

*Annotation:—As to (2) Consd. Shepherd v. Henderson* (1881), 7 App. Cas. 49.

**1436. —.**—*BIRRELL v. DRYER*, No. 800, *ante*.

**SECT. 19.—WARRANTIES—IMPLIED.**

**SUB-SECT. 1.—SEAWORTHINESS OF SHIP.**

**A. Voyage Policies.**

**(a) In General.**

See Marine Insurance Act, 1906 (c. 41), ss. 34 (2), 39 (1), (4).

**1437. Whether implied.]—MILLS v. ROEBUCK** (1769), 4 H. L. Cas. 357, n., Ex. Ch.

*Annotations:—Consd. March v. Pigot* (1771), 5 Burr. 2802; *Gibson v. Small* (1853), 4 H. L. Cas. 353. *Refd. Burges v. Wickham* (1863), 3 B. & S. 669.

**1438. —.**—*GIBSON v. SMALL*, No. 1491, *post*.

**1439. —.**—(1) It being now well established, as a rule of law, that on an insurance for a voyage either on ship, or goods, or freight, a warranty of seaworthiness, for the voyage, of the ship insured, or of the ship in which the goods are carried, is to be implied; but "seaworthiness" being a relative term, & the question of what it involves in each case being one of fact, there is no exception to the

rule in the case of an insurance on salvage, that is, on ship & cargo, in respect of the lien of the insured for salvage service rendered, there being no exclusion of such a warranty; & words in the policy, reciting that the ship & cargo have been abandoned by the original crew, & taken into port by the salvor (the insured), in whose interest the insurance is effected, do not amount to an implied exclusion of it, it being merely explanatory of the interest insured.

(2) The question to what extent the vessel, under such circumstances, is to be seaworthy, is for the jury, who will say whether the ship was, at the commencement of the voyage, in such a state as to be reasonably capable of performing it.—*KNILL v. HOOPER* (1857), 2 H. & N. 277; 26 L. J. Ex. 377; 29 L. T. O. S. 229; 5 W. R. 791; 157 E. R. 115.

*Annotation:—As to (1) Consd. Burges v. Wickham* (1863), 3 B. & S. 669.

**1440. —.**—*BICCARD v. SHEPHERD*, No. 1510, *post*.

**1441. —.**—The warranty of seaworthiness which is implied as to the ship in an ordinary policy of marine insurance does not extend to lighters employed to land the cargo. Therefore, to a declaration on an ordinary policy on goods from Liverpool to Melbourne "including all risk to & from the ship," the policy to endure until the goods should be discharged & safely landed at Melbourne, alleging damage by perils insured against, a plea that the damage happened after the goods had been discharged from the ship & while they were in a lighter for the purpose of being conveyed to the shore, that the lighter was not seaworthy for the purpose & that the damage was caused solely by such unseaworthiness, affords no defence.

If one of the ordinary incidents of the voyage is the hiring of local lighters, the insurer must bear the consequences of such local lighters not being qualified to land the goods in safety (*ERLE, C.J.*).—*LANE v. NIXON* (1866), L. R. 1 C. P. 412; Har. & Ruth. 585; 35 L. J. C. P. 243; 12 Jur. N. S. 392; 14 W. R. 641.

*Annotation:—Folld. Paul v. Insee. of North America* (1899), 15 T. L. R. 534.

**1442. —.**—A policy on a steam vessel was effected in Lower Canada at & from Montreal to Halifax, in Nova Scotia. The policy specially excepted the underwriters (*inter alia*) "from rottenness, inherent defects, & other unseaworthiness; theft, barratry, or robbery; bursting or explosion of boilers; or collapsing of flues, or breakage of machinery, unless occasioned by unavoidable external causes, or fire ensue therefrom; & charges, damages, or loss in consequence on a seizure or detention on account of any illicit to prohibited trade in articles contraband of war." At the time of starting there was a defect in the boiler of the vessel which was not apparent in rivers, but when she got into salt water she became disabled by reason of such defect, & was compelled to put into port to repair, when, after being repaired & detained for some days, she proceeded to sea, but encountering bad weather was lost:—*Held*: (1) in a voyage policy there was by implication of law, a warranty of seaworthiness, which had not been complied with, as the vessel sailed with a

**PART II. SECT. 19, SUB-SECT. 1.—A. (a).**

**1437 i. Whether implied.]—**In a policy of insurance effected for a voyage the law implies a warranty on the part of the assured which amounts to a positive undertaking that the vessel, at the

commencement of the voyage, is seaworthy.—*WHITE v. NEWFOUNDLAND MARINE INSURANCE CO.* (1864), 5 Nfld. L. R. 27.—*NFLD.*

**1437 ii. —.]—**It is a warranty precedent implied in every voyage policy that the ship in which the goods are insured, should at the loading of

the goods on board be seaworthy for the voyage.—*ROGERSON v. UNION MARINE INSURANCE CO.* (1870), 5 Nfld. L. R. 359.—*NFLD.*

**1437 iii. —.]—***BAKER & ADAMS v. SCOTTISH SEA INSURANCE CO.* (1856), 18 Dunl. (Ct. of Sess.) 691; 28 Sc. Jur. 293.—*SCOT.*



## INSURANCE.

*Sect. 19.—Warranties—Implied: Sub-sect. 1, A. (b) i., iii.,*

rendered seaworthy for the voyage, upon a policy "at & from," there can be no return of premium.—

ANNEN v. WOODMAN (1810), 3 Taunt. 299; 128 E. R. 119.

*Annotations:—*Consd. Bocard v. Shepherd (1861), 14 Moo. P. C. C. 471; Cohn v. Davidson (1877), 2 Q. B. D. 455. Refd. Dixon v. Sadler (1839), 9 L. J. Ex. 48.

**1457. — Absence of steam power—Old battleship—Being towed for breaking up purposes.]—**Pltfs. bought an old British battleship for breaking up in Germany, & having arranged for her towage across the North Sea, insured her with defts. against total loss, the insurance to run for twelve months & to cover the vessel during towage & after her arrival in Germany for breaking up. A runner crew of eight men was put on board the vessel by the tug co. as part of the towage contract & no steam was provided in her either for motive power or for dealing with the anchors. On the voyage the vessel was abandoned by the tugs, & she drifted ashore on the Dutch coast, & leave from the Dutch authorities to move her could not be obtained unless sufficient money was found to make sure that no injury would be done to the dike defences. Pltfs. then wrote to defts. saying that the vessel was totally lost & asking for the insurance money. In an action on the policy for total loss:—*Held*: (1) as the vessel could still be got off there was no actual total loss, but, as the cost of getting the vessel off & of satisfying the requirements of the dike authorities would exceed her insured value, there was a constructive total loss; (2) where an assured wrote to his insurer saying there was a total loss & asking for payment, this was a sufficient notice of abandonment for the purpose of a constructive total loss; (3) in the circumstances absence of steam power did not constitute unseaworthiness.—COHEN (G.) SONS & CO. v. STANDARD MARINE INSURANCE CO., LTD. (1925), 41 T. L. R. 232; 69 Sol. Jo. 310; 30 Com. Cas. 139; 21 Lloyd, L. R. 30.

*Annotation:—*Refd. The Refrigerant, [1925] P. 130.

*See, also*, No. 875, *ante*.

**1458. Damage to ship soon after sailing—Not attributable to stress of weather.]—**DOUGLAS v. SCOUGALL, No. 1452, *ante*.

*See, also*, No. 1451, *ante*, Nos. 1531–1547, *post*.

**1459. Non-compliance with rules of insurance association—As to yearly survey of ships.]—**Neglect to comply with the rules of an insurance association, providing that the managing underwriters were to survey the ships yearly, & order such stores & repairs as they deemed necessary, & unless these were supplied "the ships should not be insured" held to render the ship unseaworthy.—STEWART v. WILSON (1843), 12 M. & W. 11; 13 L. J. Ex. 27; 2 L. T. O. S. 75, 103; 7 Jur. 1020; 152 E. R. 1089.

### ii. Reasonable Fitness.

*See* Marine Insurance Act, 1906 (c. 41), s. 39 (1), (4).

**1460. Question of fact.]—**KNILL v. HOOPER, No. 1439, *ante*.

**1461. Necessity for.]—**BUCHANAN & CO. v. FABER, No. 603, *ante*.

**1462. What amounts to—Condition commensurate with risk—Stages of voyage.]—**HIBBERT v. MARTIN (1808), Park's Marine Insurances, 8th ed. p. 473.

*Annotations:—*Refd. Dixon v. Sadler (1839), 9 L. J. Ex. 48; Small v. Gibson (1849), 14 L. T. O. S. 290.

**1463. — — — — —.]—**BICCARD v. SHEPHERD, No. 1510, *post*.

**1464. — Insufficient repair.]—**TAYLOR SOUTH DEVON MARINE FIRE & LIFE INSURANCE Co. (1828), Dan. & Ll. 91.

**1465. — Size & construction of ship—Ship built for river navigation.]—**Declaration on a policy by which pltfs. were assured "at & from all or any ports & places in the Clyde, or from Liverpool, to Kurrachee or Calcutta, & for the space of thirty days after her arrival at her port, upon the body, tackle, apparel, ordnance, munition, artillery, boat & other furniture of & in the good ship or vessel called the *Ganges*, a steamer." There were pleas of unseaworthiness & of undue concealment, on which issues were joined. The *Ganges* was built for navigating the Indus, & was on this account of such a construction as to be unfit generally for ocean navigation. Everything however was done that possibly could be done by temporary appliances to render a vessel of her construction as strong as she could be made to encounter the perils of the voyage insured. The assured had, before the policy was entered into, informed defts. of the original construction & character of the *Ganges*, telling them at the same time that the additional strengthening contemplated was then in progress, & that everything possible would be done to strengthen & fit her for the voyage. An additional premium was paid commensurate to the increased risk arising from the character of the vessel:—*Held*: (1) the warranty of seaworthiness must be taken to be limited to the capacity of the vessel, & therefore was satisfied if, at the commencement of the risk, the vessel was made as seaworthy as she was capable of being made, though it might not make her as fit for the voyage as would have been usual & proper if the adventure had been that of sending out an ordinary sea-going vessel; (2) extrinsic evidence as to the character of the vessel was admissible.—BURGES v. WICKHAM (1863), 3 B. & S. 669; 33 L. J. Q. B. 17; 8 L. T. 47; 10 Jur. N. S. 92; 11 W. R. 992; 1 Mar. L. C. 303; 122 E. R. 251.

*Annotations:—*As to (1) Folld. Clapham v. Langton (1864), 5 B. & S. 729; Turnbull v. Janson (1877), 36 L. T. 635. Consd. The Vortigern, [1899] P. 140. Refd. Readhead v. Mid. Ry. (1867), L. R. 2 Q. B. 412; Contiere Meccanico Brindisino v. Janson (1912), 81 L. J. K. B. 850. Generally, Mentd. Willans v. Ayers (1877), 3 App. Cas. 133.

**1466. — — — — —.]—**The seaworthiness of which, in the absence of express stipulation, there is an implied warranty in every voyage policy, is a relative term depending on the nature of the ship as well as of the voyage insured. Therefore, on a policy "on a voyage from the Tyne to Odessa," it being shown that the vessel was an iron steamer of very light draught of water, constructed for river navigation only, that this was disclosed to the underwriters before the policy was effected & the dimensions of the vessel then stated to them, & that, though it was impossible to make her fit to encounter the ordinary perils of ocean navigation, the ship had been made as seaworthy as her size & construction would admit, the underwriters were held liable on her being lost by the perils insured against.

*Qu.*: whether parol evidence as to the character of the vessel was admissible to qualify the ordinary warranty of seaworthiness.—CLAPHAM v. LANGTON (1864), 5 B. & S. 729; 4 New Rep. 411; 34 L. J. Q. B. 46; 10 L. T. 875; 12 W. R. 1011; 2 Mar. L. C. 54; 122 E. R. 1001, Ex. Ch.

*Annotation:—*Folld. Turnbull v. Janson (1877), 36 L. T. 635.

**1467. — — — — —.]—**Where a vessel built for inland navigation is insured for an ocean voyage there is an implied warranty that she shall

be made as seaworthy for the voyage as such a vessel can be made by ordinary available means.

A steamer of light construction, built for inland navigation in Trinidad, was insured for the voyage out. On the voyage she broke in two at sea, & went down. In an action on the policy the jury found that the vessel was not seaworthy as an ocean going vessel, & was not made as seaworthy as she might have been by ordinary available means:—*Held*: on these findings deft. was entitled to judgment.—*TURNBULL v. JANSON* (1877), 36 L. T. 635; 3 Asp. M. L. C. 433, C. A.

*Annotation*:—*Refd.* *Cantiere Meccanico Brindisino v. Janson* (1912), 81 L. J. K. B. 850.

**1468. — Seaworthiness for purposes insured.]**—*DANIELS v. HARRIS*, No. 1499, *post*.

### iii. *Fitness in All Respects.*

*See* Marine Insurance Act, 1906 (c. 41), s. 39 (4).

**1469. Want of proper medicines.]**—*WOOLF v. CLAGGETT*, No. 1093, *ante*.

**1470. Defective sails.]**—A ship to be seaworthy must be rendered as secure as possible from capture, as well as from the perils of the sea.

In an action of this kind pl'tfs. are bound to prove, not only that the ship was tight, staunch & strong, but that she was properly equipped with sails & other stores, & that she was manned with a sufficient crew to navigate her on the voyage insured. These are conditions precedent to the policy attaching, & if they were not complied with, so that the peril was enhanced, from whatever cause this might arise, & though no fraud was intended on the part of the assured, the underwriters may answer "we are not liable" (*LORD ELLENBOROUGH, C.J.*).—*WEDDERBURN v. BELL* (1807), 1 Camp. 1, N. P.

**1471. Defective anchors.]**—Under the implied warranty of the assured, as to seaworthiness, it is necessary not only that the hull of the vessel be tight, staunch, & strong, but that the ship be furnished with ground tackling sufficient to encounter the ordinary perils of the sea; & therefore, where it appeared that the best bower anchor, & the cable of the small bower anchor, were defective, the vessel was held not to be seaworthy.—*WILKIE v. GEDDES* (1815), 3 Dow, 57; 3 E. R. 988, H. L.

*Annotations*:—*Refd.* *Small v. Gibson* (1850), 20 L. J. Q. B. 152; *Fawcus v. Sarsfield* (1856), 2 Jur. N. S. 665; *Dudgeon v. Pembroke* (1875), 1 Q. B. D. 96.

**1472. Defective planks, stern.]**—*PARFITT v. RAYDON* (1846), 8 L. T. 767, N. P.

**1473. Defective boilers.]**—*QUEBEC MARINE INSURANCE CO. v. COMMERCIAL BANK OF CANADA*, No. 1442, *ante*.

**1474. Ship going to sea under one boiler.]**—A vessel held not to be unseaworthy by reason of her proceeding to sea under one boiler only.—*THE PENTLAND* (1897), 13 T. L. R. 430.

**1475. Slight defect—Capable of repair by crew.]**—*AJUM GOOLAM HOSSEN & CO. v. UNION MARINE INSURANCE CO., HAJEE CASSIM JOOSUB v. AJUM GOOLAM HOSSEN & CO.*, No. 1547, *post*.

**1476. Insufficient coal.]**—*GREENOCK S.S. CO. v. MARITIME INSURANCE CO.*, No. 1518, *post*.

*See, also*, No. 1517, *post*.

### iv. *Fitness to Encounter Perils of Port.*

**1477. Condition sufficient to ensure reasonable security.]**—*PARMETER v. COUSINS*, No. 875, *ante*.

*See, also*, No. 603, *ante*.

## PART II. SECT. 19, SUB-SECT. 1.— A. (b) v.

**1479 i. General rule.]**—With respect to the cargo insured, as well as the vessel

itself, a marine policy may, by an express, though not by an implied, agreement, become legally invalid for the want of care & skill on the part of

the captain & crew in navigating the vessel.—*GILLESPIE v. BRITISH AMERICA FIRE & LIFE ASSURANCE CO.* (1849), 7 U. C. R. 108.—*CAN.*

**1478. Necessity for full crew.]**—*ANNEN v. WOODMAN*, No. 1456, *ante*.

### v. *Competent Crew.*

*See* Marine Insurance Act, 1906 (c. 41), s. 39 (4).

**1479. General rule.]**—*WEDDERBURN v. BELL*, No. 1470, *ante*.

**1480. —.]**—*FORSHAW v. CHABERT*, No. 1159, *ante*.

**1481. —.]**—*HOLDSWORTH v. WISE*, No. 2144, *post*.

**1482. —.]**—*SHORE v. BENTAIL* (*circa* 1828), 7 B. & C. 798, n.; 108 E. R. 921.

*Annotations*:—*Refd.* *Holdsworth v. Wise* (1828), 7 B. & C. 798; *Sadler v. Dixon* (1841), 8 M. & W. 895; *Biccard v. Shepherd* (1861), 14 Moo Lupton (1863), 15 C. B. N.

**1483. —.]**—*PHILLIPS v. HEADLAM*, No. 1494, *post*.

*See, also*, Nos. 1510, 1513, 1651, 1654, *post*.

**1484. Master ignorant of parts to be navigated.]**—*TAIT v. LEVI*, No. 985, *ante*.

**1485. Negligence of crew—Absence at time of loss.]**—*BUSK v. ROYAL EXCHANGE ASSURANCE CO.*, No. 1651, *post*.

**1486. —.]**—*DIXON v. SADLER*, No. 1513, *post*.

**1487. —.]**—*BICCARD v. SHEPHERD*, No. 1510, *post*.

**1488. No one competent to deputise for master.]**—An insurance is void if effected on a vessel which has not a crew sufficient to meet the ordinary contingencies of its voyage:—*Held*: on a voyage from Mauritius to London, where there was no one able to do the duties of the captain if he was ill, the underwriters were not liable for a loss.—*CLIFFORD v. HUNTER* (1827), 3 C. & P. 16; *Mood. & M.* 103, N. P.

**1489. Misconduct of crew.]**—*DIXON v. SADLER*, No. 1513, *post*.

**1490. —.]**—*BICCARD v. SHEPHERD*, No. 1510, *post*.

### vi.

*See* Marine Insurance Act, 1906 (c. 41), s. 39 (4).

**1491. General rule.]**—(1) It is undoubted law that there is an implied warranty, with respect to a policy for a voyage, that the ship should be seaworthy at the commencement of the voyage, or in port when preparing for it; or has been seaworthy for the voyage when the voyage insured had been commenced, if the insurance is on a vessel already at sea; which voyage being commensurate with the risk insured, the warranty is compendiously described as a warranty of seaworthiness at the commencement of the risk; & this has led to the supposition that there is always such a warranty. It is also perfectly clear that, in our law, there is no other warranty of seaworthiness in a voyage policy, than that the ship is seaworthy at the commencement of the voyage. There is no warranty in the law of England that the vessel shall continue seaworthy after the voyage has commenced; none that the crew, if originally competent, shall continue so; none that the vessel shall be navigated with due care & skill during the voyage; none that pilots shall be taken on board at proper places, if the voyage has already commenced, unless, perhaps, where required by Act of Parliament; none, on an insurance for one voyage out & home, that the ship shall be seaworthy on the return voyage (*PARKE, B.*).

*Sect. 19.—Warranties—Implied: Sub-sect. 1, A. (b) vi., vii., viii. & ix. & (c) i. & ii.]*

(2) In a voyage policy, where the contract shows the nature of the adventure, from which the intent of the parties may be collected, the law implies a consideration of seaworthiness to perform the voyage (LORD ST. LEONARDS).—GIBSON *v.* SMALL (1853), 4 H. L. Cas. 353; 1 C. L. R. 363; 21 L. T. O. S. 240; 17 Jur. 1131; 10 E. R. 499, H. L.; *affg.* S. C. *sub nom.* SMALL *v.* GIBSON (1849), 16 Q. B. 141, Ex. Ch.

*Annotations:—As to (1) Consd.* Jenkins *v.* Heycock (1853), 8 Moo. P. C. C. 351; Fawcus *v.* Sarsfield (1856), 6 E. & B. 192; Michael *v.* Tredwin (1856), 17 C. B. 551; Burges *v.* Wickham (1863), 3 B. & S. 669; Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284. *Refd.* Couch *v.* Steel (1854), 3 E. & B. 402; Thompson *v.* Hopper (1858), E. B. & E. 1038; Clapham *v.* Langton (1864), 5 B. & S. 729. *As to (2) Consd.* Knill *v.* Hooper (1857), 2 H. & N. 277. *Refd.* Daniels *v.* Harris (1874), 23 W. R. 86. *Generally, Mentd.* Readhead *v.* Mid. Ry. (1867), L. R. 2 Q. B. 412; Stanton *v.* Richardson, Richardson *v.* Stanton (1872), L. R. 7 C. P. 421; Kopitoff *v.* Wilson (1876), 1 Q. B. D. 377; Steel *v.* State Line S.S. Co. (1877), 3 App. Cas. 72; Biddell *v.* Horst Co., [1911] 1 K. B. 934; The West Cock, [1911] P. 208; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson Zochonis, [1924] A. C. 522.

**1492. By statute.]—**A ship homeward bound to the port of London, received a pilot at Orfordness, & dropped him before she reached her moorings in the river Thames; after which before she was safely moored an accident happened & the vessel was sunk; the underwriter on the ship & cargo was held discharged from his liability on account of there not being any pilot on board at that time; though it did not appear that the loss was directly imputable to want of skill in those who navigated the vessel. *Qu.*: whether it is essentially necessary to the assured's right of action on such a policy that the pilot taken in to navigate up the Thames should be duly qualified according to the directions of 5 Geo. 2, c. 20.—LAW *v.* HOLLINGSWORTH (1797), 7 Term Rep. 160; 101 E. R. 909.

*Annotations:—Distd.* Phillips *v.* Headlam (1831), 2 B. & Ad. 380. *Expld.* Sadler *v.* Dixon (1841), 8 M. & W. 895. *Distd.* Wilson *v.* Rankin (1865), 13 W. R. 404. *Refd.* Busk *v.* Royal Exchange Assce. (1818), 2 B. & Ald. 73; Hollingworth *v.* Brodrick (1837), 7 Ad. & El. 40.

**1493. —.]—**GIBSON *v.* SMALL, No. 1491, *ante*.

**1494. By nature of navigation—At port of departure.]—**(1) A ship insured at & from Liverpool to Sierra Leone, arrived off the river Sierra Leone, where there was a regular establishment of pilots, about three o'clock in the evening. The captain hoisted a signal for a pilot; but no pilot having come on board, about ten o'clock at night he attempted to enter the river without one, & in so doing the ship took the ground & was lost. The judge left it to the jury whether the captain, in entering without a pilot, did what a prudent man ought to have done in the circumstances. The jury were of that opinion, & found for pltf. On motion for a new trial on the ground that the verdict was against evidence:—*Held*: the underwriters were liable, & would have been so although the captain had been wrong in attempting to enter the port without a pilot; he being a person of competent skill, having used reasonable diligence to obtain a pilot, & having exercised his discretion *bond fide* in the circumstances.

(2) The rule of law is, that the assured is bound to have the ship seaworthy at the commencement of the risk. He is bound, therefore, to have a sufficient crew, & a master of competent skill & ability to navigate her at the commencement of the voyage; & if she sail from a port where there is an establishment of pilots, & the nature of the navigation requires one, the master must take a pilot on board (PARKE, J.).—PHILLIPS *v.* HEAD-

LAM (1831), 2 B. & Ad. 380; 9 L. J. O. S. K. B. 238; 109 E. R. 1184.

**1495. —.]—**(1) To a declaration by assured against underwriter of a policy on ship, at & from any port or ports, for twelve months, alleging loss by perils of the seas, deft. pleaded that, during the time for which the ship was insured, & before the loss, she was damaged & unseaworthy, but, by reasonable care, & at small cost, compared with her value, she might & ought to have been by pltf. repaired & rendered seaworthy; yet pltf. well knowing the premises, did not repair & render her seaworthy, but neglected, etc., & she remained in such unseaworthy state till the loss. Demurrer, because it was not stated that the non-repair caused the loss. *Qu.*: whether, in an action as above, it would be a defence that, after the commencement of the risk, the ship by actual default on the part of the assured, showing gross negligence, became unseaworthy & was lost:—*Held*: at all events, this plea was bad, as it did not sufficiently aver knowledge by the assured that the ship was unseaworthy, & might have been repaired before the loss; nor did it show that he could in fact, if not grossly negligent, have repaired before the loss; or that the loss was occasioned by his alleged default.

(2) The implied warranty of seaworthiness on the part of the assured, refers to the commencement of the risk, the only exception is, where pilots, or a particular description of crew, are necessary in certain parts of the voyage. There is no difference, as to such implied warranty, between time policies & others (PATTESON, J.).

(3) In *Law v. Hollingworth*, No. 1492, *ante*, there was an intermediate voyage, if I may so say, contributed by Act of Parliament upon which voyage the vessel was not seaworthy unless she had a pilot (PATTESON, J.).—HOLLINGWORTH *v.* BRODRICK (1837), 7 Ad. & El. 40; 8 L. J. Q. B. 80; 1 Jur. 430; 112 E. R. 386; *sub nom.* BRODERICK *v.* HOLLINGSWORTH, 2 Nev. & P. K. B. 608; Will. Woll. & Dav. 689.

*Annotations:—As to (2) Consd.* Gibson *v.* Small (1853), 4 H. L. Cas. 353. *N.F.* Thompson *v.* Hopper (1856), 6 E. & B. 172. *Consd.* Dudgeon *v.* Pembroke (1875), 4 Q. B. D. 96. *As to (3) Refd.* Dixon *v.* Sadler (1839), 5 M. & W. 405.

#### vii. Security from Capture.

**1496. Former law.]—**WEDDERBURN *v.* BELL, No. 1470, *ante*.

*See, now,* Marine Insurance Act, 1906 (c. 41), sched. I., Rules 7, 10.

*See, further,* Nos. 1497, 1560–1563, 1565, *post*.

#### viii. Proper Documents.

**1497. Neutral vessel.]—**A neutral vessel is not seaworthy unless she is provided with documents to prove her neutrality. *Qu.*: if a neutral vessel be insured on a voyage on which it is notoriously necessary to carry simulated papers, in order to elude one of the belligerents, whether permission to carry them must be expressed in the policy. An American, bound from London to Riga, was taken by the Danes, & condemned for circumstantial reasons, & amongst others, the want of a sea-passport & muster-rolls, she was provided with false clearances from Bergen, but they were not produced. Her sea-passport would have proved she had come from London, which, under the Berlin decree, would be a ground of condemnation by the French:—*Held*: although it would subject her to this risk, she ought not to be without those documents which would prove her neutrality with respect to other belligerents.



It seems to be clear that an adjustment is not binding if it in any degree proceeds on mistake (LORD MANSFIELD, C.J.).

It is always competent to deft. to show that the adjustment ought not to bind him, although it is *prima facie* evidence of a case (LAWRENCE, J.).—STEEL v. LACY (1810), 3 Taunt. 285; 128 E. R. 113.

*Annotation*:—Mentd. De Montellano v. Garcias (1822), 7 Moore, C. P. 361.

See, also, Sub-sect. 5.

#### ix. Seaworthiness to Carry Intended Cargo.

See Marine Insurance Act, 1906 (c. 41), s. 40 (2).

**1498. General rule—Perishable cargo.**—The ship must at the commencement of the voyage be fit for her intended voyage & cargo. A vessel may be in a fit state to carry a cargo not subject to being dissolved by sea water; & yet not seaworthy for a perishable cargo, such as soda in barrels.—CASTLES v. IRVING (1840), 8 L. T. 767.

**1499.** — **Deck cargo.**—A policy of insurance was made “on wine in casks, on or under deck” in a named ship. The wine was stowed wholly on deck, & so loaded the ship was unable to stand the rough weather which she encountered, except by jettison of the wine; she was, however, in respect of herself & the under-deck cargo, at no time in very real danger, on account of the facility with which the deck cargo could be got rid of, which was affected by staving in the casks of wine. The weather was of the rough character to be expected at the time of year. In an action against the underwriters for the loss of the wine:—*Held*: the warranty of seaworthiness implied on voyage policies extended to the ship, including the cargo, & was not fulfilled if the ship only could be made safe on an ordinary voyage by the destruction of the insured cargo.

In a policy on cargo, the implied warranty that the ship is seaworthy, cannot be considered to contemplate the destruction, in order to save the ship on an ordinary voyage, of that very cargo which is the subject-matter of insurance.

*Semble*: if the policy had been on the ship & under-deck cargo, & not on the deck cargo, the implied warranty of seaworthiness would have been satisfied by the safety of the ship & under-deck cargo, & would not have been affected by the peril to or loss of the deck cargo, provided that the latter, by reason of the facility with which it could have been got rid of, would have caused no danger to the ship, or subject-matter of insurance.—DANIELS v. HARRIS (1874), L. R. 10 C. P. 1; 44 L. J. C. P. 1; 31 L. T. 408; 23 W. R. 86; 2 Asp. M. L. C. 413.

*Annotation*:—Mentd. Thorn v. London Corpn. (1875), L. R. 10 Exch. 112.

**1500.** — **Cattle.**—SLEIGH v. TYSER, No. 1527, *post*.

See, also, No. 1510, *post*.

#### (c) Time When Warranty Attaches.

##### i. In General.

See Marine Insurance Act, 1906 (c. 41), s. 39 (1).

**1501. Commencement of voyage only.**—EDEN v. PARKISON, No. 1393, *ante*.

**1502.** —.]—BERMON v. WOODBRIDGE, No. 72, *ante*.

**1503.** —.]—WATSON v. CLARK, No. 1542, *post*.

**1504.** —.]—PARKER v. POTTS, No. 1543, *post*.

**1505.** —.]—BUSK v. ROYAL EXCHANGE ASSURANCE CO., No. 1651, *post*.

**1506.** —.]—HOLDSWORTH v. WISE, No. 2144, *post*.

**1507.** —.]—HOLLINGWORTH v. BRODRICK, No. 1495, *ante*.

**1508.** —.]—DIXON v. SADLER, No. 1513, *post*.

**1509.** —.]—GIBSON v. SMALL, No. 1491, *ante*.

**1510.** —.]—By the law of Marine insurance there is an implied warranty in every insurance of a ship, that the vessel shall be seaworthy, by which is meant, that she shall be in a fit state as to repairs, equipment, & crew, & in all other respects, to perform the voyage insured, & to encounter the ordinary perils at the time of sailing upon it. If the assurance attaches before the voyage, it is enough that the state of the ship be commensurate to the risk; & if the voyage be such as to require a different complement of men, or state of equipment in different parts of it, as if it was a voyage down a canal or river, & thence to & on the open sea, it is enough if the vessel be at each stage of the navigation in which the loss happened properly manned & equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage, & their negligence or misconduct is no defence to an action on the policy, when the loss has been immediately occasioned by the perils insured against.

Action upon a policy of insurance on copper ore on board a ship “at & from the anchorage of H. & N. to S. to commence upon the loading on board the ship at & from the above ports.” Part of the ore was loaded at H. & part at N. The ship was seaworthy at H., but became unseaworthy before leaving N., in consequence of being over-loaded, & was lost on her voyage from N. to S.:—*Held*: the insurer of the ore was entitled to recover for the ore shipped at H., but not in respect of the ore loaded at N. as the policy covered two risks, & the sea voyage was to be considered to begin at different times; & the implied warranty that the ship should be there fit to carry the additional, as well as the original cargo, appeared by the evidence not to have been complied with.

Some propositions in the doctrine of the implied warranty of seaworthiness, which form part of every contract of marine insurance on voyages, for to time policies they do not apply, are perfectly settled (LORD WENSLEYDALE).—BICCARD v. SHEPHERD (1861), 14 Moo. P. C. C. 471; 15 E. R. 383; *sub nom.* COMMERCIAL MARINE CO. v. NAMAQUA MINING CO., 5 L. T. 504; 10 W. R. 136; 1 Mar. L. C. 165, P. C.

*Annotations*:—Apld. Bouillon v. Lupton (1863), 15 C. B. N. S. 113. Foll. Thin v. Richards, [1892] 2 Q. B. 141. Rejd. Turnbull v. Janson (1877), 36 L. T. 635. Mentd. Lloyd v. General Iron Screw Collier Co. (1864), 3 H. & C. 284.

See, also, Nos. 1439, 1465, *ante*, & compare Nos. 603, 875, 1491–1495, *ante*.

**1511. Insurance after commencement of voyage.**—GIBSON v. SMALL, No. 1491, *ante*.

**1512.** — **One voyage out & home.**—GIBSON v. SMALL, No. 1491, *ante*.

##### ii. Voyage in Different Stages.

See Marine Insurance Act, 1906 (c. 41), s. 39 (3).

**1513. Ship seaworthy at commencement of each stage.**—In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment & crew, & in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing

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upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; & if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, & thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned & equipped for it, but the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; & their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against (PARKE, B.).—DIXON v. SADLER (1839), 5 M. & W. 405; 9 L. J. Ex. 48; 151 E. R. 172; *affd. sub nom.* SADLER v. DIXON (1841), 8 M. & W. 895, Ex. Ch.

*Annotations:—*Apprvd. Bliccard v. Shepherd (1861), 14 Moo. P. C. C. 471. *Apld.* Burges v. Wickham (1863), 3 B. & S. 669; Thin v. Richards, [1892] 2 Q. B. 141; Hedley v. Pinkney S.S. Co., [1894] A. C. 222. *Refd.* Gibson v. Small (1853), 4 H. L. Cas. 353; Jenkins v. Heycock (1853), 5 Moo. Ind. App. 361. Worms v. Storey (1855), 25 L. J. Ex. 1; Hudson v. Bilton (1856), 2 Jur. N. S. 784; Thompson v. Hopper (1856), 6 E. & B. 937; Bouillon v. Lupton (1863), 15 C. B. N. S. 113; Davidson v. Burnard (1868), L. R. 4 C. P. 117; Quebec Marine Insee. v. Commercial Bank of Canada (1870), L. R. 3 P. C. 234; Dudgeon v. Pembroke (1875), 1 Q. B. D. 96; West India Telegraph Co. v. Home & Colonial Insee. (1880), 6 Q. B. D. 51; Trinder, Anderson v. Thames & Mersey Marine Insee., Trinder, Anderson v. North Queensland Insee., Trinder, Anderson v. Weston, Crocker, [1898] 2 Q. B. 114; The Vortigern, [1899] P. 140; Leonard v. Leyland (1902), 18 T. L. R. 727. *Mentd.* Alcock v. Royal Exchange Insee. (1849), 18 L. J. Q. B. 121; Wilton v. Atlantic Royal Mail Steam Co. (1861), 10 C. B. N. S. 453; Lloyd v. General Iron Screw Collier Co. (1864), 3 H. & C. 284; Everett v. London Assee. (1865), 19 C. B. N. S. 126; Grill v. General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; The Duero (1869), L. R. 2 A. & E. 393.

1514. —.]—BICCARD v. SHEPHERD, No. 1510, *ante.*

1515. —.]—(1) Three steamers, the *Bourdon*, the *Papin* No. 1, & the *Papin* No. 6, which were intended for the navigation of the Danube, were insured "at & from Lyons to Galatz," with leave to call at all ports & places in the Mediterranean for all or any purpose, beginning the adventure at Lyons, etc., with a declaration that "it should be lawful for the ships to proceed & sail to & touch & stay at any ports or places whatsoever, & with leave to tow & be towed, without being deemed any deviation," etc., warranted to sail on or before Aug. 15, 1861. The *Papin* No. 6 left Lyons on July 24 & arrived at Marseilles on July 30. The *Bourdon* & *Papin* No. 1 left Lyons on Aug. 2 & arrived at Marseilles, the former on Aug. 7, the latter on Aug. 8. All three vessels were in a fit & proper state for the voyage down the Rhone to Marseilles, but, from the nature of the navigation, they could not, on leaving Lyons, be in a state of readiness, as to masts & sails, chains & anchors, sea crew, etc., for the sea portion of the voyage to Galatz. They all left Marseilles properly manned & equipped for the residue of the voyage on Aug. 23, the intermediate time having been consumed in the sea equipment, & in procuring the surveys & permit to depart required by the French law, which could only be obtained at Marseilles. This delay the jury found not to have been unreasonable:—*Held*: both the implied warranty of seaworthiness, & the express warranty to sail on or before Aug. 15, were complied with.

(2) As to the *Papin* No. 6, which arrived at Marseilles on July 30, it appeared that she might have been got ready for sea several days earlier than she was, but that the captain deemed it prudent to detain her at Marseilles in order that all three vessels might depart in company. The jury having found that this was a reasonable cause of delay as to that vessel, the ct. refused to disturb their verdict.—BOUILLON v. LUPTON (1863), 15 C. B. N. S. 113; 2 New Rep. 393; 33 L. J. C. P. 37; 8 L. T. 575; 10 Jur. N. S. 422; 11 W. R. 966; 1 Mar. L. C. 347; 143 E. R. 726.

1516. —.]—QUEBEC MARINE INSURANCE CO. v. COMMERCIAL BANK OF CANADA, No. 1442, *ante.*

1517. —.]—In my judgment when a question of seaworthiness arises between either a steamship owner & his underwriter upon a voyage policy, or between a steamship owner & a cargo owner upon a contract of affreightment, & the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the ship-owner, in order to displace this defence, which is a good one, to prove that he has divided the voyage into stages for coaling purposes by reason of the necessity of the case, & that, at the commencement of each stage, the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage. If he fails in this he fails in defeating the issue of unseaworthiness which *prima facie* has been established against him. In each case it is a matter for proof as to when the necessity of the case requires that each stage should be (A. L. SMITH, L.J.).—THE VORTIGERN, [1899] P. 140; 68 L. J. P. 49; 80 L. T. 382; 47 W. R. 437; 15 T. L. R. 259; 8 Asp. M. L. C. 523; 4 Com. Cas. 152, C. A.

*Annotations:—*Folld. Greenock S.S. Co. v. Maritime Insee., [1903] 2 K. B. 657. *Refd.* MacIver v. Tate Steamers (1903), 8 Com. Cas. 124; Darling v. Raeburn, [1907] 1 K. B. 846.

1518. —.]—In the case of a voyage policy upon a steamship, where the contemplated voyage, must from its length, be necessarily divided into stages for coaling purposes, the ship-owner is, as between himself & his underwriter, under an implied warranty that the ship shall, at the commencement of each stage of the voyage be seaworthy for that stage, by having on board a sufficiency of coal, for that stage. Pltfs. insured their steamship with defts. for a round voyage from the United Kingdom to port or ports on the west coast of South America & back again, with leave to call at any ports or places on the east coast of South America, etc. The insurance included general average. The perils insured against were of the seas, etc., subject to clauses annexed to the policy which provided (*inter alia*); "This insurance is also to cover loss through the negligence of the master, etc.," & "Held covered in case of any breach of warranty, etc., at a premium to be hereafter arranged." During the voyage the ship called at Monte Video, & through the negligence of the master sailed thence without having sufficient coal on board to take her to St. Vincent, her next place of call, where in ordinary course she would coal again. Her coal supply failing between Monte Video & St. Vincent, the master burnt as fuel some of the ship's fittings, spars, & some of the cargo, & if he had not done so she would have been in danger of becoming a total loss. Pltfs. did not know until after the ship reached St. Vincent that she had left Monte Video without sufficient coal, & no premium had been arranged under the "held

covered" clause. In an action on the policy to recover in respect of the loss of the fittings, spars, & cargo:—*Held*: the policy was a "voyage policy" not a "time policy" & the voyage was divisible into stages, the case thus falling within *The Vortigern*, No. 1517, *ante*; & accordingly as the ship had not, at the commencement of the stage from Monte Video, a sufficiency of coal for that stage, *pltf.* had broken their implied warranty that she was seaworthy for that stage, so that the policy then ceased to attach to the risks insured against.—*GREENOCK S.S. Co. v. MARITIME INSURANCE Co.*, [1903] 2 K. B. 657; 72 L. J. K. B. 868; 89 L. T. 200; 52 W. R. 186; 19 T. L. R. 680; 47 Sol. Jo. 761; 9 Asp. M. L. C. 463; 9 Com. Cas. 41, C. A.

*Annotations*:—*Mentd. Mentz, Decker v. Maritime Insee.*, [1910] 1 K. B. 132; *Hewitt v. Wilson*, [1915] 2 K. B. 739.

*See, also*, Nos. 603, 1491–1495, *ante*.

**1519. Commencement of stages—Matter of proof in each case.**—*THE VORTIGERN*, No. 1517, *ante*.

**1520. Statement of total loss—Request for payment.**—*COHEN (G.) SONS & Co. v. STANDARD MARINE INSURANCE Co., LTD.*, No. 1457, *ante*.

(d) *Effect of Breach.*

*See* Marine Insurance Act, 1906 (c. 41), s. 34 (2).

**1521. Policy avoided.**—*LANE v. NIXON*, No. 1441, *ante*.

**1522. —**—*THORLEY (JOSEPH), LTD. v. ORCHIS S.S. Co., LTD.*, No. 1455, *ante*.

(e) *Waiver of Breach.*

**1523. Defect communicated to underwriters—Liberty given to return to port—Memorandum giving liberty attached to policy.**—(1) A ship insured at & from a port, sails on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry. The defect is discovered before any loss accrued, & part of the cargo is discharged, & a loss subsequently accrues, in no degree attributable to her having been overladen in the early part of her voyage:—*Held*: the underwriters were liable for such loss.

The vessel having sailed & put back to the Downs, & then sailed again, & laboured & strained much from being overloaded, & then put back a second time; & upon an application to the underwriters for liberty for the ship to go into port to discharge part of the cargo, it was only communicated to them that the ship was too deep in the water:—*Held*: (2) as the subsequent loss had not in any degree arisen from her having so strained & laboured, the communication of that fact was immaterial, & the communication made was quite sufficient; (3) the memorandum giving such liberty did not require a new stamp.—*WEIR v. ABERDEEN* (1819), 2 B. & Ald. 320; 106 E. R. 383.

*Annotations*:—*As to* (1) *Consd. Quebec Marine Insee. v. Commercial Bank of Canada* (1870), L. R. 3 P. C. 234. *Refd. Dunbar v. Smuthwaite* (1854), 3 W. R. 68.

(f) *Exclusion of Warranty.*

*See* Marine Insurance Act, 1906 (c. 41), s. 34 (3), & s. 35 (3).

**By waiver—Memorandum on policy.**—*See* No. 1523, *ante*.

**1524. By express terms of policy—"Ship allowed to be seaworthy for voyage."**—In *assumpsit* against the underwriters of a policy of insurance for a total loss, the declaration stated, that *defts.* agreed that the ship should be considered, & was thereby allowed to be, seaworthy in her hull,

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tackle, & materials for the voyage; the insured declaring, that, to the best of their belief, & according to their knowledge & information, the ship, at the time of the insurance, was, in all respects, seaworthy for the voyage. It then alleged the effecting of the policy, & that the vessel during her voyage, by stormy winds & tempestuous weather, & by the force & violence of the winds & waves, became leaky, strained, riven & damaged, insomuch that, by means thereof it became necessary for her preservation for her to sail to the nearest port of safety, that she accordingly sailed to the nearest port of safety, to wit, the harbour of G., that, on her arrival at Gambia, she was unfit to prosecute her voyage without being repaired & refitted; that she was found to be unseaworthy, & unfit to prosecute her voyage unless great repairs were done upon her; that such repairs could not be done at G.; that it was not possible to obtain any repairs sufficient to enable her to proceed on her voyage, or to proceed to any other port to be repaired; that it became expedient & necessary to abandon the voyage & to sell the ship; & that the ship was sold, by means of which said premises the voyage was not performed & the vessel was wholly lost to *pltf.*:—*Held*: whether the loss of the vessel was occasioned by unseaworthiness, or by perils of the sea, *defts.* were bound by their admission, & could not dispute the seaworthiness.—*PARFITT v. THOMPSON* (1844), 13 M. & W. 392; 14 L. J. Ex. 73; 4 L. T. O. S. 116, 138; 153 E. R. 163.

*Annotations*:—*Refd. Paterson v. Harris* (1861), 7 Jur. N. S. 1276; *Cantiere Meccanico Brindisino v. Janson*, [1912] 3 K. B. 452.

**1525. —**—*PHILLIPS v. NAIRNE*, No. 2180, *post*.

**1526. — Exceptions clause—Must show intention to exclude.**—*QUEBEC MARINE INSURANCE Co. v. COMMERCIAL BANK OF CANADA*, No. 1442, *ante*.

**1527. — Proviso as to approval by surveyor.**—By a policy of marine insurance on cattle it was provided that the fittings of the ship were to be approved by Lloyd's surveyor. The fittings were in fact so approved. During the voyage a large number of the cattle died, owing partly to the insufficiency of the appliances for ventilation & partly to the insufficient number of cattlemen appointed to attend to them:—*Held*: the ship was unseaworthy in both respects, the implied warranty of seaworthiness was not excluded by the provision as to the approval of the fittings, & the underwriters were not liable.—*SLEIGH v. TYSER*, [1900] 2 Q. B. 333; 69 L. J. Q. B. 626; 82 L. T. 804; 16 T. L. R. 404; 9 Asp. M. L. C. 97; 5 Com. Cas. 271.

**1528. — By "held covered, etc." clause.**—*GREENOCK S.S. Co. v. MARITIME INSURANCE Co.*, No. 1518, *ante*.

**1529. — Admission of seaworthiness.**—*CANTIERE MECCANICO BRINDISINO v. JANSON*, No. 1211, *ante*.

**1530. By recital of abandonment & salvage of ship—Policy on salvage.**—*KNILL v. HOOPER*, No. 1439, *ante*.

(g) *Evidence and Proof.*

**1531. Admissibility of evidence—Parol evidence—To qualify warranty of seaworthiness—Age of ship.**—*WATSON v. CLARK*, No. 1542, *post*.

**1532. — — — — Character of ship.**—*BURGES v. WICKHAM*, No. 1465, *ante*.

**1533. — — — —**—*CLAPHAM v. LANGTON*, No. 1466, *ante*.



**Sect. 19.—Warranties—Implied: Sub-sect. 1, A. (g), & B.; sub-sect. 2.]**

**1534. — Opinion of shipwright as to seaworthiness—Upon facts given in evidence.]—**A shipbuilder may be called as a witness to give his opinion as to the seaworthiness of a ship, on the facts stated by others.—**THORNTON v. ROYAL EXCHANGE ASSURANCE CO.** (1790), Peake, 37, N. P.

**1535. — — — —.]—**Upon a question concerning the seaworthiness of a ship, after the evidence of persons who have examined her condition, experienced shipwrights who never saw her may be called, to say whether, upon the facts sworn to, she was in their opinion seaworthy or not.—**BECKWITH v. SYDEBOTHAM** (1807), 1 Camp. 116, N. P.

**Annotation:—Mentd. Mann Macneal & Steeves v. Capital & Counties Insce., Same v. General Marine Underwriters,** [1921] 2 K. B. 300.

**1536. Onus of proof—Onus on insurer.]—****PARKER v. POTTS**, No. 1543, *post*.

**1537. — — — —.]—**(1) Where, in an action on a policy of insurance, the loss was laid by perils of the seas, & the insurer pleaded unseaworthiness of ship at the commencement of her voyage, *semble*, the ship must be taken *prima facie* to be seaworthy, & it lay on the insurer to prove the contrary. But where the insured gave evidence of seaworthiness, & that during rough weather on a short voyage a leak was sprung, which increased on the crew so that they finally abandoned the ship, & no contrary evidence was adduced by deft., the ct. refused a new trial, after a verdict for pltf. for the value of the goods on board, on the ground that the finding of the jury that she was seaworthy when she sailed, but was abandoned too soon, was equivocal, no objection having been taken at the trial on that ground.

(2) *Semble*: a policy on "goods valued at £1,400" is a valued policy; without stating the particulars of goods valued.

(3) The onus of proving deviation lies on the insurer.—**FRANCO v. NATUSCH** (1836), Tyr. & Gr. 401.

**1538. — — — —.]—**A. effected a policy against "perils of the seas," etc., & "all other perils, losses," etc., in the usual form, upon goods for a voyage by a steamer from K. to Y. While the steamer was loading in the harbour of K. her draught was increased by the weight of her cargo until the discharge pipe was brought below the surface of the water, which then flowed down the pipe under the valve, & some cocks or valves in the machinery having been negligently left open, flowed into the hold & injured A.'s goods. In an action by A. upon the policy:—**Held**: (1) the injury was caused by one of the perils insured against; (2) the burden of proving that the vessel

was unseaworthy was on deft.—**DAVIDSON v. BURNAND** (1868), L. R. 4 C. P. 117; 38 L. J. C. P. 73; 19 L. T. 782; 17 W. R. 121; 3 Mar. L. C. 207.

**Annotations:—As to (1) Consd. Thames & Mersey Marine Insce. v. Hamilton, Fraser** (1887), 12 App. Cas. 484. **Distd. Samuel v. Dumas**, [1924] A. C. 431. **Refd. Australasian Insce. v. Jackson** (1875), 33 L. T. 286; **Leyland Shipping Co. v. Norwich Union Fire Insce. Soc.**, [1917] 1 K. B. 873.

**1539. — — — —.]—****PICKUP v. THAMES & MERSEY MARINE INSURANCE CO.**, No. 1545, *post*.

**1540. Onus shifted—Defect appearing soon after sailing.]—****OLIVER v. COWLEY** (1765), 1 Park's Marine Insurances, 7th ed. p. 343; 1 Marshall on Insurances, 3rd ed. p. 153.

**Annotation:—Dtd. Koebel v. Saunders** (1864), 17 C. B. N. S. 71.

**—.]—MUNRO v. VANDAM** (1794), 1 Park's Marine Insurances, 8th ed. p. 469.

**1542. — — — —.]—**Insurance on an old ship, "at & from Honduras to London." Ship sails on her voyage, & in a few days after, without adequate cause, arising after the period of her setting sail, becomes so leaky as to compel the master to return. Vessel strikes on a reef of rocks, & is lost. Decided that she was not seaworthy at the commencement of the risk.

When the inability of the ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was, that it was from causes existing before her setting sail on her intended voyage & the ship was then not seaworthy (**LORD ELDON, C.**).—**WATSON v. CLARK** (1813), 1 Dow, 336; 3 E. R. 720, H. L.

**Annotations:—Apld. Parker v. Potts** (1815), 3 Dow, 23. **Refd. Small v. Gibson** (1850), 16 Q. B. 141; **Pickup v. Thames & Mersey Insce.** (1878), 3 Q. B. D. 594; **Lindsay v. Klein, The Tatjana**, [1911] A. C. 194.

**1543. — — — —.]—**When a ship, soon after her sailing on a voyage insured, is found to be unfit for sea, the question whether or not she was seaworthy at the commencement of the risk, or the voyage, when not otherwise ascertained, must be decided by rational inference from the circumstances.

A ship is *prima facie* to be deemed seaworthy. But if it is found soon after her sailing that she is not so sound, without adequate cause by stress of weather, or otherwise, to account for it, the rational inference is that, notwithstanding appearances, she was not seaworthy.

If a ship is seaworthy at the time of her sailing, however soon after she may become otherwise, the warranty is complied with.—**PARKER v. POTTS** (1815), 3 Dow, 23; 3 E. R. 977, H. L.

**Annotation:—Consd. Franco v. Natusch** (1836), Tyr. & Gr. 401.

**1544. — — — —.]—****PICKUP v. THAMES & MERSEY MARINE INSURANCE CO.**, No. 1545, *post*.

*See, also*, Nos. 1451, 1452, *ante*.

**PART II. SECT. 19, SUB-SECT. 1.—A. (g).**

**1536 i. Onus of proof—Onus on insurer.]—**Where a ship was insured, being warranted seaworthy, on May 16, & was employed till Sept. 29, when she left port apparently tight, & was lost on Sept. 30, then *prima facie* the warranty was good, & in the absence of evidence to the contrary:—**Held**: the ship was lost by the perils of the sea & natural deterioration.—**BEDFORD v. THOMAS** (1852), 3 Nfld. L. R. 295.—**NFLD.**

**1536 ii. — — — —.]—****MEEHAN v. UNION MARINE INSURANCE CO.** (1871), 5 Nfld. L. R. 367.—**NFLD.**

**1540 i. Onus shifted—Defect appearing soon after sailing.]—**Where the inability of a ship to perform the voyage became evidence in a short time from

the commencement of the risk:—**Held**: the presumption was that it was from causes existing before her setting sail, & that she was not then seaworthy, & the onus was on the assured to prove that she was.—**BEDFORD v. WARREN** (1852), 3 Nfld. L. R. 291.—**NFLD.**

**1540 ii. — — — —.]—****COONS v. AETNA INSURANCE CO.** (1868), 18 C. P. 305; 19 C. P. 235.—**CAN.**

**1540 iii. — — — —.]—****MYLES v. MONTREAL INSURANCE CO.** (1870), 20 C. P. 283.—**CAN.**

**n. Loss inexplicable—No presumption of unseaworthiness—Where evidence of seaworthiness at commencement of voyage.]—****MORRISON v. NOVA SCOTIA MARINE INSURANCE CO., LTD.** (1896), 28 N. S. R. 346.—**CAN.**

**o. — — — —.]—**It will not be

presumed that a vessel was not seaworthy, merely because the cause of her foundering is unknown.—**SMITH v. BISSETT** (1810), 15 Fac. Coll. 617.—**SCOT.**

**p. Vessel foundering in port—During loading operations—Unseaworthiness presumed.]—**Where a vessel in harbour, taking in cargo, foundered without encountering any extraordinary peril or other visible cause to produce such effect, this is strong presumptive evidence that she was not seaworthy when the cargo was placed in her.—**ROGERSON v. UNION MARINE INSURANCE CO.** (1870), 5 Nfld. L. R. 359.—**NFLD.**

**q. Seaworthy at commencement of voyage—Damaged & repaired on putting in to port—Subsequent loss—Evidence of unseaworthiness.]—****IRVINE v. NOVA**

**1545. ——— What is short time after sailing —Question of fact.]—**The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon deft., & so far as the pleadings go it never shifts, it always remains upon him. But when facts are given in evidence, it is often said certain presumptions, which are really inferences of fact, arise, & cause the burden of proof to shift; & so they do so as a matter of reasoning, & as a matter of fact, for instance, where a ship sails from a port, & soon after she has sailed sinks to the bottom of the sea, & there is nothing in the weather to account for such a disaster, it is a reasonable presumption to be made that she was unseaworthy when she started; & a jury may be properly told that, upon such uncontradicted evidence, they may presume as a matter of reasoning & inference from the facts, the vessel must have been in an unseaworthy condition when she started; that is, when she started she was not in a fit state to encounter the ordinary perils of the voyage, & if a jury, with no other evidence than that I have stated, were to find the contrary, it would not be a finding against any principle of law, but it would be such a finding against the reasonable inference from the facts that it would amount to a verdict against evidence (BRETT, L.J.).—PICKUP v. THAMES & MERSEY MARINE INSURANCE CO. (1878), 3 Q. B. D. 594; 47 L. J. Q. B. 749; 39 L. T. 341; 26 W. R. 689; 4 Asp. M. L. C. 43, C. A.

*Annotations:—*Consd. Ajum Goolam Hossen v. Union Marine Insce., Hajee Cassim Joosub v. Ajum Goolam Hossen, [1901] A. C. 362; Lindsay v. Klein, The Tatjana, [1911] A. C. 194.

**1546. ——— Ship sinking in smooth water—Without apparent cause.]—**ANDERSON v. MORICE, MORICE v. ANDERSON, No. 650, ante.

**1547. ——— ]—**Where a vessel cap-sized & sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe, there is a presumption of unseaworthiness on which a jury may be directed to act in the absence of evidence. Where evidence is given, all the facts must be considered including the unexplained sinking, & unless it establishes unseaworthiness the defence founded on it must fail. The defence in this case was overruled, since the real cause of the loss was not ascertainable on the evidence, though it appeared to be attributable to mistakes in managing the vessel after she sailed rather than to her unseaworthiness when she sailed.

A ship ought not to be treated as unseaworthy by reason of something objectionable but easily curable by those on board.—AJUM GOOLAM HOSSEN & CO. v. UNION MARINE INSURANCE CO., HAJEE CASSIM JOOSUB v. AJUM GOOLAM HOSSEN & CO., [1901] A. C. 362; 70 L. J. P. C. 34; 84 L. T. 366; 17 T. L. R. 376; 9 Asp. M. L. C. 167, P. C. *Annotations:—*Refd. Lindsay v. Klein, The Tatjana, [1911] A. C. 194; Anghelatos v. Northern Assee. (1923), 39 T. L. R. 235.

#### B. Time Policies.

See Marine Insurance Act, 1906 (c. 41), s. 39 (5).

**1548. No warranty of seaworthiness.]—**GIBSON v. SMALL, No. 1491, ante.

**1549. ———.]—**The warranty of seaworthiness in a time policy, at the commencement of the

risk, is not a continuing obligation cast upon the assured while the risk is running. *Semble*: there is no implied warranty of seaworthiness in a time policy.—JENKINS v. HEYCOCK (1853), 8 Moo. P. C. C. 351; 5 Moo. Ind. App. 361; 1 C. L. R. 406; 8 L. T. 802; 14 E. R. 134, P. C.

*Annotations:—*Consd. Michael v. Tredwin (1856), 17 C. B. 551. Refd. Thompson v. Hopper (1858), E. B. & E. 1038; Dudgeon v. Pembroke (1875), 1 Q. B. D. 96.

**1550. ———.]—**There is not in general an implied warranty of seaworthiness in a time policy of assurance.—THOMPSON v. HOPPER (1856), 6 E. & B. 172; 25 L. J. Q. B. 240; 26 L. T. O. S. 308; 2 Jur. N. S. 608; 4 W. R. 360; 119 E. R. 828; subsequent proceedings (1858), E. B. & E. 1038, Ex. Ch.

*Annotations:—*Folld. Fawcus v. Sarsfield (1856), 6 E. & B. 192. Apprvd. Dudgeon v. Pembroke (1877), 2 App. Cas. 284. Refd. Knill v. Hopper (1857), 2 H. & N. 277; Aubert v. Gray (1862), 3 B. & S. 169; Quebec Marine Insce. v. Commercial Bank of Canada (1870), 22 L. T. 559; Anderson v. Morice (1874), L. R. 10 C. P. 58; Samuel v. Dumas, [1924] A. C. 431.

**1551. ———.]—**To a declaration on a policy of insurance alleged to have been made on May 1, 1852 "at & from the meridian of the day of sailing from Suez, to the meridian of Mar. 20, 1853," averring that afterwards the ship set sail & departed from Suez, & that the day of her so sailing from Suez was after Mar. 20, 1852, & before Mar. 20, 1853, & that, after the meridian of the said day of sailing from Suez, & before the meridian of the said Mar. 20, 1853, the ship was by the perils of the seas wholly lost, deft. pleaded, "that the said ship was not, at the time of sailing from Suez, or at any time on the day of sailing from Suez, or at any time afterwards during the continuance of the risk in the said policy of insurance mentioned, seaworthy," etc.:—*Held*: on the authority of Gibson v. Small, No. 1491, ante, the plea was no answer to the action; the policy being in substance a time policy, & consequently there being no implied warranty that the vessel was seaworthy on the day when the policy was intended to attach.—MICHAEL v. TREDWIN (1856), 17 C. B. 551; 25 L. J. C. P. 83; 8 L. T. 802; 4 W. R. 297; 139 E. R. 1191.

*Annotation:—*Refd. Dudgeon v. Pembroke (1875), 1 Q. B. D. 96.

**1552. ———.]—**FAWCUS v. SARFIELD, No. 1580 post.

**1553. ———.]—**BICCARD v. SHEPHERD, No. 1510, ante.

**1554. ———.]—**DUDGEON v. PEMBROKE, No. 1581, post.

Compare No. 1495, ante.

**1555. Ship unseaworthy — With privity of assured.]—**THOMAS (M.) & SON SHIPPING CO., LTD. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., LTD., No. 1668, post.

**1556. ———.]—**THOMAS v. TYNE & WEAR STEAMSHIP FREIGHT INSURANCE ASSOCN., No. 1669, post.

As to time policies generally, See Sect. 12, subsect. 1, ante.

#### SUB-SECT. 2.—SEAWORTHINESS OF CARGO.

See, now, Marine Insurance Act, 1906 (c. 41), s. 40 (1).

**1557. No warranty of fitness—Ordinary vicissitudes of voyage.]—**It is not a condition precedent

SCOTIA MARINE INSURANCE CO. (1872), 8 N. S. R. 510.—CAN.

MARINE INSURANCE CO. (1879), 13 N. S. R. (1 R. & G.) 168.—CAN.

r. ——— Defect appearing shortly after sailing—Whether evidence of unseaworthiness.]—EWART v. MERCHANTS

t. Surveyors' certificate of seaworthiness—Admissibility of evidence of incorrectness.]—DANSON v. CAWLEY (1823), 1 Nfld. L. R. 377.—NFLD.

#### PART II. SECT. 19, SUB-SECT. 1.—B.

**1548i. No warranty of seaworthiness.]—**WHITE v. NEWFOUNDLAND MARINE INSURANCE CO. (1864), 5 Nfld. L. R. 27.—NFLD.

*Sect. 19.—Warranties—Implied: Sub-sects. 2, 3, 4 & 5. Sect. 20: Sub-sect. 1, A.]*

to the attaching of a policy on goods against sea-risks, that the subject of insurance should at the commencement of the voyage be fit to encounter the ordinary vicissitudes of a voyage.—*KOEBEL v. SAUNDERS* (1864), 17 C. B. N. S. 71; 4 New Rep. 403; 33 L. J. C. P. 310; 10 L. T. 695; 10 Jur. N. S. 920; 12 W. R. 1106; 2 Mar. L. C. 68; 144 E. R. 29.

*See, also, Marine Insurance Act, 1906 (c. 41), s. 55.*

#### SUB-SECT. 3.—LEGALITY.

*See Marine Insurance Act, 1906 (c. 41), s. 41. Illegal insurances, generally, See Sect. 15, ante.*

#### SUB-SECT. 4.—NATIONALITY.

*See, now, Marine Insurance Act, 1906 (c. 41), s. 37.*

**1558. Name of ship—Not warranty of nationality.]**—*CLAPHAM v. COLOGAN*, No. 522, *ante*.

**1559. Change of nationality.]**—*Held*: the fact of the change of nationality of the ship could not affect the contract of insurance, as there was no express warranty or condition in the policy that the ship should continue English, & such a condition could not be implied.—*DENT v. SMITH* (1869) L. R. 4 Q. B. 414; 10 B. & S. 249; 38 L. J. Q. B. 144; 20 L. T. 868; 17 W. R. 646; 3 Mar. L. C. 251.

*Annotations:—Refd. Harris v. Scaramanga* (1872), L. R. 7 C. P. 481. *Mentd. Messina v. Petroccholino* (1872), L. R. 4 P. C. 144; *R. v. L. G. Board, Ex p. Arlidge*, [1914] 1 K. B. 160.

Documents as to nationality, *See Sub-sect. 5, post*.

#### SUB-SECT. 5.—DOCUMENTS.

*See, now, Marine Insurance Act, 1906 (c. 41), Sched. 1, Rules 7, 10.*

**1560. Insurance of ship.]**—(1) An assured upon an American ship & cargo, provided with such a passport as is required by the treaty between America & France, & with all other usual American papers & documents, is entitled to recover against an underwriter of a policy on such ship & goods in case of a capture by a French privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a French ct. of admiralty; such sentence proceeding on the ground of a breach of French ordinances requiring certain particulars to be observed in respect of the ship documents beyond what was necessary by the treaty. (2) *Qu.*: whether if a ship be not warranted of any particular country, there be an implied warranty in a policy of assurance that she shall be properly documented according to the laws of that country, & her particular treaties with foreign states.—*PRICE v. BELL* (1801), 1 East, 663; 102 E. R. 257.

*Annotations:—As to (1) Refd. Baring v. Clagett* (1802), 3 Bos. & P. 201; *Lothian v. Henderson* (1803), 3 Bos. & P. 499.

**1561. —.]**—(1) If a neutral American ship, insured here, be captured by a French ship, & condemned in a French ct. as prize, upon the express ground stated in the sentence of condemnation, which is evidence for this purpose, that the ship was not properly documented according to

the existing treaty between France & the United States of America, conjointly with the suppression of papers by the captain after the capture; on which no opinion was given by the ct.; the neutral assured cannot recover their loss against the British underwriter, although there was no warranty or representation that the ship was American; the neglect of the ship-owners themselves, who are bound at their peril to provide proper national documents for their ship, being in such a case the efficient cause of the loss.

(2) Neither can the agents of the assured, some of whom were also interested in the cargo as well as the ship, recover for the loss of the cargo insured, which was also condemned at the same time & for the same reason; such assured of the goods being implicated in the same neglect in their character of ship-owners.

(3) But it is otherwise in the case of a mere assured of goods, who is not answerable for the proper documenting of the ship, without a warranty or representation of her national character.—*BELL v. CARSTAIRS* (1811), 14 East, 374; 104 E. R. 646.

*Annotations:—As to (1) Refd. Le Cheminant v. Pearson* (1812), 4 Taunt. 367; *Thompson v. Hopper* (1858), E. B. & E. 1038; *Dudgeon v. Pembroke* (1874), L. R. 9 Q. B. 581; *Trinder, Anderson v. Thames & Mersey Marine Insce., Trinder, Anderson v. North Queensland Insce., Trinder, Anderson v. Weston, Crocker*, [1898] 2 Q. B. 114. *As to (3) Refd. Carruthers v. Gray* (1812), 15 East, 35; *Dudgeon v. Pembroke* (1874), L. R. 9 Q. B. 581. *Generally, Refd. Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471.

**1562. —.]**—(1) In an action by the owners of a ship, including the master, on a policy of marine insurance, for loss within the perils insured against, the fact that the loss arose through the negligent navigation of the master, not amounting to wilful negligence, affords no defence to his claim.

(2) The fact that no notice of abandonment of freight had been given did not disentitle the assured to recover a total loss under a policy on freight.

(3) In the case of insurance against capture there is an implied contract that the ship shall be properly documented (*COLLINS, L.J.*).—*TRINDER, ANDERSON & CO. v. THAMES & MERSEY MARINE INSURANCE CO., TRINDER, ANDERSON & CO. v. NORTH QUEENSLAND INSURANCE CO., TRINDER, ANDERSON & CO. v. WESTON, CROCKER & CO.*, [1898] 2 Q. B. 114; 67 L. J. Q. B. 666; 78 L. T. 485; 46 W. R. 561; 14 T. L. R. 386; 8 Asp. M. L. C. 373; 3 Com. Cas. 123, C. A.

*Annotations:—As to (1) Apld. A.-G. v. Adelaide S.S. Co.*, [1923] A. C. 292. *Refd. Weld Blundell v. Stephens*, [1920] A. C. 956; *City Tailors v. Evans* (1921), 91 L. J. K. B. 379; *Sainuel v. Dumas*, [1924] A. C. 431. *Generally, Mentd. Westport Coal Co. v. McPhail*, [1898] 2 Q. B. 130.

**1563. Insurance of goods.]**—Goods insured on board a certain ship generally by her name, without any addition of country, & not represented to be of any particular country at the time of the policy subscribed, though the broker had before said she was an American, when the ship was subscribed, & though she were in fact an American, need not be documented as such: & therefore in case of a capture by a foreign state for want of the documents required by treaty between that state & her own, the owner of the goods may recover against the underwriters.—*DAWSON v. ARTY* (1806), 7 East, 367; 103 E. R. 142.

*Annotations:—Expld. Bell v. Carstairs* (1811), 14 East, 374. *Refd. Edwards v. Footner* (1808), 1 Camp. 530; *Le Cheminant v. Pearson* (1812), 4 Taunt. 367.

**1564. —.]**—*BELL v. CARSTAIRS*, No. 1561, *ante*.



**1565.** —.]—There is not an implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented. Therefore, where from an omission of the captain, the goods insured on a voyage from this country to a foreign port are not mentioned in the ship's manifest, but the loss is not occasioned by this defect the underwriters are liable.—*CARRUTHERS v. GRAY* (1811), 3 Camp. 142, N. P.; *subsequent proceedings* (1812), 15 East, 35.

*Annotation*:—*Distd.* *Bradford v. Levy* (1825), 2 C. & P. 137.

*See, also*, No. 622, *ante*.

## SECT. 20.—PERILS INSURED AGAINST.

### SUB-SECT. 1.—“PERILS OF THE SEA.”

#### A. In General.

*See* Marine Insurance Act, 1906 (c. 41), s. 55, & sched. 1. r. 7.

**1566.** Interpretation—Question of law.]—*CROFTS v. MARSHALL*, No. 1609, *post*.

**1567.** — Same in policies as in bills of lading.]—The words “perils of the seas” have the same meaning in a policy of insurance & in a bill of lading.

I think it clear that the term “perils of the sea” does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril “of” the sea.

Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural & inevitable action of the winds & waves, which results in what may be described as wear & tear.

There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.

It was contended that those losses only were losses by peril of the sea which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words & it is certainly not supported by the authorities or by common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather & sinks this is a loss by perils of the sea; & a loss by foundering, owing to a vessel coming into collision with another vessel . . . falls within the same category (*LORD HERSCHELL*).—*WILSON, SONS & CO. v. XANTHO (CARGO OWNERS)* (1887), 12 App. Cas. 503; 56 L. J. P. 116; 57 L. T. 701; 36 W. R. 353; 3 T. L. R. 766; 6 Asp. M. L. C. 207, H. L.

*Annotations*:—*Consd.* *Sassoon v. Western Assce.*, [1912] A. C. 561; *Grant, Smith & McDonnell v. Seattle Construction & Dry Dock Co.*, [1920] A. C. 162. *Expld.* *Samuel v. Dumas*, [1924] A. C. 431. *Refd.* *Hamilton, Fraser v. Pandorf* (1887), 12 App. Cas. 518; *The Glendarroch*, [1894] P. 226; *Johnson v. Wainwright* (1894), 38 Sol. Jo. 362; *Trinder, Anderson v. Thames & Mersey Marine Insce.*, *Trinder, Anderson v. North Queensland Insce.*, *Trinder, Anderson v. Weston, Crocker*, [1898] 2 Q. B. 114; *Blackburn v. Liverpool, Brazil & River Plate Steam Navigation Co.*, [1902] 1 K. B. 290; *Jackson v. Mumford* (1902), 8 Com. Cas. 61; *Stott (Baltic) Steamers v. Marten*, [1914] 3 K. B. 1262; *Trim Joint District School Board of Management v. Kelly*, [1914] A. C. 667; *Leyland Shipping Co. v. Norwich Union Fire Insce. Soc.*, [1918] A. C. 350. *Mentd.* *Dunn v. Bucknall*, *Dunn v. Donald Currie*,

[1902] 2 K. B. 614; *The Torbryan*, [1903] P. 35; *Baxter's Leather Co. v. Royal Mail Steam Packet Co.*, [1908] 1 K. B. 796; *Travers v. Cooper* (1914), 20 Com. Cas. 44; *British & Foreign S.S. Co. v. R.*, [1918] 2 K. B. 879.

**1568.** — Same in policies on goods or ships.]—*SASSOON (E. D.) & Co. v. WESTERN ASSURANCE CO.*, No. 1584, *post*.

**1569.** Fortuitous accidents—Occurring in course of voyage.]—*MAGNUS v. BUTTEMER*, No. 1600, *post*.

**1570.** — — —.]—*HAMILTON, FRASER & CO. v. PANDORF & CO.*, No. 1624, *post*.

**1571.** — — — Not inevitable accident.]—*PATERSON v. HARRIS*, No. 1594, *post*.

**1572.** — — —.]—*MERCHANTS TRADING CO. v. UNIVERSAL MARINE CO.* (1870), cited in L. R. 9 Q. B. at p. 596; 2 Asp. M. L. C. 431, n., C. A.

*Annotations*:—*Distd.* *Dudgeon v. Pembroke* (1874), L. R. 9 Q. B. 581. *Consd.* *Anderson v. Morice* (1874), L. R. 10 C. P. 58; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455. *Refd.* *Jackson v. Mumford* (1902), 8 Com. Cas. 61; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41.

**1573.** — — —.]—*WILSON, SONS & CO. v. XANTHO (CARGO OWNERS)*, No. 1567, *ante*.

**1574.** Only perils of sea included.]—*WILSON, SONS & CO. v. XANTHO (CARGO OWNERS)*, No. 1567, *ante*.

**1575.** — Bursting of donkey engine.]—A steamer was insured by a time policy in the ordinary form on the ship & her machinery, including the donkey-engine. For the purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when owing to a valve being closed which ought to have been kept open, water was forced into & split open the air-chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer, & was not due to ordinary wear & tear:—*Held*: whether the injury occurred through negligence or accidentally without negligence, it was not covered by the policy, such a loss not falling under the words “perils of the seas,” etc., nor under the general words “all other perils, losses, & misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of insurance.”

Definitions are most difficult. . . . I have thought that the following might suffice: “All perils, losses & misfortunes of a marine character, or of a character incident to a ship as such” (*LORD BRAMWELL*).—*THAMES & MERSEY MARINE INSURANCE CO. v. HAMILTON, FRASER, & CO.* (1887), 12 App. Cas. 484; 56 L. J. Q. B. 626; 57 L. T. 695; 36 W. R. 337; 3 T. L. R. 764; 6 Asp. M. L. C. 200, H. L.; *revsg.* S. C. *sub nom.* *HAMILTON v. THAMES & MERSEY MARINE INSURANCE CO.* (1886), 17 Q. B. D. 195, C. A.

*Annotations*:—*Consd.* *The Bedouin*, [1894] P. 1; *Oceanic S.S. Co. v. Faber* (1906), 95 L. T. 607; *Hutchins v. Royal Exchange Assce. Corpn.*, [1911] 2 K. B. 398. *Appld.* *Stott (Baltic) Steamers v. Marten*, [1916] 1 A. C. 304. *Consd.* *Samuel v. Dumas*, [1924] A. C. 431. *Refd.* *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455; *Lund v. Thames & Mersey Marine Insce.* (1901), 17 T. L. R. 566; *Blackburn v. Liverpool, Brazil & River Plate Steam Navigation Co.*, [1902] 1 K. B. 290; *Jackson v. Mumford* (1902), 8 Com. Cas. 61; *S.S. Knutsford v. Tillmanns*, [1908] A. C. 406; *Thorman v. Dowgate S.S. Co.*, [1910] 1 K. B. 410; *S.S. Magnhild v. McIntyre*, [1920] 3 K. B. 321. *Mentd.* *I. R. Comrs. v. Smyth*, [1914] 3 K. B. 406; *Akt. Frank v. Namaqua Copper Co.* (1920), 90 L. J. K. B. 36; *Ambatielos v. Anton Jurgens Margarine Works*, [1922] 2 K. B. 185.

**1576.** — Ship caught in ice.]—By policies of marine insurance plths. insured with defts. goods & freight by named steamers from London to inland places in Siberia viâ the Kara Sea. The policies

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enumerated the usual perils. The steamers left London in July, 1899, & on Aug. 16 got into heavy ice at the entrance to the Kara Sea. They were involved in the ice till Sept. 3, when, finding it impossible to proceed, & being in danger, they returned to London. This ice was unusual at that time of the year, & was caused by the prevalence of north winds & Arctic currents. After reaching London pl'tfs. returned goods, which they had contracted to carry, to their owners, & sold a large part of their own goods. In June, 1900, pl'tfs. forwarded the remainder of their goods to the destination in Siberia by railway through Russia, & paid, in respect thereof, much heavier duties to the Russian Gov't. than they would have paid if the goods had arrived in Siberia via the Kara Sea:—*Held*: the presence of ice, under the circumstances stated, was a peril insured against.—*POPHAM v. St. PETERSBURG INSURANCE CO.* (1904), 10 Com. Cas. 31.

**1577. — Damage by crane breaking.]—STOTT (BAL TIC) STEAMERS, LTD. v. MARTEN, No. 1828, post.**

**1578. — Ship scuttled.]—SAMUEL (P.) & CO. v. DUMAS, No. 666, ante.**

**1579. — Ship sunk unintentionally.]—**The agents of pl'tfs., who were ship-breakers, effected on their behalf a policy of insurance on a submarine "covering all & every risk" on the vessel whilst being broken up. The policy was on an ordinary printed form of marine policy, the above-quoted words being added. There was no warranty against negligence, or exception of negligence, in the policy. During the breaking up the vessel, as the result of negligence, sank to the bottom. In an action on the policy to recover the cost of having the vessel salvaged:—*Held*: the unintentional admission of sea water into a ship whereby she was caused to sink was a peril of the sea, & therefore, even if the policy was to be read as an ordinary marine policy, so that the ct. must find something in the nature of a marine peril before the underwriters could be held liable, pl'tfs. were entitled to recover.—*COHEN, SONS & CO. v. NATIONAL BENEFIT ASSURANCE CO., LTD.* (1924), 40 T. L. R. 347.

**B. "Inherent Vice" of Ship.**

**1580. Time policy—Loss from peril insured against—Ship unseaworthy.]—**Where a vessel is sent to sea in a state not fit for the particular voyage, & without encountering any more than ordinary risk, is obliged, owing to the defective state in which she sailed, to put into a port for repair, the ship-owner, though the defects were not known to him & he has acted without fraud, cannot recover against the insurer the expenses of such repairs as were rendered necessary in consequence of the unseaworthy state of the vessel, though there be no warranty of seaworthiness. There is in general no implied warranty of seaworthiness in a time policy. Nor is such implication raised by the facts that the policy was effected in Liverpool, & that the ship was in that port when the risk was to commence, &

remained there till she sailed on the voyage in which she was lost, & that there were means of making her seaworthy at Liverpool; it not appearing that the insuring owner knew of the unseaworthiness, or resided in Liverpool or, except from the words West Hartlepool being added to his name at the commencement of the policy, in the United Kingdom.

Although she was not seaworthy when she sailed, it must be taken, according to my view of the case, that the policy attached; but, unless this loss arose from the perils insured against, it cannot be cast upon the underwriters (*LORD CAMPBELL, C.J.*).—*FAWCUS v. SANSFIELD* (1856), 6 E. & B. 192; 25 L. J. Q. B. 249; 26 L. T. O. S. 323; 2 Jur. N. S. 665; 119 E. R. 836.

*Annotations*:—*Consd.* *Dudgeon v. Pembroke* (1877), 2 App. Cas. 284. *Appld.* *Ballantyne v. Mackinnon* (1896), 65 L. J. Q. B. 395. *Refd.* *Paterson v. Harris* (1861), 7 Jur. N. S. 1276; *Anderson v. Morice* (1874), L. R. 10 C. P. 58; *Jackson v. Mumford* (1903), 9 Com. Cas. 114.

**1581. — — — — —.]—**(1) In a time policy the law, in the absence of special stipulations in the contract, does not imply any warranty that the vessel should be seaworthy.

(2) If the shipowner knowingly & wilfully sends his ship to sea in an unseaworthy condition, the knowledge & wilfulness are essential elements in the consideration of his claim to recover. A time policy was effected on an iron steamer, the *Frances*, of 705 tons burden, then lying in the yard of its owner, a shipwright. It had been put under repair, & it was stated in evidence that there had not been any stint placed upon the repairs, & that the marine engineer who superintended the repairs, & the workmen who executed them, believed them to be completely satisfactory. It was expressly found that if the ship was unseaworthy the insured was ignorant of the fact. The ship went with nothing but a deck cargo of iron machinery from London to Gothenburg, made more water on the voyage than could have been expected from the state of the weather, ceased to do so on getting into harbour, was examined, & its condition on the voyage could not be accounted for; & in a few days afterwards took on board a cargo of oats & 380 tons of iron, & a deck loading of timber; started from Gothenburg, encountered in the open sea very bad weather which put out the fires, ran for the port of Hull, could not make the port, ran ashore, & after some time was broken up & became a total wreck:—*Held*: these facts showed a loss by perils insured against, the perils of the sea, & the insured was entitled to recover as for a total loss.

(3) A loss caused immediately by perils of the sea is within the policy though it might not have occurred but for the concurrent action of some other cause which is not within the policy.

A long course of decisions in the cts. of this country has established that *causa proxima et non remota spectatur* is the maxim by which these contracts of insurance are to be construed, & that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it (*LORD PENZANCE*).

(4) A policy of insurance was effected on ship

marine policy.—*GREAT WESTERN INSURANCE CO. v. JORDAN* (1886), 14 S. C. R. 734.—*CAN.*

a. — *Barratry.*]—Insurance in a marine policy against loss "by perils of the sea" does not cover a loss by barratry.—*O'CONNOR v. MERCHANTS*

*MARINE INSURANCE CO.* (1889), 16 S. C. R. 331.—*CAN.*

b. *Onus of proof.*]—Where goods are shipped in good condition, the ship encounters a sudden storm causing the seas to wash over the hatches & the goods, when examined at their destination, are found to have been

damaged by salt water, the fair inference is that the water got down the hatches during the storm & the *onus* upon the insured of proving damage from a peril of the sea is satisfied.—*CREEDON & AVERY, LTD. v. NORTH CHINA INSURANCE CO., LTD.*, [1917] 3 W. W. R. 33; 36 D. L. R. 359.—*CAN.*



from Jan. 22, 1872, to Jan. 23, 1873, both inclusive. These words were written in on a printed form, which also contained, in print, the words "at & from," & "for this present voyage," & other similar words which were commonly found in the forms of a voyage policy, & which had not been erased or struck through:—*Held*: the policy was really a time policy & its character was not affected by the printed words thus negligently left in the form.

It has been suggested that by reason of the policy having been drawn up on a printed form the printed terms of which are applicable to a voyage & also to goods as well as to the ship the policy is something less or something more than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe & limit the risk intended to be insured against without striking out the printed words which may be applicable to a larger or different contract is too well known to permit of any such conclusion (LORD PENZANCE).—DUDGEON *v.* PEMBROKE (1877), 2 App. Cas. 284; 46 L. J. Q. B. 409; 36 L. T. 382; 25 W. R. 499; 3 Asp. M. L. C. 393, H. L.

*Annotations*:—As to (1) *Refd.* Turnbull *v.* Janson (1877), 36 L. T. 635. As to (2) *Apld.* West India Telegraph Co. *v.* Home & Colonial Insee, (1880), 6 Q. B. D. 51. *Consd.* Whittle *v.* Mountain, [1920] 1 K. B. 447. *Refd.* Trinder, Anderson *v.* Thames & Mersey Marine Insee., Trinder, Anderson *v.* North Queensland Insee., Trinder, Anderson *v.* Weston, Crocker, [1898] 2 Q. B. 114; Jackson *v.* Mumford (1903), 9 Com. Cas. 114; Leyland Shipping Co. *v.* Norwich Union Fire Insee. Soc., [1917] 1 K. B. 873. As to (3) *Consd.* Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455; Leyland Shipping Co. *v.* Norwich Union Fire Insee. Soc., [1917] 1 K. B. 873. *Refd.* British & Foreign Marine Insee. *v.* Gaunt, [1921] 2 A. C. 41; Samuel *v.* Dumas, [1924] A. C. 431. As to (4) *Consd.* Re Sutro & Hellbut, Symons, [1917] 2 K. B. 348; Marten *v.* Vestey, [1920] A. C. 501.

1582. ———.—]—MOUNTAIN *v.* WHITTLE, No. 799, ante.

1583. ———.—]—Loss from inherent unfitness.]—A steamer insured against sea perils, under a time policy, sailed with an insufficient supply of coal, & had, in consequence, to obtain assistance for which the salvors recovered a salvage award in the Admlty. Div. In an action by the owners of the steamer against the underwriters for the amount of the salvage charges:—*Held*: the salvage charges were not rendered necessary by a peril of the sea, but by the inherent unfitness of the steamer, & the owners could not recover.—BALLANTYNE *v.* MACKINNON, [1896] 2 Q. B. 455; 65 L. J. Q. B. 616; 75 L. T. 95; 45 W. R. 70; 12 T. L. R. 601; 8 Asp. M. L. C. 173; 1 Com. Cas. 424, C. A.

*Annotations*:—*Refd.* Trinder, Anderson *v.* North Queensland Insee. (1897), 66 L. J. Q. B. 802. *Mentd.* Minna Craig S.S. Co. *v.* Chartered Mercantile Bank of India, London & China, [1897] 1 Q. B. 55; The Veritas, [1901] P. 304; Jones *v.* Lewis, [1919] 1 K. B. 328.

1584. ———.—]—Pltfs. were the owners of a wooden hulk which was moored in a tidal river, & which was used by them as a store. In this hulk they placed some opium on which they effected a time policy with defts. against "perils of the sea . . . & all other perils, losses & misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . goods." During the currency of the policy the hulk sprang a leak, & the opium was damaged by the percolating water. The leak was wholly due to the rotten condition of the hulk, but this condition of the hulk was unknown to pltfs., the weak place being covered up by some copper sheathing. In an action on the policy:—*Held*: (1) the damage was not due to a peril of the sea, but was solely due to

the weakness of the hulk, & therefore pltfs. were not entitled to recover.

(2) The expression "perils of the sea" bears the same meaning when used in a policy on goods as it bears when used in a policy on ship.—SASSOON (E. D.) & Co. *v.* WESTERN ASSURANCE CO., [1912] A. C. 561; 81 L. J. P. C. 231; 106 L. T. 929; 12 Asp. M. L. C. 206; 17 Com. Cas. 274, P. C.

*Annotations*:—As to (1) *Apld.* Grant, Smith & McDonnell *v.* Seattle Construction & Dry Dock Co., [1920] A. C. 162. *Consd.* Samuel *v.* Dumas, [1924] A. C. 431.

1585. ———.—]—Appls. hired from resps. for two years a dry-dock to be used afloat in construction work on caissons at Victoria, British Columbia. By the hiring agreement applts. admitted that the dry-dock was seaworthy & fit for the work contemplated, & agreed to keep it insured for the benefit of resps. for 75,000 dollars against marine risks & to redeliver it in equally good condition save for wear & tear. While the dry-dock was being used in harbour for the contemplated work, it capsized & was totally lost; the accident was due to its inherent unfitness for the work, & not to any condition of the wind or sea. Appls. had failed to insure the dry-dock as agreed; its value was only 34,500 dollars:—*Held*: the loss was not due to a marine risk, & consequently resps. were not entitled to recover as damages 75,000 dollars, but only 34,500 dollars.—GRANT, SMITH & CO. & McDONNELL, LTD. *v.* SEATTLE CONSTRUCTION & DRY DOCK CO., [1920] A. C. 162; 89 L. J. P. C. 17; 122 L. T. 203.

*Annotation*:—*Consd.* Samuel *v.* Dumas, [1924] A. C. 431.

Privity of owner as to unseaworthiness.]—See Nos. 1667–1669, post.

### C. "Inherent Vice" or Nature of Cargo.

1586. Slaves—Loss through want of sustenance—Delay of voyage.]—Where the captain of a slave-ship mistook Hispaniola for Jamaica, whereby the voyage being retarded, & the water falling short, several of the slaves died for want of water, & others were thrown overboard, it was held that these facts did not support a statement in the declaration, that by the perils of the seas, & contrary winds & currents, the ship was retarded in her voyage. & by reason thereof so much of the water on board was spent, that some of the negroes died for want of sustenance, & others were thrown overboard for the preservation of the rest.—GREGSON *v.* GILBERT (1783), 3 Doug. K. B. 232; 99 E. R. 629.

*Annotation*:—*Consd.* Tatham *v.* Hodgson (1796), 6 Term Rep. 656.

1587. ———.—]—Upon an insurance on slaves against perils of the sea, their death by failure of sufficient & suitable provision occasioned by extraordinary delay in the voyage from bad weather is not a loss within the policy, but a loss by natural death which cannot be insured against since 30 Geo. 3, c. 33, s. 8, & 34 Geo. 3, c. 80.—TATHAM *v.* HODGSON (1796), 6 Term Rep. 656; 101 E. R. 756.

*Annotations*:—*Distd.* Lawrence *v.* Aberdeen (1821), 5 B. & Ald. 107. *Consd.* Taylor *v.* Dunbar (1869), L. R. 4 C. P. 206. *Refd.* A.-G. *v.* Cleobury (1849), 4 Exch. 65.

1588. ———.—]—Loss through mutiny.]—JONES *v.* SCHMOLL (1785), 1 Term Rep. 130, n.; 99 E. R. 1012, N. P.

*Annotation*:—*Refd.* Becker, Gray *v.* London Assce. Corp., [1918] A. C. 101.

1589. Damaged goods liable to combustion.]—(1) If a fire arises on board a ship from the damaged quality of goods on board which are insured, the underwriters are not liable; (2) if the loss is not



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occasioned by the damaged state of the goods on board, the policy is not vitiated by the fact not having been disclosed to the underwriters that the goods were damaged, though that might have a tendency to increase the risk.—*BOYD v. DUBOIS* (1811), 3 Camp. 133, N. P.

*Annotations:—As to (1) Refd. Koebel v. Saunders (1864), 17 C. B. N. S. 71. As to (2) Dbtd. Carr v. Montefiore (1864), 5 B. & S. 408. Refd. Mann Macneal & Steeves v. Capital & Counties Insce., [1921] 2 K. B. 300.*

**1590. Animals—Loss through storm—Warranted free from mortality & jettison.]—**A policy was effected on living animals, warranted free from mortality & jettison. In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed; & others, from the same cause, received such injury that they died before the termination of the voyage insured:—*Held*: this was a loss by a peril of the sea, for which the underwriters were liable.

I think that the words used in this exception will protect the underwriter in cases where the death of the animal arises from natural causes remotely produced by some of the perils insured against; but that they will not protect him where such death arises directly from any of the perils insured against (*BAYLEY, J.*).

The word mortality, in its ordinary sense, never means violent death, but death arising from natural causes (*ABBOTT, C.J.*).—*LAWRENCE v. ABERDEIN* (1821), 5 B. & Ald. 107; 106 E. R. 1133.

*Annotations:—Folld. Gabay v. Lloyd (1825), 3 B. & C. 793. Distd. Taylor v. Dunbar (1869), L. R. 4 C. P. 206. Refd. A.-G. v. Cleobury (1849), 4 Exch. 65; St. Paul Fire & Marine Insce. v. Morice (1906), 11 Com. Cas. 153.*

**1591. ———.]—***GABAY v. LLOYD*, No. 303, *ante*.

**1592. ——— Slaughtered under quarantine regulations—"Warranted free from capture & seizure."]**—*ST. PAUL FIRE & MARINE INSURANCE CO. v. MORICE*, No. 1738, *post*.

**1593. Damage to sugar by sea water—Ship not leaky.]—***THE QUEEN BEE, GOODHALL v. HYDE* (1855), 7 L. T. 533.

**1594. Chemical action of sea water on cable—Imperfect insulation.]—**(1) A person possessed of a share in The Atlantic Telegraph co., established for the purpose of laying down a submarine electric cable between the United Kingdom & America, insured the same by a policy in the ordinary form of a policy of marine insurance. The insurance was expressed to be "at & from the United Kingdom, say from London, & wheresoever the risk may commence, to the Atlantic Ocean, & at & thence, by or in one or more ship or ships, or steamer or steamers, to the place or places of destination, both in the United Kingdom &/or the Continent, island or peninsula of America &/or the British or other possessions of America, including & containing all & every accident, danger & risk that may be incurred at sea or on land in all or any boats, ships, & craft whatsoever & wheresoever, until the final, complete & successful laying down of the Atlantic Telegraph Cable from shore to shore." The usual blank for the name of the ship was filled up thus: "any ship or ships, or steamer or steamers, or craft as above"; & in the valuation clause the subject of insurance was to be taken as "on one £1,000 share in The Atlantic Telegraph co., said share valued at £1,100. In case of loss the part saved to be sold or appraised for the benefit of the underwriters." The insurance contained the common memorandum, with the addition of a special agree-

ment, in a memorandum annexed to the policy, that the insurance should "cover & include the successful working of the cable when laid down." An electric cable extending from the Irish to the North American coast was finally laid down after a previous abortive attempt, during which a portion of it was lost by perils of the seas; & on the second attempt, during which some more cable was lost, a quantity of superfluous cable was taken out to meet contingencies. It was, however, found impossible to maintain electrical communication sufficient for telegraphic purposes, & the telegraph was abandoned. The cause of the failure was the imperfect insulation of the copper wire along which the electric fluid passed, arising from defect in the outer covering by which it was protected from external contact; which defect was occasioned by accident prior to the shipment of the cable & the commencement of the risk, aggravated by the action of the sea, and arose from the chemical action of the sea water on the interior of the cable, & not from any mischief done by the mechanical action of the sea:—*Held*: this was not an injury caused by "perils of the seas."

In an action on the policy with respect to the portion of the cable lost by perils of the seas:—*Held*: (2) *pltf.* was entitled to recover as for a partial loss; (3) the warranty against partial average was applicable, & consequently that *pltf.* could not recover unless a loss of £3 per cent. had been sustained; (4) in assessing the damages the value of the whole cable that ever was exposed to peril, including the portion lost, must be ascertained according to its cost, when shipped free on board; & the proportion between that value & the loss actually incurred by the perils insured against would give the percentage payable by each underwriter on his subscription; (5) in applying the above principle, that portion of the cable which was lost in the first attempt to lay down the cable, & which it became necessary to replace by new cable, should be estimated at the cost of the substituted cable; but as regarded that portion of the lost cable which was taken out as superfluous cable, by way of a provision against accident, it might be reasonable to consider how far such cable, if not lost, would have been depreciated in marketable value by having been coiled in the hold of a vessel or by other circumstances.

(6) We are of opinion that an injury of this nature, not arising from the external violence or mechanical action of the winds or waves, but which was the natural & necessary consequence of the ordinary action of the sea water on the cable, in the state in which it was when immersed in the sea, is not comprehended in the perils insured against. The injury, so far as the damage occasioned by the sea is concerned was the inevitable consequence of the immersion of the cable in its then state in the sea water. But the purpose of insurance is to afford protection against contingencies & dangers which may or may not occur; it cannot properly apply to a case when the loss or injury must inevitably take place in the ordinary course of things (*COCKBURN, C.J.*).—*PATERSON v. HARRIS* (1861), 1 B. & S. 336; 30 L. J. Q. B. 354; 5 L. T. 53; 7 Jur. N. S. 1276; 9 W. R. 743; 1 Mar. L. [C.] 124; 121 E. R. 740.

*Annotations:—As to (1) Distd. Davidson v. Burnand (1868), 38 L. J. C. P. 73. As to (6) Refd. Dudgeon v. Pembroke (1874), L. R. 9 Q. B. 581. Generally, Refd. Wilson v. Jones (1866), L. R. 1 Exch. 193; Macaura v. Northern Assce., [1925] A. C. 619. Mentd. Cunard S.S. Co. v. Marten, [1903] 2 K. B. 511.*

*D. Stranding.*

**1595. Ship bilged & damaged on land.]**—*RowcROFT v. DUNSMORE* (1801), cited in 3 Taunt. at p. 228; 128 E. R. 91.

*Annotation:—Distd. Carruthers v. Sydebotham* (1815), 4 M. & S. 77.

**1596. —.]**—If a ship hove down on a beach within the tide-way, to repair, be thereby bilged & damaged, it is not a loss occasioned by the perils of the sea.—*THOMPSON v. WHITMORE* (1810), 3 Taunt. 227; 128 E. R. 90.

*Annotations:—Distd. Carruthers v. Sydebotham* (1815), 4 M. & S. 77; *Laurie v. Douglas* (1846), 15 M. & W. 746. **Consd.** *Davidson v. Burnand* (1868), L. R. 4 C. P. 117.

**1597. Complement of crew depleted.]**—In moving a ship from one part of a harbour to another it became necessary to send two of the crew on shore to make fast a new line & cast off the rope by which the ship was made fast; those two men being immediately impressed & carried away, & not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore & was lost:—*Held*: a loss by perils of the sea within the policy.—*HODGSON v. MALCOLM* (1806), 2 Bos. & P. N. R. 336; 127 E. R. 656.

*Annotation:—Refd. Bishop v. Pentland* (1827), 1 Man. & Ry. K. B. 49.

**1598. Ship damaged in graving-dock.]**—*PHILLIPS v. BARBER*, No. 1818, *post*.

**1599. Ship damaged in tide-harbour—Grounding at low tide—Forced entry into harbour.]**—A transport in Govt. service was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was hard & uneven, & on the tide having left her, she received damage by taking the ground:—*Held*: this was a loss by a peril of the sea.—*FLETCHER v. INGLIS* (1819), 2 B. & Ald. 315; 106 E. R. 382.

*Annotations:—Distd. Phillips v. Barber* (1821), 5 B. & Ald. 161. **Consd.** *Spence v. Chodwick* (1847), 10 Q. B. 517. **Distd.** *Magnus v. Buttemer* (1852), 11 C. B. 876; *Thames & Mersey Marine Insce. v. Hamilton, Fraser* (1887), 12 App. Cas. 484. **Refd.** *Devaux v. J'Anson* (1839), 5 Blng. N. C. 519; *Phillips v. Nairne* (1847), 4 C. B. 343; *Letchford v. Oldham* (1880), 5 Q. B. D. 538.

**1600. ——— In ordinary course of voyage.]**—Damage resulting from the ship's taking the ground on the falling of the tide, in a tide-harbour, in a spot where she is properly placed for the purpose of unloading, is not a stranding within the ordinary terms of a policy of insurance.

To make the underwriters liable, the injury must be the result of something fortuitous or accidental occurring in the course of the voyage (*JERVIS, C.J.*).—*MAGNUS v. BUTTEMER* (1852), 11 C. B. 876; 21 L. J. C. P. 119; 18 L. T. O. S. 276; 16 Jur. 480; 138 E. R. 720.

*Annotations:—Expld. Dudgeon v. Pembroke* (1875), 1 Q. B. D. 96. **Distd.** *Letchford v. Oldham* (1880), 5 Q. B. D. 538. **Refd.** *Antony v. Etna Insce.* (1869), 21 L. T. 473; *Samuel v. Dumas, Graham Joint Stock Shipping Co. v. Merchants Marine Insce.* (No. 2), [1923] 1 K. B. 592. **Mentd.** *Paterson v. Harris* (1861), 7 Jur. N. S. 1276.

**What amounts to stranding.]**—See Sect. 22, subsect. 4, B. (b) ii., *post*.

*E. Wear and Tear.*

See Marine Insurance Act, 1906 (c. 41), s. 55 (2) (c).

**1601. Not a peril of the sea.]**—*DELBOIS v. ABERDEEN* (1835), cited in 7 C. & P. at pp. 601, 602, 604.

*Annotation:—Expld. Crofts v. Marshall* (1836), 7 C. & P. 597.

**1602. —.]**—*HARRISON v. UNIVERSAL MARINE INSURANCE CO.*, No. 1608, *post*.

**1603. —.]**—Underwriters are not bound to indemnify the assured against every loss that occurs during the period insured but only against those occasioned by perils insured against; & if the damage or loss arises from no unusual cause though the winds & the waves may be concerned in it, the loss is wear & tear, for which the underwriters are not responsible (*BLACKBURN, J.*).—*DUDGEON v. PEMBROKE* (1874), L. R. 9 Q. B. 581; 43 L. J. Q. B. 220; 31 L. T. 31; 22 W. R. 914; 2 Asp. M. L. C. 323; *affd.* (1877), 2 App. Cas. 284, H. L.

*Annotations:—Refd. Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455; *Trinder, Anderson v. Thames & Mersey Marine Insce.*, *Trinder, Anderson v. North Queensland Insce.*, *Trinder, Anderson v. Weston, Crocker*, [1898] 2 Q. B. 114; *Jackson v. Mumford* (1903), 9 Com. Cas. 114; *Leyland Shipping Co. v. Norwich Union Fire Insce. Soc.*, [1917] 1 K. B. 873; *Whittle v. Mountain*, [1920] 1 K. B. 447; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41; *Samuel v. Dumas*, [1921] A. C. 431. **Mentd.** *Turnbull v. Janson* (1877), 36 L. T. 635; *West India & Panama Telegraph Co. v. Home & Colonial Marine Insce.* (1880), 6 Q. B. D. 51; *Re Sutro & Heilbut, Symons*, [1917] 2 K. B. 348; *Marten v. Vestey*, [1920] A. C. 307.

**1604. —.]**—*WILSON, SONS & CO. v. XANTHO (CARGO OWNERS)*, No. 1567, *ante*.

**1605. —.]**—*MERCHANTS TRADING CO. v. UNIVERSAL MARINE CO.* (1870), cited in L. R. 9 Q. B. at p. 596; 2 Asp. M. L. C. 431, n., C. A.

*Annotations:—Consd. Anderson v. Morice* (1874), L. R. 10 C. P. 58; *Dudgeon v. Pembroke* (1874), L. R. 9 Q. B. 581; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41. **Refd.** *Jackson v. Mumford* (1902), 8 Com. Cas. 61.

**1606. — Unless arising from ship's detention.]**

—An iron steamer, while riding at anchor in an open roadstead, where she had been driven by distress, encountered some severe gales, in which she pitched & rolled a good deal, & some time afterwards, while still there waiting necessary repairs, a hole in her bottom was discovered which might have been repaired; & there being also evidence that some of her rivets were wrenched & some of the iron plates on her bottom "started" —injuries which might either have arisen from straining in a storm, or from wear & tear; & the assured having abandoned her & claimed as for a total loss, the underwriter paying into ct. a sum estimated only on a partial loss calculated on the cost of repair:—*Held*: (1) pltf. could only recover for loss or injury proved to have been caused by perils of the seas; (2) he could not recover as for a constructive total loss; unless, under the circumstances, the captain was justified in abandoning the ship; (3) this would depend upon whether the ship could & ought to have been repaired where she was, or whether she could safely have been taken to some port where she might have been repaired; (4) pltf. could not recover for any injury caused by wear & tear, unless in consequence of the ship's detention at the place in question by previous perils of the seas.—*LINDSAY v. LEATHLEY* (1862), 2 F. & F. 696; *subsequent proceedings* (1863), 3 F. & F. 902.

**1607. What amounts to—Damage by violent storm.]**—A vessel sailed to Bombay, & on the homeward voyage encountered a violent storm which disabled her. The rudder was damaged, part of the cargo was thrown overboard, & the ship was taken into the Mauritius to repair. The underwriters were found liable by a jury for the expense of caulking & re-coppering the vessel's bottom, as having been occasioned by "perils of

## PART II. SECT. 20, SUB-SECT. 1.—D.

**1595 i. Ship bilged & damaged on land.]**—*BRITISH & FOREIGN MARINE INSURANCE CO. v. RUDOLF* (1898), 28 S. C. R. 607.—CAN.

*Sect. 20.—Perils insured against: Sub-sect. 1, E., F., G., H., I. & J.]*

the sea.”—*THE PEMBERTON, PRITCHARD v. NICHOLL* (1849), 6 L. T. 165.

*Annotation:—Refd. Harrison v. Universal Marine Insco.* (1862), 3 F. & F. 190.

**1608.** ———.]—(1) In the absence of any custom, underwriters are liable for injury to a ship's bottom, caused not by the ordinary action of the winds & waves, but by their violent action in a storm; & it is doubtful whether evidence of a custom that they are not to be liable for injuries to the bottom or below the water-line, unless caused by striking against the ground, or some foreign substance other than water, is admissible to control the construction of the policy. *Semle*: it is not.

A shipowner does not insure against ordinary wear & tear & has no right under pretence of damage by perils of the sea to have such wear & tear replaced & an old ship repaired at the expense of the underwriters (*MELLOR, J.*).

(2) The usage must be shown to be so general as that it must be taken to be known & submitted to by the insured (*MELLOR, J.*).—*HARRISON v. UNIVERSAL MARINE INSURANCE CO.* (1862), 3 F. & F. 190, N. P.

#### *F. Leakage and Breakage.*

See Marine Insurance Act, 1906 (c. 41), s. 55

**1609. Ordinary & extraordinary perils distinguished.]**—(1) The words “perils of the seas” in a policy of insurance are terms of general import, upon which the ct. is to put a construction.

(2) It appears that at the end of the voyage the cargo was not shifted from its place, nor were the casks damaged, but ten of them were found completely empty, & others had lost much of their contents. You are to say whether that loss or any part of that damage was occasioned by the perils of the seas. . . . The term “perils of the sea” is rather a loose term, but the counsel on both sides have limited it. . . . They have spoken of ordinary & extraordinary perils & you will say whether it is made out to your satisfaction that this loss was occasioned by extraordinary perils. If it is, you will find your verdict for plffs.; if it is not you will find for deft. (*LORD DENMAN, C.J.*).—*CROFTS v. MARSHALL* (1836), 7 C. & P. 597, N. P.

**1610. Risk expressly covered.]**—*TRADERS & GENERAL INSURANCE ASSOCN., LTD. v. BANKERS & GENERAL INSURANCE CO., LTD.* (1921), 38 T. L. R.

**1611.** ——— “Breakage & leakage however caused”—*Variation between slip & policy.]*—*MAIGNEN & CO. v. NATIONAL BENEFIT ASSURANCE CO., LTD.* (1922), 38 T. L. R. 257.

#### *G. Loss caused by Delay.*

See Marine Insurance Act, 1906 (c. 41), s. 55 (2) (b).

**1612. Expenses incurred during detention—For repairs.]**—*FLETCHER v. POOLE* (1769), 1 Park on Marine Insurances, 8th ed. p. 115, N. P.

*Annotations:—Apprvd. & Folld. De Vaux v. Salvador* (1836), 4 Ad. & El. 420. *Refd. Field S.S. Co. v. Burr*, [1899] 1 Q. B. 579.

**1613.** ———.] — *LATEWARD v. CURLING* (1776), 1 Park on Marine Insurances, 8th ed. p. 288.

**1614.** ———.]—*DE VAUX v. SALVADOR*, No. 1695, *post*.

**1615.** ———.]—*EDEN v. POOLE* (1785), 1 Park on Marine Insurances, 8th ed. p. 117.

*Annotation:—Refd. Field S.S. Co. v. Burr*, [1899] 1 Q. B. 579.

.]—Barges were insured against loss or damage, which the insured should sustain or become liable to others for, by reason of the collision of the barges with any other vessel. The barges having been damaged by collision, the insured claimed damages for loss in consequence of detention of the barges during repairs:—*Held*: in order to be recoverable, the loss must be proximately caused by the perils insured against, & that the damages claimed were too remote, & could not be recovered under the policy.—*SHELBORNE & CO., v. LAW INVESTMENT & INSURANCE CORPN.*, [1898] 2 Q. B. 626; 67 L. J. Q. B. 944; 79 L. T. 278; 8 Asp. M. L. C. 445; 3 Com. Cas. 304.

*Annotation:—Refd. Adclalide S.S. Co. v. R.* (1924), 93 L. J. K. B. 871.

**1617. ——— Delay by embargo.]**—Seamen's wages & provisions during an embargo are not covered by an insurance on the body of a ship.—*ROBERTSON v. EWER* (1786), 1 Term Rep. 127; 99 E. R. 1011.

*Annotations:—Distd. Brough v. Whitmore* (1791), 4 Term Rep. 206; *Rotch v. Edie* (1795), 6 Term Rep. 413. *Apld. De Vaux v. Salvador* (1836), 4 Ad. & El. 420; *Field S.S. Co. v. Burr*, [1899] 1 Q. B. 579. *Refd. Sharp v. Gladstone* (1805), 7 East, 24; *Earle v. Roweroft* (1806), 8 East, 126. *Mentd. Roddick v. Indemnity Mutual Marine Insco.*, [1895] 2 Q. B. 380.

**1618. Loss of freight—Delay by embargo—Freight subsequently earned.]**—*M'CARTHY v. ABEL*, No. 1677, *post*.

**1619.** ———.]—*EVERTH v. SMITH*, No. 2266, *post*.

**1620. Loss of cargo—Of perishable nature—Delay by weather.]**—Meat shipped at Hamburg for London was delayed on the voyage by tempestuous weather, & solely by reason of such delay became putrid, & was necessarily thrown overboard at sea:—*Held*: not a loss by perils of the sea, or within the words “all other perils, losses, & misfortunes,” etc., in the policy.—*TAYLOR v. DUNBAR* (1869), L. R. 4 C. P. 206; 38 L. J. C. P. 178; 17 W. R. 382.

*Annotations:—Apld. Inman S.S. Co. v. Bischoff* (1882), 7 App. Cas. 670; *Pink v. Fleming* (1890), 25 Q. B. D. 396. *Refd. The Alps*, [1893] P. 109; *Leyland Shipping Co. v. Norwich Union Fire Insce. Soc.*, [1917] 1 K. B. 873.

**1621. ——— Collision.]**—Goods were insured by a marine policy against among other things damage consequent on collision. The ship in which they were shipped came into collision with another ship, & was thereby damaged, so as to render it necessary for her to go into a port for repairs. For the purpose of such repairs it was necessary to discharge a portion of the goods insured. When the repairs were completed, such goods were re-shipped, & the ship proceeded to her destination. On arrival it was found that the goods being of a perishable nature had been damaged by the handling necessary for their discharge & re-shipment & by the delay. In an action by the insured upon the policy to recover the amount of the damage to the goods:—*Held*: the collision was not the proximate cause of the loss, & therefore plffs. could not recover.—*PINK v. FLEMING* (1890), 25 Q. B. D. 396; 59 L. J. Q. B. 151, 559; 63 L. T. 413; 6 T. L. R. 432; 6 Asp. M. L. C. 554, C. A.

*Annotations:—Distd. Schloss v. Stevens*, [1906] 2 K. B. 665. *Consd. Leyland Shipping Co. v. Norwich Union Fire Insce. Soc.*, [1917] 1 K. B. 873. *Refd. Retscher v. Borwick*, [1894] 2 Q. B. 548; *Coxe v. Employers' Liability Assee. Corpn.*, [1916] 2 K. B. 629.



*H. Destruction caused by Pests.*

See Marine Insurance Act, 1906 (c. 41), s. 55 (2) (c).

**1622. Worms.**—*ROHL v. PARR*, No. 1971, *post*.

**1623. Rats—Eating holes in ship's bottom.**—A loss arising from rats eating holes in the ship's bottom is not within the perils insured against by the common form of a policy of insurance.—*HUNTER v. POTTS* (1815), 4 Camp. 203, N. P.

*Annotations*:—*Consd.* *Pandorf v. Hamilton* (1886), 17 Q. B. D. 670 (see 12 App. Cas. 518). *Refd.* *Butler v. Wildman* (1820), 3 B. & Ald. 398; *Antony v. Etna Insee.* (1869), 21 L. T. 473; *British & Foreign Marine Insee. v. Gaunt*, [1921] 2 A. C. 41.

**1624. —Gnawing hole in pipe—Escape of sea water—Damage to cargo.**—Rice was shipped under a charterparty & bills of lading which excepted "dangers & accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, whereby sea-water escaped & damaged the rice, without neglect or default on the part of the shipowners or their servants:—*Held*: the damage was within the exception & the shipowners were not liable.

In the class of contract where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them, but because in those cases an additional term exists in the contract which makes the negligence of the shipowner, or of those for whom he is responsible a material element; but it is also necessary to give effect to the words "dangers & accidents of the seas" (*LORD HALSBURY, C.*).

... I think the idea of something fortuitous & unexpected is involved in both words "peril" or "accident"; you could not speak of the danger of a ship's decay; you would know that it must decay (*LORD HALSBURY, C.*).—*HAMILTON, FRASER & Co. v. PANDORF & Co.* (1887), 12 App. Cas. 518; 57 L. J. Q. B. 24; 57 L. T. 726; 52 J. P. 196; 36 W. R. 369; 3 T. L. R. 768; 6 Asp. M. L. C. 212, H. L.; *reversg.* S. C. *sub nom.* *PANDORF v. HAMILTON* (1886), 17 Q. B. D., 670, C. A.

*Annotations*:—*Consd.* *Trinder, Anderson v. Thames & Mersey Marine Insee.*, *Trinder, Anderson v. North Queensland Insee.*, *Trinder, Anderson v. Weston, Crocker*, [1898] 2 Q. B. 114. *Expld. & Apld.* *Blackburn v. Liverpool, Brazil & River Plate Steam Navigation Co.*, [1902] 1 K. B. 290. *Consd.* *Leyland Shipping Co. v. Norwich Union Fire Insee. Soc.*, [1918] A. C. 350; *Samuel v. Dumas*, [1924] A. C. 431. *Refd.* *Thames & Mersey Marine Insee. v. Hamilton, Fraser* (1887), 12 App. Cas. 484; *The Bedouin*, [1894] P. 1; *Ballantyne v. Mackinnon* [1896] 2 Q. B. 455; *Hensley v. White, Lloyd v. Sugg, Walker v. Lilleshall Coal Co.*, [1900] 1 Q. B. 481; *Fenton v. Thorley*, [1903] A. C. 443; *The Torbryan*, [1903] P. 35; *Steel v. Cammell, Laird*, [1905] 2 K. B. 232; *Ingram & Royle v. Services Maritimes du Tréport* (1913), 109 L. T. 733; *Stott (Baltic) Steamers v. Marten*, [1914] 3 K. B. 1262; *Denholm v. Shipping Controller* (1920), 124 L. T. 378. *Mentd.* *Walker v. Lilleshall Co.* (1899), 69 L. J. Q. B. 192; *The Northumbria* (1906), 95 L. T. 618; *Morrison v. Shaw, Savill & Albion Co.*, [1916] 1 K. B. 747; *Becker, Gray v. London Assee. Corp.*, [1918] A. C. 101; *British & Foreign S.S. Co. v. R.*, [1918] 2 K. B. 879.

**1625. Insects.**—*SCHLOSS BROTHERS v. STEVENS*, No. 1832, *post*.

*I. Damage caused by Collision.*

**1626. With another ship.**—A loss occasioned by another ship running down the ship insured, through gross negligence, is a loss by perils of the

sea.—*SMITH v. SCOTT* (1811), 4 Taunt. 126; 128 E. R. 276.

**1627. —**—*WILSON, SONS & Co. v. XANTHO (CARGO OWNERS)*, No. 1567, *ante*.

**1628. With wreck—Sunk by enemy.**—Deft. assocn. insured pltfs.' steamship by a policy which was expressed to cover only the risks of capture, seizure, & detainment by the King's enemies & the consequences thereof or any attempt thereat, & all consequences of hostilities or warlike operations by or against the King's enemies & also all risks excluded from recovery under an ordinary policy by the f.c. & s. clause. The ship was under the policy deemed to be at all times fully insured by an ordinary policy against all other risks. Pltfs.' steamship during the currency of the policy ran upon the wreck of another steamer which had been sunk in shallow water earlier on the same day by an enemy submarine, & was seriously damaged by the collision. The spot where the wreck lay was not marked by a buoy or otherwise at the time of the collision owing to the shortness of the time which had elapsed since that vessel was sunk. In an action by pltfs. to recover under the policy in respect of the damage which their steamship had sustained by the collision as being a consequence of hostilities:—*Held*: the damage to pltfs.' steamship was due to a marine peril, & the act of hostilities in the sinking of the first vessel by the enemy submarine was not the proximate cause of the loss, & therefore pltfs. were not entitled to recover under the policy.—*FRANCE (WILLIAM), FENWICK & Co., LTD. v. NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCN.*, [1917] 2 K. B. 522; 86 L. J. K. B. 1109; 116 L. T. 684; 33 T. L. R. 437; 61 Sol. Jo. 577; 14 Asp. M. L. C. 92; 23 Com. Cas. 37.

*Annotations*:—*Distd.* *Stoomvaart M. Sophie H. v. Merchants' Marine Insee.* (1918), 34 T. L. R. 404. *Refd.* *British & Foreign S.S. Co. v. R.*, [1918] 2 K. B. 879.

*J. Presumption in Case of Missing Ship.*

See, now, Marine Insurance Act, 1906 (c. 41), s. 58.

**1629. Presumption of foundering.**—A ship never heard of is presumed to be foundered at sea.—*GREEN v. BROWN* (1743), 2 Stra. 1199; 93 E. R. 1126.

*Annotations*:—*Folld.* *Munro, Brice v. War Risks Assocn.*, [1918] 2 K. B. 78. *Consd.* *La Compania Martiartu v. Royal Exchange Assee.*, [1923] 1 K. B. 650; *Samuel v. Dumas*, [1923] 1 K. B. 592.

**1630. —**—*NEWBY v. READ* (1761), *Marshall on Marine Insurances*, 4th ed. p. 388.

**1631. —**—Where, in *assumpsit* on a policy of insurance on goods by a certain ship, it was proved that she sailed on the voyage insured with the goods on board & never arrived at her port of destination, & that a few days after her departure, a report was heard at the place whence she sailed, that the ship had foundered at sea, but that the crew were saved:—*Held*: this was sufficient *prima facie* evidence of a loss by perils of the sea, & pltf. was not bound to call any of the crew, or to show that he was unable to procure their attendance.—*KOSTER v. REED* (1826), 6 B. & C. 19; 9 Dow. & Ry. K. B. 2; 108 E. R. 359; *sub nom.* *FOSTER v. REEVE*, 5 L. J. O. S. K. B. 73; *previous proceedings, sub nom.* *KOSTER v. INNES* (1825), Ry. & M. 333, N. P.

**1632. —**—*COMPANIA MARTIARTU v. ROYAL EXCHANGE ASSURANCE*, No. 1641, *post*.

## PART II. SECT. 20, SUB-SECT. 1.—H. —SCOT.

**1622 i. Worms.**—Destruction of a vessel by the sea-worm is not one of those perils which are covered by an ordinary policy of insurance.—*LOVELL v. M'MILLAN* (1809), 15 Fac. Coll. 341.

## PART II. SECT. 20, SUB-SECT. 1.—J.

**1629 i. Presumption of foundering.**—*YOUNG v. YOUNG SHIP, ETC.* (1921), 16 Hong Kong 34.—*HONG KONG*

c. *Evidence supporting presumption.*—*POMARES v. MINAS MARINE INSURANCE CO.* (1875), 16 N. B. R. (3 Pug.) 245.—*CAN.*

d. —.—*FERRIER v. SANDIEMAN* (1809), 15 Fac. Coll. 373.—*SCOT.*

*Sect. 20.—Perils insured against: Sub-sect. 1, J.; sub-sect. 2, A.]*

**1633. — In time of war.]—**Pltfs., who were owners of a steamship, insured her with the first defts. against war risks & with the second defts. against the usual marine perils to the exclusion of war risks. She left Liverpool in Jan. 1917, for Rangoon via the Cape & had not since been heard of. She was seaworthy, & though the weather was bad it was not sufficient to explain the loss. She was believed to have passed through an area in which an enemy submarine was operating at the time. In an action on the war risk policy & alternatively on the ordinary marine policy:—*Held*: though, when there was no evidence as to the cause of the loss, there was, in the absence of unseaworthiness, a presumption even in time of war that the loss was due to an ordinary marine peril, yet on the facts there was sufficient evidence that the vessel was sunk by an enemy submarine, & therefore the loss fell on the war risk underwriters.—*BRITISH & BURMESE STEAM NAVIGATION CO., LTD. v. LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCN., LTD. & BRITISH & FOREIGN MARINE INSURANCE CO., LTD.* (1917), 34 T. L. R. 140.

*Annotation:—Consd. Compania Maritima of Barcelona v. Wishart* (1918), 87 L. J. K. B. 1027.

**1634. — — —.]—**In an action on a policy insuring against loss by perils of the sea with a clause excepting loss by capture, seizure, & consequences of hostilities, it is not necessary for a pltf. whose ship has been lost at sea to prove that it was not lost by the excepted causes.

In an action on a policy insuring a ship against loss by capture, seizure, & consequences of hostilities, pltf. fails if on the evidence the probabilities are equally in favour of a loss by the perils insured against & a loss by other perils.

Rules for determining the incidence of the burden of proof in actions upon policies of insurance containing exceptions from liability.

I have on two former occasions expressed the opinion that in cases of this sort, where all that can be proved is that a vessel is lost at sea, no one knows how, the loss falls upon the marine policy. The assured having proved that his vessel foundered at sea has proved a loss by a peril of the sea, for in the last resort every vessel that sinks at sea is lost by a peril of the sea (*BAILACHE, J.*).—*MUNRO, BRICE & CO. v. WAR RISKS ASSOCN.*, [1918] 2 K. B. 78; 88 L. J. K. B. 509; 118 L. T. 708; 34 T. L. R. 331; 14 Asp. M. L. C. 312; *subsequent proceedings, sub nom. MUNRO, BRICE & CO. v. MARTEN, SAME v. R.*, [1920] 3 K. B. 91, C. A.

**1635. — — —.]—**A policy of insurance on the s.s. *Pelayo* contained the following exceptions clause: "Warranted free from capture, seizure & detention & the consequences thereof or any attempt thereat, piracy excepted, & also from all consequences of hostilities or warlike operations, whether before or after the declaration of war." On Nov. 17, 1916, the s.s. *Pelayo* left the Tyne for Barcelona with a cargo of steel & was never seen or heard of again. It was proved in evidence that when the vessel left port on her last voyage, she was seaworthy. It was also proved that the weather was very severe, & was such as was calculated to bring about & did bring about serious marine casualties. There was no evidence of any submarine casualties, having taken place on the *Pelayo's* route between Nov. 17 & 21, 1916, & there was no evidence of floating mines in the area in question, nor of any mine-fields which the

*Pelayo* was likely to have approached & suffered from unobserved. Evidence was given of two vessels having struck mines at about that time, but both casualties took place far out of the *Pelayo's* course:—*Held*: although demonstration & certainty were unattainable, the law allowed & demanded that an inference should be drawn from such facts as pointed to a conclusion; & the facts pointed to the conclusion that the *Pelayo* was lost by foundering not brought about by any perils excluded by the free from capture, seizure & detention clause.—*COMPANIA MARITIMA OF BARCELONA v. WISHART* (1918), 87 L. J. K. B. 1027; 118 L. T. 705; 34 T. L. R. 251; 14 Asp. M. L. C. 298; 23 Com. Cas. 264.

*Annotations:—Consd. Munro, Brice v. War Risks Asscn.*, [1918] 2 K. B. 78. *Refd. Zachariessen v. Importers' & Exporters' Marine Insee.* (1924), 40 T. L. R. 297.

**1636. When presumption arises—Rule of law as to time.]—**(1) There is no fixed rule of law with regard to the time, after which a missing ship shall be reputed to be lost. It is, in all cases, a question of presumption to be governed by the circumstances of the particular case.

(2) If a ship, for which the underwriters, when a demand is made upon the policy, have paid as for a lost ship, should chance to turn up, she is to be considered as abandoned & will belong to the underwriters.—*HOUSTMAN v. THORNTON* (1816), Holt, N. P. 242, N. P.

**1637. Evidence supporting presumption—Proof of sailing on insured voyage.]—**In an action on a policy of insurance where a loss by the perils of the sea is to be inferred from the ship not being heard of after her sailing, pltf. must prove that when she left the port of outfit she was bound upon the voyage insured. For this purpose the convoy bond, mentioning the port of destination in the common form is *prima facie* evidence.—*COHEN v. HINCKLEY* (1809), 2 Camp. 51, N. P.

**1638. — — —.]—***KOSTER v. REED*, No. 1631, *ante*.

**1639. — Non-arrival at port of destination.]—**In an action on a policy from an English to a foreign port, to found a presumption that the ship was lost on the voyage, it is enough to prove that she was not heard of in this country after she sailed, without calling witnesses from her port of destination, to show that she never arrived there.—*TWEMLOW v. OSWIN* (1809), 2 Camp. 85, N. P.

**1640. — — — Crew heard of after loss.]—***KOSTER v. REED*, No. 1631, *ante*.

**1641. — Rebutting evidence—Balance of proof.]—**In an action by a shipowner against underwriters on a policy of marine insurance there is a presumption of a loss by perils of the sea, when the insured ship having sailed out of port on an intended voyage has never been heard of again. But when the insured ship having been lost the owner gives some evidence of a loss by perils of the sea & the underwriters offer a reasonable explanation of the loss & show that it was probably due to an event not insured against, for example the scuttling of the ship with the connivance of the owner, then, if the evidence leaves the ct. in doubt to which cause the loss is attributable, pltf. fails to prove his case & defts. are entitled to judgment.—*COMPANIA MARTIARTU v. ROYAL EXCHANGE ASSURANCE*, [1923] 1 K. B. 650; 92 L. J. K. B. 546; 129 L. T. 1; 16 Asp. M. L. C. 189; 28 Com. Cas. 76, C. A.; *affd.*, [1924] A. C. 850, H. L. *Annotations:—Refd. Banco de Barcelona v. Union Marine Insee.* (1925), 30 Com. Cas. 316. *Mentd. Falcon v. Famous Players Film Co.* (1925), 42 T. L. R. 91.

**As to missing ship insured under War Risks Policies.]—***See Sub-sect. 6, B., post.*



## SUB-SECT. 2.—PROXIMATE CAUSE OF LOSS TO BE REGARDED.

## A. In General.

See Marine Insurance Act, 1906 (c. 41), s. 55 (1).

**1642. General rule.**—Action on a time policy on a ship for total loss. Plea: that pltf. knowingly, wilfully & improperly sent the ship to sea in a condition in which it was dangerous to go to sea, & suffered her to remain in that state near the shore, during which time, by reason of the premises, the loss occurred. On the trial, it appeared pltf. personally sent the ship out to sea in an unseaworthy state, & caused her to anchor in the offing in that state. Whilst there she was caught in a storm from seaward & driven ashore. There was evidence justifying the jury in finding that the immediate cause of the loss was not occasioned in any way by the unseaworthiness; & the jury having found that such was the fact, a verdict was entered for pltf. There was evidence from which the jury might have drawn the conclusion that, though the unseaworthiness was not the immediate cause of the loss, the loss would not have occurred if the ship had been seaworthy when she went to sea. No question as to this was left to the jury.

The Ct. of Q. B. having made absolute a rule for a new trial on the ground of misdirection, holding that the plea was proved, if that misconduct of pltf. occasioned the loss, though it was not the immediate cause, the Ct. of Exchequer Chamber on appeal reversed the decision.—**THOMPSON v. HOPPER** (1858), E. B. & E. 1038; 27 L. J. Q. B. 441; 32 L. T. O. S. 38; 5 Jur. N. S. 93; 6 W. R. 857; 120 E. R. 796, Ex. Ch.; *previous proceedings* (1856), 6 E. & B. 172.

*Annotations*:—**Consd.** *Anderson v. Morice* (1874), L. R. 10 C. P. 58; *Trinder, Anderson v. Thames & Mersey Marine Insee., Trinder, Anderson v. North Queensland Insee., Trinder, Anderson v. Weston, Crocker.* [1898] 2 Q. B. 114. **Refd.** *Aubert v. Gray* (1862), 3 B. & S. 163; *Sully v. Duranty* (1864), 3 H. & C. 270; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1882), 9 Q. B. D. 118; *Ballantyne v. Mackinnon* (1896), 65 L. J. Q. B. 616; *Samuel v. Dumas*, [1924] A. C. 431.

**1643.** —.]—**IONIDES v. UNIVERSAL MARINE INSURANCE CO.**, No. 1854, *post*.

**1644.** —.]—The rule is that to entitle the assured to recover upon a policy the loss must be direct & immediate consequence of the peril insured against, & not a remote one.

Action on a policy of insurance as for a total loss of freight to be earned in carrying a cargo of coals & iron from Rio to San Francisco. On the voyage the ship received damage from heavy seas which compelled her to put into Monte Video, having previously, for safety's sake, thrown overboard some portion of her cargo, & landed another portion at the Falkland Islands. On the ship's being surveyed at Monte Video, she was found to be incapable of pursuing the voyage with the cargo on board, & no other vessel could be found to take the cargo on. The cost of warehouse room was so great at Monte Video, that in a few months it would have equalled the value of the cargo, & owing to the town being in a state of siege & political revolution, it was unsafe to land the cargo & leave it unwarehoused, under these circumstances the captain, being in want of money, sold the cargo & applied the proceeds to the ship's purposes, & then brought her back in ballast to

Liverpool for repairs. At the trial the judge left two questions to the jury: first was there a constructive total loss of the ship?; secondly was there a constructive total loss of the goods? The jury answered both questions in the negative, & found a verdict generally for defts., & upon a rule to set the verdict aside for misdirection on the part of the judge in telling the jury, that those were the only questions for consideration:—**Held**: there was no misdirection, & the two questions submitted to the jury were, under the circumstances, proper questions for the determination of the case.

**Semble**: nevertheless, the question of total loss of freight would not, in every case of an action on a policy for a total loss of freight, be necessarily concluded by the decision of those two questions.—**KLINGENDER v. HOME & COLONIAL INSURANCE CO., LTD.** (1866), 15 L. T. 16; 2 Mar. L. C. 409.

**1645.** —.]—**DUDGEON v. PEMBROKE**, No. 1581, *ante*.

**1646.** —.]—It is a settled rule of law that in the case of an action on a contract of marine insurance regard is to be had to the *causa proxima* (**MANISTY, J.**).—**CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.** (1882), 9 Q. B. D. 118; 51 L. J. Q. B. 393; 46 L. T. 530; 4 Asp. M. L. C. 523; *on appeal* (1883), 10 Q. B. D. 521, C. A.

*Annotations*:—**Refd.** *Woodley v. Michell* (1883), 11 Q. B. D. 47. **Mentd.** *Jacobs v. Credit Lyonnais* (1884), 12 Q. B. D. 589; *Wilson, Sons v. Xantho (Cargo Owners)* (1887), 12 App. Cas. 503; *Leduc v. Ward* (1888), 20 Q. B. D. 475; *The August*, [1891] P. 328; *The Englishman & The Australia*, [1894] P. 239; *The Industrie*, [1894] P. 58; *Davidson v. Hill*, [1901] 2 K. B. 606; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *S.S. Tongariro (Cargo Owners) v. S.S. Drumlanrig*, [1911] A. C. 16.

**1647. Loss by capture—Previous sea damage—Rate of sailing diminished.**—**LIVIE v. JANSON**, No. 2024, *post*.

**1648. Loss by sea perils—Insurance on goods—Subsequent seizure by foreign government.**—Where, on a policy of insurance on goods warranted "free from capture & seizure," the ship sailed on her voyage, & when within eight or nine miles of port, was obliged to come to an anchor for want of a pilot, & afterwards drifted on the sand, & was wrecked & totally lost; & whilst she remained on the sand, she was seized by persons acting under the authority of the Spanish Govt., & the goods were taken on shore by them in a damaged state, & no portion of them ever came again into the possession of the assured:—**Held**: this was a loss by the perils of the seas, & not by capture or seizure; the *proxima causa* being the loss of the ship.—**HAHN v. CORBETT** (1824), 2 Bing. 205; 9 Moore, C. P. 390; 3 L. J. O. S. C. P. 253; 130 E. R. 285.

*Annotations*:—**Consd.** *Naylor v. Palmer* (1853), 1 C. L. R. 356. **Distd.** *Ionides v. Universal Marine Insee.* (1863), 14 C. B. N. S. 259. **Appld.** *Andersen v. Marten*, [1908] 1 K. B. 601. **Refd.** *Thompson v. Hopper* (1856), 28 L. T. O. S. 142; *Leyland Shipping Co. v. Norwich Union Fire Insee. Soc.*, [1917] 1 K. B. 873; *Wilson Shipping Co. v. British & Foreign Insee.*, [1920] 2 K. B. 25.

**1649.** — — — **Contact with damaged goods.**—A vessel laden with hides & tobacco, in the course of her voyage, shipped large quantities of sea water. On the termination of the voyage it was discovered that the sea water had rendered the hides putrid, & that the putrefaction of the hides had imparted an ill flavour to the tobacco, & had

## PART II. SECT. 20, SUB-SECT. 2.—A.

**1642 i. General rule.**—Action on a policy on a vessel, alleging a total loss. Plea, that pltf. knowingly & wrongfully sent the vessel from T. in an unseaworthy state, & permitted

her to remain on the lake in such state, without being properly equipped, & for these reasons the vessel was wrecked & lost:—**Held**: the plea was not proved by showing that the vessel was unseaworthy when she was wrecked unless such unseaworthiness

was the immediate cause of the loss.—**WOODHOUSE v. PROVINCIAL INSURANCE CO.** (1871), 31 U. C. R. 176.—**CAN.**

**1642 ii.** —.]—**KENNETH & Co. v. MOORE** (1883), 10 R. (Ct. of Sess.) 547; 20 Sc. L. R. 362.—**SCOT.**



**Sect. 20.—Perils insured against: Sub-sect. 2, A., B. & C.]**

thereby injured it:—*Held*: the damage thus occasioned to the tobacco was a loss by perils of the seas.—*MONTROYA v. LONDON ASSURANCE CO.* (1851), 6 Exch. 451; 20 L. J. Ex. 254; 17 L. T. O. S. 82; 155 E. R. 620.

*Annotations*:—*Consd.* *Thompson v. Hopper* (1858), E. R. & E. 1038. *Distd.* *Cator v. Great Western Insce. of New York* (1873), L. R. 8 C. P. 552. *Refd.* *Inman S.S. Co. v. Bischoff* (1882), 7 App. Cas. 670; *Field S.S. Co. v. Burr* [1899] 1 Q. B. 579.

**1650. Damage by collision—Loss during towing to place of repair.]—**A tug was insured against “the risk of collision & damage received in collision with any object.” The policy did not include the perils of the sea. The tug ran against a floating snag which did it considerable injury, including damage to the engine-room machinery, & amongst other things broke the cover of the condenser, leaving an opening about twenty square inches in area. The tug commenced leaking, & there being danger that the water would come into the ship through the ejection pipes & the hole in the condenser cover, the pipes were plugged from the outside. While she was being towed to a place of repair, a plug came out & the water rushed into the engine-room through the ejection pipes & the hole in the condenser cover, & she began to fill rapidly. An attempt to again plug the ejection pipes failed, & the vessel sank:—*Held*: the collision, & not the towing, was the proximate cause of the loss, & the insurers were liable under the policy for a total loss.—*REISCHER v. BORWICK*, [1894] 2 Q. B. 548; 63 L. J. Q. B. 753; 71 L. T. 238; 10 T. L. R. 568; 7 Asp. M. L. C. 493; 9 R. 558, C. A.

*Annotations*:—*Apprvd.* *Leyland Shipping Co. v. Norwich Union Insce. Soc.*, [1918] A. C. 350. *Apld.* *The Christel Vinnen*, [1924] P. 208. *Consd.* *Samuel v. Dumas*, [1924] A. C. 431. *Refd.* *Becker, Gray v. London Assce. Corp.*, [1918] A. C. 101; *Charente S.S. Co. v. Transports Director* (1921), 38 T. L. R. 148. *Mentd.* *Wilson v. United Counties Bank*, [1920] A. C. 102.

**Proximate cause in damage generally.]—See DAMAGES, Vol. XVII., pp. 93 et seq.**

**B. Negligence of Master and Crew.**

See Marine Insurance Act, 1906 (c. 41), s. 55 (2) (a).

**1651. Loss from peril insured against—Master & crew competent at commencement of voyage.]—**In an action on a policy on ship, by which, amongst other risks, the underwriters insured against fire, & barratry of the master & mariners, they are liable for a loss by fire occasioned by the negligence of the master & mariners. Where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss was no breach of the implied warranty, that the ship should be properly manned.—*BUSK v. ROYAL EXCHANGE ASSURANCE CO.* (1818), 2 B. & Ald. 73; 106 E. R. 294.

*Annotations*:—*Apld.* *Walker v. Maitland* (1821), 5 B. & Ald. 171. *Folld.* *Phillips v. Headlam* (1831), 2 B. & Ad. 380. *Refd.* *Bishop v. Pentland* (1827), 7 B. & C. 219; *Broderick v. Hollingsworth* (1837), Will. Woll. & Dav. 689; *Sadler v. Dixon* (1841), 8 M. & W. 895; *Wyld v. Pickford* (1841), 10 L. J. Ex. 382; *Thompson v. Hopper* (1856), 6 E. & B. 937; *Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471; *Bouillon v. Lupton* (1863), 15 C. B. N. S. 113; *Trinder, Anderson v. Thames & Mersey Marine Insce.*, *Trinder, Anderson v. North Queensland Insce.*, *Trinder, Anderson v. Weston, Crocker*, [1898] 2 Q. B. 114; *A.-G. v. Adelaide S.S. Co.*, [1923] A. C. 292.

**1652. ———.]—SHORE v. BENTALL** (circa 1828), 7 B. & C. 798, n.; 108 E. R. 921.

*Annotations*:—*Refd.* *Holdsworth v. Wise* (1828), 7 B. & C. 794; *Sadler v. Dixon* (1841), 8 M. & W. 895; *Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471; *Bouillon v. Lupton* (1863), 15 C. B. N. S. 113.

**1653. ———.]—DIXON v. SADLER**, No. 1513, ante.

**1654. ———.]—**The underwriters on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master & mariners.—*WALKER v. MAITLAND* (1821), 5 B. & Ald. 171; 106 E. R. 1155.

*Annotations*:—*Folld.* *Phillips v. Headlam* (1831), 2 B. & Ad. 380. *Apld.* *Redman v. Wilson* (1845), 14 M. & W. 476. *Refd.* *Bishop v. Pentland* (1827), 7 B. & C. 219; *Holdsworth v. Wise* (1828), 7 B. & C. 794; *Sadler v. Dixon* (1841), 8 M. & W. 895; *Blythe v. Sheppherd* (1842), 6 Jur. 489; *Thompson v. Hopper* (1856), 6 E. & B. 937; *Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471; *Bouillon v. Lupton* (1863), 15 C. B. N. S. 113; *Becker, Gray v. London Assce. Corp.*, [1918] A. C. 101; *British & Foreign S.S. Co. v. R.*, [1918] 2 K. B. 879.

**1655. ———.]—**(1) Policy on goods “warranted free from average, unless general, or the ship be stranded.” On the voyage, the ship was driven by necessity into a harbour, dry every tide, where she was moored along the quay, in the place usual for ships of her burthen, & in as safe a situation as could be found; & being sharp built, she was lashed to the pier by a rope from her mast head, which the mate insisted to be sufficient, though it was objected to by the pilot who had brought the ship in. When the tide ebbed, the rope broke, & the ship fell over, & bilged, & the goods in consequence were damaged. If the rope had not broken, the accident would not have happened:—*Held*: the ship was stranded, within the meaning of the policy.

Stranding, is where a ship, by an accident, & out of the ordinary course of her voyage, gets upon the strain, & receives injury in consequence.

(2) Negligence of the crew does not discharge the underwriters, if the loss is occasioned by one of the perils insured against.—*BISHOP v. PENTLAND* (1827), 7 B. & C. 219; 1 Man. & Ry. K. B. 49; 6 L. J. O. S. K. B. 6; 108 E. R. 705.

*Annotations*:—*As to* (1) *Distd.* *Kingsford v. Marshall* (1832), 8 Bing. 458. *Folld.* *Wells v. Hopwood* (1832), 3 B. & Ad. 20. *Consd.* *Magnus v. Buttemer* (1852), 11 C. B. 876; *Corcoran v. Gurney* (1853), 1 E. & B. 456; *Letchford v. Oldham* (1880), 5 Q. B. D. 538. *Refd.* *De Mattos v. Saunders* (1872), L. R. 7 C. P. 570. *As to* (2) *Refd.* *Broderick v. Hollingsworth* (1837), Will. Woll. & Dav. 689; *Sadler v. Dixon* (1841), 8 M. & W. 895; *Redman v. Wilson* (1845), 14 M. & W. 476; *Thompson v. Hopper* (1856), 6 E. & B. 937; *Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471; *Bouillon v. Lupton* (1863), 15 C. B. N. S. 113.

**1656. ———.]—PHILLIPS v. HEADLAM**, No. 1494, ante.

**1657. ———.]—**Where a ship, insured against the perils of the sea, was injured by the negligent loading of her cargo by the natives on the coast of Africa, & in consequence shortly afterwards became leaky, & being pronounced unseaworthy, was run ashore in order to prevent her from sinking, & to save the cargo:—*Held*: the insurers were liable for a constructive total loss, the immediate cause of the loss being the perils of the sea, although the cause of the unseaworthiness was the negligence in the loading.—*REDMAN v. WILSON, REDMAN v. HAY* (1845), 14 M. & W. 476; 14 L. J. Ex. 333; 9 Jur. 714; 153 E. R. 562.

*Annotations*:—*Refd.* *Thompson v. Hopper* (1856), 6 E. & B. 937; *Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471.

**PART II. SECT. 20, SUB-SECT. 2.—B.**

**e. Duty of master—Where cargo imperilled—Shipwrecked vessel.]—FAIRBANKS v. UNION MARINE INSURANCE CO.** (1854), N. S. R. (James) 271.—CAN.

1658. —.]—BICCARD *v.* SHEPHERD, No. 1510, *ante*.

1659. —.]—DAVIDSON *v.* BURNAND, No. 1538, *ante*.

1660. —.]—TRINDER, ANDERSON & CO. *v.* THAMES & MERSEY MARINE INSURANCE CO., TRINDER, ANDERSON & CO. *v.* NORTH QUEENSLAND INSURANCE CO., TRINDER, ANDERSON & CO. *v.* WESTON, CROCKER & CO., No. 1562, *ante*.

### *C. Wilful Misconduct.*

See Marine Insurance Act, 1906 (c. 41), ss. 39 (5), 55 (2) (a).

1661. *Ship stranded fraudulently.*]—BOWRING *v.* ELMSLIE (1790), 7 Term Rep. 216, n. ; 101 E. R. 939.

1662. *Ship scuttled—With connivance of owner.*]—ISSAIAS *v.* MARINE INSURANCE CO. (1922), 28 Com. Cas. 95.

1663. ——— *Burden of proof.*]—In an action against underwriters by the owner of a vessel & by the assignees of a policy of marine insurance for the total loss of the vessel, which had run on the rocks, the defence was that the vessel had been deliberately cast away with the connivance of the owner. The trial judge held that the burden of proving that the vessel, having been found on the rocks, got there by design & not by accident was on the underwriters, & he held that that burden had not been discharged, but he gave judgment for them as against the owner on the ground that there had been a breach of the warranty as to over-insurance contained in the institute time clauses in the policy, & he gave judgment for the assignees of the policy against the underwriters on the ground that the assignees had no notice of the over-insurance:—*Held*: on the facts, whether it was or was not the duty of underwriters in such a case to discharge the *onus* of showing that the vessel had been cast away, the underwriters had discharged that *onus*, & judgment must be entered for the underwriters.—ANGHELATOS *v.* NORTHERN ASSURANCE CO., LTD., LONDON JOINT CITY & MIDLAND BANK, LTD. *v.* SAME (1924), 40 T. L. R. 813 ; 68 Sol. Jo. 812 ; 30 Com. Cas. 31, H. L.

1664. ———.]—In Dec. 1919, the owner of a ship which was in the course of being built created a charge on the ship to secure an advance & agreed with his mtgees. to execute a formal mtge. containing such covenants & conditions as in the opinion of the mtgees. should be necessary for their protection. In May, 1920, when the ship was nearing completion, the owner, by his agent, instructed a firm of insurance brokers to insure her against sea risks, for twelve months from her arrival at a certain port. The brokers negotiated the insurance & wrote to the mtgees., informing them that the insurance had been effected & that at the request of their client they were holding the policy to the order of the mtgees. to the extent of their interest in the ship. The policy was taken out by the brokers in their own names "&/or as agents, hereinafter called the assured." The premium was paid by the owner. In July, 1920, the owner executed a form of mtge. of the ship to his mtgees., & thereby covenanted that the ship should be kept insured at the expense of the owner against risks of every kind, & that all policies of insurance on hull & machinery should be suitably indorsed in favour of the mtgees. & lodged with them along with the mtge., or with the brokers on their behalf, who should address a letter to the mtgees., acknowledging that the

policies were held on behalf of the mtgees. The same form of mtge. had been used by the parties in several earlier mtge. transactions in which they were concerned & at the time when the insurance was effected all parties contemplated that the mtge. would take that form. During the currency of the policy the ship was scuttled with the connivance of the owner but without any connivance or complicity on the part of the mtgees. In an action on the policy by the mtgees. the broker who effected the policy was called as a witness & stated that he knew at the time that there were mtgees. & that he intended to cover whomsoever might be concerned:—*Held*: the proper inference to be drawn from the documents was that the insurance was effected on behalf of the owner & the title of the mtgees. rested on an equitable assignment from him, & this inference was not displaced by the oral evidence ; & as the mtgees. were not independently insured, they were affected by the fraud of the owner & could not recover on the policy.—GRAHAM JOINT STOCK SHIPPING CO. *v.* MERCHANTS MARINE INSURANCE CO., [1924] A. C. 294 ; 93 L. J. K. B. 122 ; 130 L. T. 706 ; 40 T. L. R. 192 ; 68 Sol. Jo. 273 ; 16 Asp. M. L. C. 300 ; 29 Com. Cas. 107, H. L. ; *affg.* S. C. *sub nom.* SAMUEL (P.) & CO. *v.* DUMAS, GRAHAM JOINT STOCK SHIPPING CO. *v.* MERCHANTS MARINE INSURANCE CO. (No. 2), [1923] 1 K. B. 592, C. A.

1665. ———.]—SAMUEL (P.) & CO. *v.* DUMAS, No. 666, *ante*.

1666. ———.]—COMPAÑIA MARTIARTU *v.* ROYAL EXCHANGE ASSURANCE, No. 1641, *ante*.

1667. *Ship unseaworthy—Privity of owner.*]—DUDGEON *v.* PEMBROKE, No. 1581, *ante*.

1668. ——— *Insufficient crew.*]—Pltfs. sued defts. claiming to recover upon a time policy on the steamship Dunsley, which was totally lost during the currency of the policy:—*Held*: the Dunsley was unseaworthy when she was sent on the voyage in question, inasmuch as she was provided with an insufficient crew, & as she was sent on the voyage in that condition with the privity of pltfs.' managing owner, & the loss was attributable to such unseaworthiness Marine Insurance Act, 1906 (c. 41), s. 39 (5), relieved defts. from liability for the loss.—THOMAS (M.) & SON SHIPPING CO., LTD. *v.* LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., LTD. (1914), 30 T. L. R. 595, C. A.

*Annotation*:—*Consd.* Cohen *v.* Standard Marine Insce. (1925), 30 Com. Cas. 139.

1669. ——— *Unseaworthy from two causes—Privity of owner as to one cause.*]—The "loss attributable to unseaworthiness," for which under Marine Insurance Act, 1906 (c. 41), s. 39 (5), the insurer under a time policy is not to be held liable, is a loss attributable to unseaworthiness to which the assured was privy.

A ship which was insured under a time policy was at the time of her being sent to sea unseaworthy in two respects ; her hull was in an unfit state for the voyage, & her crew was insufficient. The assured knew of the insufficiency of the crew but not of the unfitness of the hull. The ship was lost on the voyage by reason of her unseaworthiness in the latter respect:—*Held*: the sub-sect. afforded no defence to the insurers.—THOMAS *v.* TYNE & WEAR STEAMSHIP FREIGHT INSURANCE ASSOCN., [1917] 1 K. B. 938 ; 86 L. J. K. B. 1037 ; 117 L. T. 55 ; 14 Asp. M. L. C. 87 ; 22 Com. Cas. 239.

*Annotation*:—*Refd.* Cohen *v.* Standard Marine Insce. (1925), 30 Com. Cas. 139.



*Sect. 20.—Perils insured against: Sub-sect. 2, D.  
(a) & (b) i. & ii.]*

*D. Act or Election of Assured.*

*(a) Loss by Reason of Blockade, Embargo,  
Detention, etc.*

**1670. Abandonment of adventure—Blockade.]—**

In a case of insurance upon goods consigned to a particular port, on the arrival of the ship there, it is found to be in the hands of the enemy, that circumstance does not warrant the assured to abandon.—**LUBBOCK v. ROWCROFT** (1803), 5 Esp. 50, N. P.

*Annotations:—Distd. British & Foreign Marine Insce. v. Sanday, [1916] 1 A. C. 650. Consd. Becker, Gray v. London Assce. Corpn., [1918] A. C. 101. Refd. Miller v. Law Accident Insce., [1902] 2 K. B. 694.*

**1671. — Embargo on port of destruction.]—**

If a cargo of a perishable nature be insured from A. to B. with the usual memorandum, & in the course of the voyage information be received by the master that the port of B. is shut against the ships of his nation, in consequence of which the commander of the convoy orders the ship to proceed to another port, & the cargo be there sold by orders of the Vice-Admty. Ct. for a very small sum of money, the assured cannot abandon as for a total loss. It seems that if the voyage be lost in consequence of the port of destination being shut against the ship insured, the assured cannot declare upon this as a loss within the policy.—**HADKINSON v. ROBINSON** (1803), 3 Bos. & P. 388; 127 E. R. 212.

*Annotations:—Apld. Forster v. Christie (1809), 11 East, 205; Mercantile S.S. Co. v. Tyser (1881), 7 Q. B. D. 73; Inman S.S. Co. v. Bischoff (1882), 7 App. Cas. 670. Consd. Miller v. Law Accident Insce., [1903] 1 K. B. 712. Apld. Kacianoff v. China Traders Insce., [1914] 3 K. B. 1121. Distd. British & Foreign Marine Insce. v. Sanday, [1916] 1 A. C. 650; Russian Bank for Foreign Trade v. Excess Insce., [1918] 2 K. B. 123. Consd. Becker, Gray v. London Assce. Corpn., [1918] A. C. 101. Refd. Butler v. Wildman (1820), 2 B. & Ald. 398; Rodocanochi v. Elliott (1874), 31 L. T. 239; The Alps, [1893] P. 109; British & Foreign S.S. Co. v. R., [1918] 2 K. B. 879.*

**1672. — — — Refuge in friendly port.]—**

**BLACKENHAGEN v. LONDON ASSURANCE CO., No. 1069, ante.**

**1673. — — —.]—**A British ship insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a king's ship in the Baltic from an apprehension of hostilities for eleven days, & then proceeded to a point of rendezvous for convoy, where she waited seven days longer, & then sailed under convoy till the king's officer received intelligence that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull:—*Held*: this loss of the voyage was not attributable to the arrest or detainment of kings, etc., but immediately to the fear of the hostile embargo in the port of destination, & therefore not within the policy; though if the ship had not been detained in the first instance, by the king's officer, she would have arrived in time at St. Petersburg to have delivered her cargo before the embargo.—**FORSTER v. CHRISTIE** (1809), 11 East, 205; 103 E. R. 982.

*Annotation:—Consd. Rodocanachi v. Elliott (1873), L. R. 8 C. P. 649.*

**1674. — — — Danger of capture—Refuge in friendly port.]—**If a ship insured on arriving off her port of destination is prevented from entering it from its being in the hands of the enemy, or from being ordered away by the English commander there, the policy does not remain in force till she reaches a port of safety. Goods insured to A., that port being in the hands of the enemy, are carried to B. & afterwards to C. Their condition being here inspected for the first time from the

almost entirely destroyed by sea damage, which might have happened partly in the voyage to A. or entirely in passing from A. to C. The underwriters are not liable for any part of this loss, there being no distinct evidence that the goods were injured while they were protected by the policy.—**PARKIN v. TUNNO** (1809), 11 East, 22; 2 Camp. 59; 103 E. R. 911.

**1675. — — —.]—**Applts., English merchants, shortly before war was declared, took out a policy of marine insurance with resps. on jute belonging to them shipped at Calcutta on board a German vessel for carriage to Hamburg. The property in the goods was not to pass to the vendees, a German firm, until the goods were delivered to them at Hamburg. The policy covered (*inter alia*) peril of capture by men-of-war. During the voyage war was declared & the master on reaching the Mediterranean on Aug. 4, 1914, fearing the capture of his ship by the British & French fleets, put into Messina, & a month later moved to Syracuse, where he stated he had abandoned the voyage. Sept. 1, 1914, applts. gave resps. notice of abandonment, & claimed that there had been a constructive loss of the goods by peril insured against:—*Held*: the frustration of the adventure was not due to a peril insured against. To constitute a loss by capture, though actual seizure was not essential, the risk must have been so imminent as to compel the ship to take refuge in some neutral port, whereas here the ship had gone into a neutral port before she had even so much as sighted a man-of-war by the voluntary act of her master for the very purpose of avoiding the risk of capture.—**BECKER, GRAY & CO. v. LONDON ASSURANCE CORPN., [1918] A. C. 101; 87 L. J. K. B. 69; 117 L. T. 609; 34 T. L. R. 36; 62 Sol. Jo. 35; 14 Asp. M. L. C. 156; 23 Com. Cas. 205, H. L.; affg., [1915] 3 K. B. 410; [1916] 2 K. B. 156, C. A.**

*Annotations:—Refd. Arnhold Karberg v. Blythe, Green Jourdain, Schneider v. Burgett & Newsam (1915), 85 L. J. K. B. 665; British & Foreign S.S. Co. v. R., [1918] 2 K. B. 879; Russian Bank for Foreign Trade v. Excess Insce. (1918), 87 L. J. K. B. 872; Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insce. Assocn., [1921] 1 A. C. 99; Harrisons v. Shipping Controller, [1921] 1 K. B. 122. Mentd. Hackney B. C. v. Doré, [1922] 1 K. B. 431.*

**1676. — — — All consequences of hostilities.]—**

Rice was shipped on board a Spanish vessel for carriage from Liverpool to Cuba under a bill of lading which provided that, if as a consequence of war the captain should deem it prudent not to enter the port of destination, he might deposit the goods at such other port as he might consider convenient, the whole of the freight being in that case considered as earned. The rice was insured against all risks excluded by the free of capture & seizure clause, one of such risks being "all consequences of hostilities." After the vessel had sailed war broke out, between Spain & the United States. The captain put back to Liverpool, where freight was paid & charges were incurred, in respect of which a claim was made for a loss under the policy: *Held*: the loss was not a consequence of hostilities within the meaning of the policy, but was due to the exercise by the captain of the power given him by the bill of lading, & there had, therefore, been no loss under the policy.—**NICKELS & CO. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO. (1900), 70 L. J. Q. B. 29; 17 T. L. R. 54; 6 Com. Cas. 15.**

*Annotation:—Refd. Becker, Gray v. London Assce. Corpn., [1916] 2 K. B. 156.*

— **Through restraint of princes.]—**See Sub-sect. 4. D., *post*.



(b) *Loss of Freight.*i. *In General.*

**1677. Abandonment of ship to underwriter—Whether underwriter on freight liable—Freight subsequently earned.]**—Upon a hostile embargo in a foreign port the owner, who had separately insured ship & freight, abandoned them to the respective underwriters, which was accepted by them; after which the embargo was taken off, & the ship completed her voyage & earned freight:—*Held*: the assured could not recover as for a total loss of freight having been in fact earned; or supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment.—*M'CARTHY v. ABEL* (1804), 5 East, 388; 1 Smith, K. B. 524; 102 E. R. 1118.

*Annotations*:—*Appld.* *Bainbridge v. Nelson* (1808), 10 East, 329; *Everth v. Smith* (1814), 2 M. & S. 278. *Distd.* *Idle v. Royal Exchange Assce.* (1819), 3 Moore, C. P. 115; *Benson v. Chapman* (1843), 6 Man. & G. 792. *Consd.* *Chapman v. Benson* (1847), 5 C. B. 330. *Apprvd.* *Scottish Marine Insco. v. Turner* (1853), 21 L. T. O. S. 10. *Refd.* *Great Indian Peninsula Ry. v. Saunders* (1862), 2 B. & S. 266; *Rankin v. Potter* (1873), L. R. 6 H. L. 83.

**1678.** ———.]—A ship sustained considerable injuries from perils of the sea during her voyage, & further injuries on her arrival at the port of destination. The cargo, timber, was safely delivered to the consignees, who paid the owners the amount of freight. The owners then abandoned the ship to the insurers on ship as a total loss, & it was decided to be a proper abandonment; & by the decision of the Ct. of Session, affirmed by the House of Lords, the abandonees were declared entitled to the amount of freight received by the owners. The owners then brought an action against the insurers on freight for the amount of freight insured for:—*Held*: the owners were not entitled to recover against the insurers on freight.

It does not follow, that because a total loss of the ship has been established as between the owners & the insurers on ship, thereby giving certain rights as between those parties, therefore the owners have like rights against the insurers on freight.

The freight having been earned & received, the contract of the insurers on freight was performed; & though the freight was subsequently lost to the owners, it was so by their own act, & could not be said to have been lost by perils of the sea insured against.—*SCOTTISH MARINE INSURANCE CO. v. TURNER* (1853), 4 H. L. Cas. 312, n.; 21 L. T. O. S. 10; 17 Jur. 631; 1 W. R. 537; 1 Macq. 334; 10 E. R. 483, H. L.

*Annotations*:—*Consd.* *Rankin v. Potter* (1873), L. R. 6 H. L. 83. *Refd.* *Miller v. Woodfall* (1857), 8 E. & B. 493.

**1679.** ——— **Reinsurance policy.]**—By a policy of reinsurance freight on steamers entered in a freight club was reinsured, "to pay only in the event of total or constructive total loss." By the rules of the club the amount insured was payable in the event of the total loss of the ship entered. A ship, in question, became a constructive total loss & notice of abandonment of ship was given to & accepted by the underwriters on ship, who eventually earned the freight. Pltfs. paid a total loss of freight on the original policy:—*Held*: they could recover on the reinsurance policy.—*UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCN., LTD. v. BOULTON* (1898), 3 Com. Cas. 330.

*Annotation*:—*Consd.* *Coker v. Bolton*, [1912] 3 K. B. 315.

**1680. Damaged cargo sold by master—In exercise J.—VOL. XXIX.**

**of discretion.]**—In an action on a policy of insurance on freight it appeared, that the ship in the course of her voyage having been injured by a peril of the sea, was obliged to put into a port & land the whole of her cargo. Part of the cargo had been so wetted by sea water that it could not be reshipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, & have been attended with expense equal to the freight. Under these circumstances the master sold these goods, & finding he could not obtain others, he sailed on his voyage, & arrived at his port of destination with the rest of his cargo. The master's proceedings were such as a prudent man uninsured would have adopted:—*Held*: the underwriters were not liable for the loss of the freight of these goods.—*MORDY v. JONES* (1825), 4 B. & C. 394; 6 Dow. & Ry. K. B. 479; 3 L. J. O. S. K. B. 250; 107 E. R. 1106.

*Annotations*:—*Consd.* *Michael v. Gillespy* (1857), 2 C. B. N. S. 627. *Consd. & Expld.* *Philpott v. Swann* (1861), 11 C. B. N. S. 270. *Refd.* *Blasco v. Fletcher* (1863), 14 C. B. N. S. 147; *Notara v. Henderson* (1872), L. R. 7 Q. B. 225; *Rose v. Bank of Australasia*, [1894] A. C. 687.

ii. *Chartered Freight.*

**1681. Delay for repairs—Not at nearest port.]**—A vessel chartered for a voyage from the Cape to Hondeklip Bay, there to load a cargo of copper ore, & proceed therewith to Swansea, having loaded part of her cargo, received damage to her capstan in a storm, such that she was unable to load the rest of her cargo, 120 tons, which was ready, until the damage was repaired. The master, instead of running for the Cape, one hundred & eighty miles distant, where the damage could have been repaired, proceeded to St. Helena, eighteen hundred miles distant, expecting to be able to repair there, & intending to return for the rest of the cargo; but not being able to get repairs at St. Helena, he proceeded to Swansea with a cargo short of the 120 tons. The shipowner having sued the underwriter upon a policy of insurance upon chartered freight, as for a total loss of freight upon the 120 tons by perils of the seas, the jury found that the master acted throughout as a prudent owner, uninsured, would have acted:—*Held*: the shipowner could not recover; for that the master was not prevented by perils of the seas from procuring repairs & earning the freight.—*PHILPOTT v. SWANN* (1861), 11 C. B. N. S. 270; 30 L. J. C. P. 358; 5 L. T. 183; 7 Jur. N. S. 1291; 1 Mar. L. C. 151; 142 E. R. 800.

*Annotations*:—*Appld.* *Mercantile S.S. Co. v. Tyser* (1881), 7 Q. B. D. 73. *Refd.* *Blasco v. Fletcher* (1863), 14 C. B. N. S. 147; *De Cuadra v. Swann* (1864), 16 C. B. N. S. 772; *Notara v. Henderson* (1872), L. R. 7 Q. B. 225; *Inman S.S. Co. v. Bischoff* (1882), 7 App. Cas. 670; *Assicurazioni Generali v. S.S. Bessie Morris Co.*, [1892] 1 K. B. 571.

**1682. Delay in arriving at port of loading—Due to perils of the sea—Charter abandoned.]**—*Re JAMIESON & NEWCASTLE STEAMSHIP FREIGHT INSURANCE ASSOCN.*, No. 2092, *post*.

**1683. Exercise of option in charterparty—Cancellation.]**—Pltfs. on July 29, 1875, chartered their ship *G.* for a voyage from New York to Odessa. The freight was agreed "during the voyage aforesaid" at £5,500 in cash at Hull, England, on the discharge of the cargo in Odessa. "If the vessel has not arrived at the port of New York on or before Sept. 1, 1875, charterers have option of cancelling this charterparty." Pltfs. on Aug. 7, 1875, effected an insurance with the deft. "at & from London to New York while there, & thence to Odessa, via Constantinople," on their chartered freight, including, besides the ordinary ones, all risks "incident to steam navigation." The clause in the charterparty giving the option to cancel was

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not mentioned to deft. The ship started from England on Aug. 7, but owing to the failure of her machinery in the British Channel was obliged to put back for repairs, which occupied so much time that she did not reach New York until after Sept. 1, whereupon the charterers cancelled the charter & the freight was lost:—*Held*: the interest in the chartered freight had commenced at the time when the charter was cancelled, but deft. was not liable, for the freight was not lost by any of the perils insured against, but by the exercise of the option to cancel in the charterparty; & further, the withholding from deft. information as to the power to cancel vitiated the policy.—*MERCANTILE S.S. Co., LTD. v. TYSER* (1881), 7 Q. B. D. 73; 29 W. R. 790; 5 Asp. M. L. C. 6, n.

*Annotations*:—*Refd.* *The Alps* (1893), 41 W. R. 527; *Manchester Liners v. British & Foreign Marine Insce.* (1901), 18 T. L. R. 183.

**1684. — Abatement.]**—A ship was chartered for time on monthly hire: the charterers agreeing to pay the freight during employment & efficient performance of the service, & the owner covenanting that the ship should be seaworthy during the continuance of the charter; provided that if at any time it should appear to the charterers that the ship became inefficient it should be lawful for them to put her out of pay, or to make such abatement by way of mulct out of the hire or freight as they should adjudge fit. The owner effected a time policy of insurance "on freight outstanding." During the time the ship became inefficient through perils of the seas & the charterers refused to pay freight after that date. The owner having brought an action on the policy:—*Held*: on the true construction of the charterparty the efficiency of the ship was not a condition precedent to the earning of the freight; the pecuniary loss was caused by the charterers availing themselves of the abatement clause, & not by the perils of the seas; & the underwriters were not liable.—*INMAN S.S. Co. v. BISCHOFF* (1882), 7 App. Cas. 670; 52 L. J. Q. B. 169; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. L. C. 6, H. L.

*Annotations*:—*Apld.* *The Alps*, [1893] P. 109. *Consd.* *The Bedouin*, [1894] P. 1; *Asfar v. Blundell*, [1896] 1 Q. B. 123; *Brankelow S.S. Co. v. Canton Insce. Office*, [1899] 2 Q. B. 178. *Refd.* *Manchester Liners v. British & Foreign Marine Insce.* (1901), 18 T. L. R. 183; *Williams v. Canton Insce. Office*, [1901] A. C. 462.

**1685. — Discharge.]**—By a charterparty in the govt. form the Admty. chartered a vessel for transport service for three months certain, & thenceforward until they should give notice to the owners that the vessel was discharged from their service, such notice to be given when the vessel was in port in the United Kingdom; & the charterparty provided that if the ship became incapable from any defect, or from any cause whatsoever, to perform the service efficiently, the Admty. might make abatement by way of mulct out of the freight. The shipowners effected a time policy upon "chartered or hire money" to "cover the loss of hire money calculated at" so much per day caused by, amongst other things, want of repairs or breakdown of machinery, rendering the vessel inefficient for the service. Under the charterparty the vessel had made a voyage & had returned to England, & the three months having previously expired, the Admty. had continued the employment, & had given instructions that the vessel was to proceed on another voyage on a certain day. While the vessel was in dry dock it was discovered that some of the blades of her propeller were cracked & that

it would take some time to repair the damage. In consequence of this the Admty., under their option in the charterparty, gave the owners notice discharging the vessel, & the vessel was discharged from the govt. service as from that date. The vessel then underwent repairs, which took fifteen days from the date of her discharge by the Admty. In an action on the policy by the owners of the ship to recover from the insurers the loss of hire money for the fifteen days:—*Held*: (1) the "chartered or hire money" in the policy meant "hire money" in the nature of freight payable under a contract; (2) the loss of such hire to the shipowners for the fifteen days was caused by the exercise of the option which the Admty. had under the charterparty to discharge the vessel from their service, & not by the want of repair, breakdown of machinery, or other perils insured against under the policy, & there was therefore no loss under the policy, for which the shipowners were entitled to recover.—*MANCHESTER LINERS, LTD. v. BRITISH & FOREIGN MARINE INSURANCE CO., LTD.* (1901), 86 L. T. 148; 18 T. L. R. 183; 9 Asp. M. L. C. 266; 7 Com. Cas. 26.

*Annotation*:—*Generally, Refd.* *Scottish Shire Line v. London & Provincial Marine & General Insce.*, [1912] 3 K. B. 51.

**1686. Loss by cesser of payment clause—Damage by fire.]**—By a charterparty the charterer agreed to pay plths. so much per month for the hire of their vessel, provided that "in the event of loss of time from . . . want of repairs . . . preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service." By a policy effected with defts., plths. insured the "chartered freight" & the clause, enumerating the perils against which the assured were indemnified, was in the usual form, viz. "of the seas . . . fire . . ." etc.

Plths.' vessel was damaged by fire, & under the above clause in the charterparty, the payment of the hire ceased for the thirteen days occupied in repairs. In an action brought by plths. on the policy to recover the amount so lost:—*Held*: defts. were liable, as the clause in the charterparty was put into operation through the immediate action of the perils insured against.—*THE ALPS*, [1893] P. 109; 62 L. J. P. 59; 68 L. T. 624; 41 W. R. 527; 9 T. L. R. 285; 7 Asp. M. L. C. 337; 1 R. 587.

*Annotations*:—*Apprvd.* *The Bedouin*, [1894] P. 1. *Refd.* *The Alsace & Lorraine* (1893), 9 T. L. R. 484; *Brankelow S.S. Co. v. Canton Insce. Office*, [1899] 2 Q. B. 178. *Mentd.* *The Glenlivet*, [1893] P. 164; *The Cairo, Watson & Parker v. Gregory* (1908), 99 L. T. 940.

**1687. — Damage by peril of the sea.]**—By a charterparty the charterer agreed to pay plths. so much monthly in advance for the hire of their vessel, for the space of one voyage to South America & back to Europe, provided that "in the event of loss of time by . . . breakdown of engines or machinery . . . & the progress of the steamer is thereby delayed for more than twenty-four running hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage." By a slip initialled by deft. the risk to be covered by insurance was described as "freight chartered &/or as if chartered on board or not on board" for three months, "one-third diminishing each month." By a policy executed in accordance with the slip the perils against which deft. undertook to indemnify plths. were "of the seas," etc., in the usual form. Plths.' vessel sailed under the above charter, & before the three months expired, owing to the thrust-shaft parting, she had to be towed into St. Vincent.



Payment of hire consequently ceased during the twenty-eight days' delay caused by the accident. In an action brought by plffs. on the policy to recover the amount so lost, the judge found as a fact that the damage to the thrust-shaft was caused by sea perils:—*Held*: (1) deft. was liable, as the clause in the charterparty was put into operation through the immediate action of the perils insured against; (2) though plffs. might ultimately earn the whole amount of freight, the loss due to the postponement through the delay fell on the policy; (3) though deft. was not told at the time of initialling the slip that he was insuring freight under a time charter, containing the twenty-four hours' clause, this did not amount to non-communication of a material fact, as this cesser clause is practically universal in a time charter & the description on the slip, "freight chartered &/or as if chartered," coupled with the clause "one-third diminishing each month," are sufficient to give deft. notice of the nature of the risk.

The assured is not bound to tell the underwriter what the law is. He is bound to tell him, not every fact, but the material facts; & his other obligation is that if he is asked a question, whether a material fact or not, by the underwriters, he must answer it truly. If he answers it falsely, with intent to deceive, though it may not be a material fact, it will vitiate this policy (LORD ESHER, M.R.).—*THE BEDOUIN*, [1894] P. 1; 63 L. J. P. 30; 69 L. T. 782; 42 W. R. 299; 10 T. L. R. 70; 7 Asp. M. L. C. 391; 6 R. 693, C. A. *Annotations*:—*As to* (3) *Apld.* *Adfar v. Blundell*, [1896] 1 Q. B. 123. *Consd.* *Williams v. Canton Insce. Office*, [1901] A. C. 462.

**1688. No lien in bills of lading—Over whole cargo.**—Shipowners chartered a ship for a voyage at a lump freight, the charterers' liability to cease upon shipment of the cargo provided the cargo was worth the freight, dead freight & demurrage on arrival, & the vessel to have a lien on the cargo for the recovery of all freight, dead freight, demurrage & all other charges. The shipowners & charterers jointly insured the lump freight "chartered or as if chartered value" at the lump sum "on board or not on board." The charterers loaded the ship with a general cargo & the master signed bills of lading by which the goods mentioned in each bill were made deliverable upon payment of the bill of lading freight payable in respect of those goods. The aggregate of the bill of lading freight exceeded the chartered freight. On the voyage part of the cargo was lost by jettison upon the ship running aground. The cargo which arrived was worth the freight, dead freight, & demurrage. Owing to the loss of cargo the bill of lading freight payable on the cargo delivered was less than the chartered freight. To recover the difference an action was brought on the policy by the shipowners & charterers jointly:—*Held*: the action was not maintainable the loss having been caused not by perils of the sea, but by the master's not having reserved in the bills of lading the lien over the whole cargo for the chartered freight.—*WILLIAMS & CO. v. CANTON INSURANCE OFFICE, LTD.*, [1901] A. C. 462; 70 L. J. K. B. 962; 85 L. T. 317; 17 T. L. R. 696; 9 Asp. M. L. C. 247; 6 Com. Cas. 256, H. L.; *affg.* *S. C. sub nom. BRANKELOW S.S. CO. v. CANTON INSURANCE OFFICE*, [1899] 2 Q. B. 178, C. A.

*Annotations*:—*Consd.* *Scottish Shire Line v. London & Provincial Marine & General Insce.*, [1912] 3 K. B. 51. *Refd.* *Thomas v. Harrowing S.S. Co.*, [1915] A. C. 58.

**1689. Time charter clause—Free from claims consequent on loss of time—Delay for repairs.]**

*BENSAUDE v. THAMES & MERSEY MARINE INSURANCE CO.*, No. 93, *ante*.

**1690. — Destruction of refrigerating plant.]**—A policy of insurance was effected on the outward voyage of a steamer from London to Australian ports for freight expected to be earned on the homeward voyage, the subject-matter being described as "upon freight of frozen meat, chartered or as if chartered"; the policy was warranted "free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." The ship, which was a general ship, having three of her five holds fitted with refrigerating machinery for frozen meat, arrived at Sydney on her outward voyage, & while discharging her outward cargo a serious fire broke out on board which destroyed the refrigerating apparatus, in consequence of which it became impossible to carry frozen meat upon the return voyage to England. In an action on the policy for total loss of freight on frozen meat:—*Held*: the case could not be distinguished from *Bensaude v. Thames & Mersey Marine Insurance Co.*, No. 93, *ante*, on the ground that the freight was not chartered freight; the claim was therefore consequent on loss of time within the meaning of the exception, & the underwriters were not liable.—*TURNBULL, MARTIN & CO. v. HULL UNDERWRITERS' ASSOCN.*, [1900] 2 Q. B. 402; 69 L. J. Q. B. 588; 82 L. T. 818; 16 T. L. R. 359; 9 Asp. M. L. C. 93; 5 Com. Cas. 248.

*Annotation*:—*Consd.* *Scottish Shire Line v. London & Provincial Marine & General Insce.*, [1912] 3 K. B. 51.

**1691. — — — — —.]—RUSSIAN BANK FOR FOREIGN TRADE v. EXCESS INSURANCE CO.**, No. 1750, *post*.

(c) *Loss by Sale or Hypothecation for Repairs.*

**1692. Sale of cargo.]**—Upon a policy of insurance on goods, where the ship being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; & in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, & applied the proceeds in payment of these expenses:—*Held*: the underwriter was not answerable for this loss.—*POWELL v. GUDGEON* (1816), 5 M. & S. 431; 105 E. R. 1108.

*Annotations*:—*Apld.* *Sarqay v. Hobson* (1827), 4 Bing. 131. *Refd.* *Naylor v. Palmer* (1853), 21 L. T. O. S. 168. *Mentd.* *Hallett v. Wigram* (1850), 19 L. J. C. P. 281.

**1693. — — — — —.]**—An insurer on goods is not liable when the goods are sold by the captain of a ship to defray the expense of repairs, rendered necessary by a tempest, to which ship & goods had been exposed.—*SARQUY v. HOBSON* (1827), 4 Bing. 131; 130 E. R. 718; *sub nom.* *SARGUY v. HOBSON*, 1 Y. & J. 347; 12 Moore, C. P. 474, Ex. Ch.

*Annotation*:—*Mentd.* *Duncan v. Benson* (1847), 1 Exch. 537.

**1694. Hypothecation of cargo.]**—A policy of marine insurance was effected with English underwriters by an English merchant upon goods shipped in a French ship, & it was thereby provided that general average was to be payable as per judicial foreign statement. The ship was damaged by a collision, & put into port for repairs, the cargo, however, being uninjured. The master not having funds to do the necessary repairs, gave a bottomry bond on ship, freight, & cargo. The ship & freight proving insufficient to satisfy the bond, the assured had to pay the deficiency in order to obtain possession of his goods:—*Held*: the policy was not to be construed according to French law, except so far as the parties had expressly stipulated that it should be, & there being no loss by perils of the sea according to English law, the assured



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could not recover from the underwriters the amount which he had paid as above mentioned.—*GREER v. POOLE* (1880), 5 Q. B. D. 272; 49 L. J. Q. B. 463; 42 L. T. 687; 28 W. R. 582; 4 Asp. M. L. C.

W. R. 341; 15 T. L. R. 193; 43 Sol. Jo. 258; 8 Asp. M. L. C. 529; 4 Com. Cas. 106, C. A.

*Annotations:—Consd. Polurrian S.S. Co. v. Young* (1915), 84 L. J. K. B. 1025. *Refd. Hutchins v. Royal Exchange Assee. Corpn.*, [1911] 2 K. B. 398.

### SUB-SECT. 3.—DAMAGES PAYABLE FOR COLLISION.

#### A. In Absence of Collision Clause.

**1695. Both ships to blame—Balance payable by one ship.]—**Insurance on a ship, *V.*, with the usual warranty as to average. The ship having come into collision with another ship, & proceedings being instituted for the damage done to the other ship, the matter was referred to arbitrators, who awarded that each ship should bear half of the aggregate loss. The ship *V.* on the settlement had to pay a balance to the other ship:—*Held*: (1) not to be a loss to which the underwriters were liable; (2) the expense of the wages & provisions of the crew of the *V.*, during the time that she was detained in repairing damage done to herself by perils of the sea, were not such a loss.—*DE VAUX v. SALVADOR* (1836), 4 Ad. & El. 420; 1 Har. & W. 751; 6 Nev. & M. K. B. 713; 5 L. J. K. B. 134; 111 E. R. 845.

*Annotations:—As to (1) Apld. Ionides v. Universal Marine Insce.* (1863), 14 C. B. N. S. 259. *Consd. Inman S.S. Co. v. Bischoff* (1882), 7 App. Cas. 670; *London Steamship Owners' Insce. v. Grampian S.S. Co.* (1889), 24 Q. B. D. 32. *Refd. Taylor v. Dewar* (1864), 5 B. & S. 58; *Xenos v. Wickham* (1867), L. R. 2 H. L. 296; *Dent v. Smith* (1869), L. R. 4 Q. B. 414; *The North Britain*, [1894] P. 77; *Field S.S. Co. v. Burr*, [1899] 1 Q. B. 579; *Adelaide S.S. Co. v. R.* (1924), 93 L. J. K. B. 871. *As to (2) Refd. Field S.S. Co. v. Burr*, [1899] 1 Q. B. 579; *Adelaide S.S. Co. v. R.* (1924), 93 L. J. K. B. 871. *Generally, Mentd. Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795; *Becker, Gray v. London Assee. Corpn.*, [1918] A. C. 101.

**1696. Damaged cargo—Costs of discharge & disposal.]—**A ship, insured under a time policy on hull & materials, machinery & boilers, against perils of the seas & all other perils, losses, & misfortunes which might come to her hurt, detriment, or damage, was, during the currency of the policy, injured through a collision in the Thames whilst making for London, her port of destination, a hole being knocked in her bottom. Her cargo, cotton seed, through the action of the water & mud which come through the hold became rotten, offensive, & worthless, & neither the cargo owners nor their underwriters would pay freight or take delivery. After the collision part of the cargo was put into lighters in order to allow the ship to be taken into dry dock, where she was temporarily patched. Subsequently she was towed to the Millwall Dock to discharge the rest of the cargo, & thereupon the sanitary authority of the district ordered her to abate the nuisance caused by the offensive condition of the cotton seed & to remove it. The ship accordingly was taken down to Dagenham Pier, & her cargo was there discharged by contractors on to land belonging to them. In an action on the policy by the shipowners to recover from their underwriter the cost of dealing with the cargo between the date of the collision & the date of its arrival at Dagenham, & also the contractors' charges for discharging & disposing of it there:—*Held*: pl'tfs. were not entitled to recover any of such cost or charges.—*FIELD S.S. Co. v. BURR*, [1899] 1 Q. B. 579; 68 L. J. Q. B. 426; 80 L. T. 445; 47

#### B. Where Collision Clause Incorporated in Policy.

##### (a) In General.

**1697. Definition of "collision."]**—*CHANDLER v. BLOGG*, No. 1706, *post*.

**1698. Validity of clause.]—***Qu.*: whether an insurance against damages that a shipowner may be liable to pay in consequence of his ship running down another be not illegal.—*DELANOY v. ROBSON* (1814), 5 Taunt. 605; 128 E. R. 827.

**1699. Sale under decree to ratify damage—Proceeds less than valuation in policy.]—**A ship, the *M.*, was insured, "including the risk of running down or doing damage to any other vessel, the same as the Indemnity Co.'s policy," valued at £3,000. The Indemnity Co.'s running down clause is, that, if the ship, by negligence, shall run down any other vessel, "& the assured shall thereby become liable to pay, & shall pay, any sum not exceeding the value of the said ship or vessel" (assured) "& her freight, by or in pursuance of the judgment of any ct. of law or equity," the insurers shall pay "such proportion of three-fourths of the sum so paid as aforesaid as the sum" "hereby assured shall bear to the value of the said ship or vessel hereby assured & her freight." The *M.*, through negligence, ran down another vessel. The *M.*, was sold under a decree of the Ct. of Admlty., & the proceeds paid over for satisfying the damage. On a demurrer, upon pleadings in which it was admitted that the insured lost his ship, which was of the value of £3,000, & upwards, it being sold against his will, but that the proceeds which were paid over were only £2,110:—*Held*: the underwriters were bound to make good three-fourths of the proceeds actually paid, viz. £2,110, & not three-fourths of the value of the ship.—*THOMPSON v. REYNOLDS* (1857), 7 E. & B. 172; 26 L. J. Q. B. 93; 5 L. T. 61; 3 Jur. N. S. 462; 119 E. R. 1211.

**1700. Both ships to blame—Recovery by owner of more damaged vessel.]—**Where there is a collision between two vessels, by which one of them is more damaged than the other, & both being to blame, they have to share the damage equally, there is not a cross liability on the part of each vessel to pay half of the damage sustained by the other, but one liability only, viz., the liability of the vessel less damaged to pay to the vessel more damaged one-half of the amount of which the damage to the one exceeds the damage to the other. Therefore the owner of the more damaged vessel in such a case is not entitled to recover upon an insurance effected by him against liability for damage to another vessel by collision with his vessel.—*LONDON STEAMSHIP OWNERS' INSURANCE Co. v. GRAMPIAN S.S. Co.* (1890), 24 Q. B. D. 663; 59 L. J. Q. B. 549; 62 L. T. 784; 38 W. R. 651; 6 T. L. R. 288; 6 Asp. M. L. C. 506, C. A.

**1701. Collision due to negligence of master—Vessel engaged in warlike operations.]—**The steamship *Warilda* was taken over during the war by the Admlty. on the terms of Charterparty T. 99 for use as an ambulance transport. Whilst carrying wounded soldiers from Havre to Southampton the *Warilda* came into collision with another ship, & both ships were damaged. In an action arising out of the collision it was held that the

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collision was caused by the negligence of the master of the *Warilda*, & that the *Warilda* was liable to the other ship for damages. Charterparty T. 99 provided, cl. 19, that the Admlty. would take over war risks excluded from an ordinary marine policy by the f.c. & s. clause, which included all consequences of hostilities or warlike operations, & cl. 25, that if from deficiency of men or stores, breakdown of machinery, "or any other cause," the work of the steamer was at any time suspended, pay should cease for the whole of the period during which the vessel was inefficient. It was agreed that an ordinary marine policy incorporated the Institute Time Clauses, including the running down clause, which provided that, if the insured ship became liable to pay & paid damages to another ship in respect of a collision, the insurers would pay to the assured three-fourths of the sum so paid, & would also, if the liability of the insured ship had been contested with the consent of the insurers, pay a like proportion of the costs thereby incurred. Upon a petition of right by the owners of the *Warilda*, it was held by the House of Lords that the collision was a consequence of a warlike operation, & that the owners were entitled to recover from the Crown such sum as should be found due to them by the judge of the Commercial Ct. Upon the assessment of damages the owners of the *Warilda* claimed (*inter alia*) three-fourths of the sum which they had been held liable to pay in the collision action; three-fourths of the costs of defending that action; compensation for loss of hire during the period when the *Warilda* was undergoing repair:—*Held*: (1) the liability undertaken by the running down clause was not a risk which would be excluded by f.c. & s. clause, & the Crown was not liable to indemnify the *Warilda* wholly or in part against the liability which she had incurred to third parties in consequence of the negligence of her master; (2) the claim for costs failed, as the Crown had not consented to the liability of the *Warilda* being contested.—*ADELAIDE S.S. Co. v. A.-G.*, [1926] A. C. 172; 95 L. J. K. B. 213; 134 L. T. 258; 42 T. L. R. 180, H. L.

### (b) To What Collisions Applicable.

**1702. Collision with tug of insured vessel.]—**By a policy of marine insurance the underwriters insured the ship *Niobe* from the Clyde (in tow) to Cardiff &/or Penarth while there, & thence to Singapore, & while in port for thirty days after arrival; & agreed "if the ship hereby insured shall come into collision with any other ship or vessel & the insured shall in consequence thereof become liable to pay, & shall pay, to the persons interested in such other ship or vessel, any sum or sums of money," etc., to pay the assured a certain proportion of the sum so paid. While the *Niobe* was being towed to Cardiff her tug came into collision with & sank another vessel, whose owners recovered damages both from the *Niobe* & the tug. In an action by the owners of the *Niobe* upon the policy against one of the underwriters for payment of his proportion of the sum paid by such owners on account of the collision, the underwriter pleaded that under the policy he was only liable for damage arising from collision with the *Niobe*:—*Held*: the collision of the tug with the damaged vessel must be taken to have been a collision of the *Niobe* with another vessel within the meaning of the policy, & the underwriters were liable.—*M'COWAN v. BAINE & JOHNSTON, THE NIOBE*, [1891] A. C. 401; 65 L. T. 502; 7 T. L. R. 713;

7 Asp. M. L. C. 89, H. L.; *previous proceedings* (1888), 13 P. D. 55.

*Annotations*:—**Expld.** *The Englishman & The Australia*, [1894] P. 239. **Consd.** *Re Margetts & Ocean Accident & Guarantee Corpn.*, [1901] 2 K. B. 792; *S.S. Devonshire v. Barge Leslie (Owners)*, [1912] A. C. 634. **Distd.** *Bennett S.S. Co. v. Hull Mutual S.S. Protecting Soc.*, [1914] 3 K. B. 57. **Refd.** *The Devonian*, [1901] P. 221; *Fenwick v. Merchants' Marine Insee.*, [1914] 3 K. B. 827. **Mentd.** *Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co. v. Glamorganshire Standing Joint Committee*, [1915] 1 K. B. 471.

**1703. Sunken wreck.]—**By a policy of reinsurance effected by pltf. with defts. on the hull, machinery, etc., of a steamship the risk covered was "loss or damage through collision with (*inter alia*) any . . . sunken . . . wreck. . . ." The steamship whilst entering Port Talbot ran aground, & on the tide falling, she was found to be resting admidships on the wreck of a steamer sunk more than a year before, & the ribs of which projected about a foot above the sand. She subsequently shifted her position about her own length further forward off the wreck & on to a bank of iron ore, which, two or three years before, had formed part of the cargo of another vessel:—*Held*: both the damage sustained by contact with the wreck, & by that with the iron ore, was "loss or damage through collision with sunken wreck," within the meaning of the clause in the policy.—*THE MUNROE*, [1893] P. 248; 70 L. T. 246; 7 Asp. M. L. C. 407; 1 R. 642.

**1704. Sunken cargo of wrecked ship—Bank of iron ore.]—***THE MUNROE*, No. 1703, *ante*.

**1705. Toe of breakwater—"Collision with pier or similar structure."—**A policy of reinsurance contained a collision clause "against risk of loss or damage through collision with (*inter alia*) piers, or stages, or similar structures." Two vessels covered by this policy drifted through the violence of a storm on to the toe of a breakwater, which consisted of a long sloping bank of large stones or boulders dropped into the sea for the purpose of forming a bed or mound on which the breakwater was to rest, & these loose boulders slope down from the jetty or breakwater itself for some distance into the sea. The vessels were driven broadside on to this bank of stones, their keels being the parts that struck against the boulders, & they went to pieces on the boulders:—*Held*: what took place was a "collision," & the loss was a loss or damage from collision "with a pier or similar structure" within the meaning of the clause, as the toe of the breakwater formed a part of the jetty or breakwater itself, & not mere "stranding."—*UNION MARINE INSURANCE CO. v. BORWICK*, [1895] 2 Q. B. 279; 64 L. J. Q. B. 679; 73 L. T. 156; 11 T. L. R. 465; 39 Sol. Jo. 625; 8 Asp. M. L. C. 71; 1 Com. Cas. 87; 15 R. 546.

**1706. Sunk barge—Subsequently raised & navigated.]—**Pltf. underwrote a time policy on a steamer, containing a clause that if the steamer should come into collision with any other vessel, & the insured should have to pay damages, the insurers would pay. Deft. underwrote a policy of reinsurance, on the same steamer, for the same period, subject to the same clauses & conditions as the original policy, & to pay as might be paid thereon, but only to pay all claims for loss or damage done or received through collision.

During the period covered the steamer struck a barge, which had just been struck by collision with another vessel, & the steamer was damaged. The barge was raised next day, & sailed to her home port, & was repaired:—*Held*: although, at the moment when the steamer struck her, the barge could not have been navigated, yet, as she became navigable as soon as she was raised, there

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OTHER LOSSES & INSURANCES.  
ST. MICHAEL, [1898] P. 30; 67 L. J. P. 19; 78 L. T. 90; 46 W. R. 396; 14 T. L. R. 191; 8 M. L. C. 360; 3 Com. Cas. 62.

INSUR., [1900] 2 N. D. P. 100.  
8 Com. Cas. 61; Becker, Gray v. London Assec. Corp., [1918] A. C. 101.

1719. Cargo damaged by steam—Attempt to extinguish supposed fire—Marine Insurance Act, 1906 (c. 41), s. 66 (6).—WATSON (JOSEPH) & SON, LTD. v. FIREMEN'S FUND INSURANCE CO. OF SAN FRANCISCO, No. 1878, *post*.

### B. Capture.

1720. Distinguished from seizure.] — CORY v. BURR, No. 1736, *post*.

1721. Capture after ship stranded—In enemy country—Stress of weather.]—If a ship be driven by stress of weather on an enemy's coast & there captured, it is a loss by capture & not by the perils of the seas.—GREEN v. ELMSLIE (1794), Peake, 278, N. P.

Annotations:—*Consd.* Livie v. Janson (1810), 12 East, 618. *Distd.* Hahn v. Corbett (1824), 2 Bing. 205. *Refd.* Palmer v. Naylor (1854), 2 W. R. 621; Marsden v. City & County Assec. (1865), 35 L. J. C. P. 60; Cory v. Burr, Q. B. D. 313; Leyland Shipping Co. v. Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873.

1722. Capture by British ship—Insurance before outbreak of war—Of foreign ship.]—(1) On an insurance, by a British underwriter, during peace, against capture, etc., in general terms on a foreign ship, which is afterwards captured by one of H.M. ships of war, upon hostilities breaking out between the two countries, the assured cannot recover for the loss even after peace is restored. The general terms, arrests of princes, must be understood with an exception of the nation to which the underwriter belongs.

(2) On a policy of 25 guineas per cent. to return £8 per cent. if the ship sailed from Cadiz with convoy for England, & £2 per cent. more for convoy from England to Flushing, or £10 per cent. if with convoy for the voyage, & arrived, no part of the premium is returnable in case the ship be lost; for the words, & arrived, mean arrived at the ultimate terminus of the voyage.—KELLNER v. LE MESURIER (1803), 4 East, 396; 102 E. R. 883; *sub nom.* KELNER v. LE MESURIER, 1 Smith, K. B. 72.

Annotations:—*As to* (1) *Extd.* Brandon v. Curling (1803), 4 East, 410. *Folld.* Gamba v. Le Mesurier (1803), 4 East, 407. *Distd.* Visger v. Prescott (1804), 5 Esp. 184. *Consd.* Lubbock v. Potts (1806), 7 East, 449. *Refd.* Janson v. Driefontein Consolidated Mines, [1902] A. C. 484.

1723. ———.] — BRANDON v. CURLING, No. 1116, *ante*.

1724. Capture by privateer—Collusion between masters of both vessels.] — ARANGELO v. THOMPSON, No. 1799, *post*.

1725. By belligerent cruiser—Loss on voyage to Prize Court—Subsequent condemnation.]—In a policy against perils of the sea the risk insured was only against total loss & "warranted free from capture." A neutral ship thus insured during the Russo-Japanese war was captured by the Japanese, & while being navigated towards a ct. of prize was wrecked & became a total loss. She was afterwards condemned in the Prize Ct.:—*Held*: there was in fact a total loss by capture & the owner could not recover on the policy.—ANDERSEN v. MARTEN, [1908] A. C. 334; 77 L. J.

K. B. 950; 99 L. T. 254; 24 T. L. R. 775; 52 Sol. Jo. 680; 11 Asp. M. L. C. 85; 13 Com. Cas. 321, H. L.

Annotations:—*Refd.* Polurrian S.S. Co. v. Young, [1915] 1 K. B. 922; Leyland Shipping Co. v. Norwich Union Insce. Soc., [1918] A. C. 350; Roura & Forgas v. Townend, 1 K. B. 189; Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insce. Assn., [1921] 1 A. C. 99.

1726. ———.] — ROURA & FORGAS v. TOWNEND, No. 2214, *post*.

1727. Risk of capture—Abandonment of voyage—Before attachment of risk.]—By a policy of marine insurance ptfs., who were Russian subjects, insured a cargo of salt beef with defts. at & from San Francisco to Vladivostok via Nagasaki against (*inter alia*) capture. During the currency of the policy war between Russia & Japan broke out, & the Japanese fleet was in the Pacific & was stopping & capturing vessels. The Jananese were also blackading Vladivostok. Defts. telegraphed to ptfs. to the effect that if the cargo were sent to Vladivostok via Nagasaki they would take up the position that ptfs. deliberately caused any loss occasioned by the perils insured against. Ptfs.' representatives in San Francisco, who were not desirous of increasing the loss to the underwriters, proposed that the cargo should be discharged at San Francisco & sold elsewhere, which was done, ultimately notice of abandonment was given to the underwriters, who refused to accept it.

*Held*: the risk of capture had never begun to operate & the fact that it was anticipated that if the cargo went forward it would be lost by capture did not in the circumstances constitute a constructive total loss.—KACIANOFF v. CHINA TRADERS INSURANCE CO., LTD., [1914] 3 K. B. 1121; 83 L. J. K. B. 1393; 11 L. T. 404; 12 Asp. M. L. C. 524; 19 Com. Cas. 371, C. A.

Annotations:—*Distd.* British & Foreign Marine Insce. v. Sanday, Samuel, [1916] 1 A. C. 650. *Refd.* Polurrian S.S. Co. v. Young (1915), 84 L. J. K. B. 1025; Becker, Gray v. London Assec. Corp., [1918] A. C. 101.

1728. ——— Only justified when risk imminent.] — BECKER, GRAY & CO. v. LONDON ASSURANCE CORPN., No. 1675, *ante*.

### C. Seizure.

1729. Distinguished from capture.] — CORY v. BURR, No. 1736, *post*.

1730. What amounts to seizure—By British government—Condemnation by process of law.]—In an action brought upon a policy of insurance of a ship, if it appears upon the evidence, that the ship was condemned by process of law, & seized; by this sentence the property & ownership are destroyed, & there is no remedy upon the policy of insurance.—ANON. (1698), 1 Ld. Raym. 724; 91 E. R. 1382.

1731. ——— Seizure unlawful.] — LOZANO v. JANSON, No. 2148, *post*.

1732. ——— By foreign government—Of which assured subject.]—Policy of insurance on ship & goods at & from London to any ports in the Baltic, with liberty to carry simulated papers & clearances, & until safely warehoused in the warehouses of the consignees at the port of discharge, at 40 guineas per cent. premium:—*Held*: the underwriter was liable for a loss arising from confiscation by the Prussian Govt. notwithstanding the persons in whom the interest was averred were Prussian subjects, Prussia not being at war with this country; it being found that at the

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*by foreign ship.*] — BROWN v. MAXWELL (1824), 2 Sh. Sc. App. 373;



time of effecting the policy all direct commerce between this country & the ports in the Baltic was prohibited by the Powers possessing ports there, but that notwithstanding, an extensive course of commerce was carried on between this country & those ports by means of simulated papers, & clearances, which was well known to all descriptions of persons such as pltf.s. & deft.—*SIMEON v. BAZETT* (1813), 2 M. & S. 94; 105 E. R. 317.

*Annotations*:—*Distd.* *Campbell v. Iunes* (1821), 4 B. & Ald. 423. *Refd.* *Burges v. Wickham* (1863), 3 B. & S. 669.

**1733.** ———.]—Licence to F. & Co. obtained by them as the pltf.'s agents, permitting them to export in a ship named, bearing any flag except the French, specified goods from London to Dantzic or any port in the Baltic not blockaded, though the documents might represent her destination to any neutral or hostile port, & to whomsoever the property might appear to belong, protects a consignment made by a Prussian neutral alien, resident here by licence under the alien Act, to a hostile Russian port of the Baltic. & pltf. having insured may recover for a total loss occasioned by the act of the Govt. of Prussia, the country of which he was a native by seizure in a Prussian port whither the ship was driven by stress of weather.—*SCHNAKONEG v. ANDREWS* (1814), 5 Taunt. 716; 128 E. R. 872.

**1734.** ———.]—Gold, the property of a co. registered under the laws of the South African Republic, was insured against "arrests, restraints, & detainments of all kings, princes, & people" during transit from the mines to the United Kingdom, subject to a warranty "free of capture, seizure, & detention, whether before or after declaration of war." During transit the gold was taken possession of by the Govt. of the Republic on its own territory in anticipation of war with Great Britain, & in accordance with the laws of the Republic, & was afterwards appropriated by the Govt.:—*Held*: there was a "seizure" of the gold within the meaning of the warranty, & the insurers were not liable on the policy.—*ROBINSON GOLD MINING CO. v. ALLIANCE INSURANCE CO.*, [1904] A. C. 359; 73 L. J. K. B. 898; 91 L. T. 202; 53 W. R. 160; 20 T. L. R. 645; 9 Com. Cas. 301, H. L.

*Annotations*:—*Refd.* *Miller v. Law Accident Insee.*, [1903] 1 K. B. 712; *Leyland Shipping Co. v. Norwich Union Fire Insee. Soc.*, [1917] 1 K. B. 873.

**1735.** ———. **Seizure unlawful.**]—A policy of assurance was effected on a ship & cargo from Galatz to London. The policy was in the usual form but contained a stipulation, by way of exception that the ship & goods, etc. were warranted "free from capture & seizure & the consequences of any attempt thereof." On Mar. 17, 1854, war not being declared between England & Russia until the 29th) the ship sailed from Galatz on her homeward voyage, & on the 19th passed the mouth of the Ismail river, where there was a Russian fort & close enough to the shore to be hailed, with the English ensign flying, without being molested or receiving any communication from the shore. When about half a mile from the fort two guns were pointed at the ship, & the Russians without any notice being given, fired at her, & although her sails were lowered & anchor dropped, they continued to fire at her & she sank. The officers & crew took to the boats to save their lives, & on reaching the shore were taken prisoners by the Russians & detained some weeks, & then released. One of the Russian officers by whom some of the crew were examined, stated that the English ensign had been mistaken

for the Turkish flag, & that they thought the ship was a Turkish ship, & that he was sorry for the mistake that had been made:—*Held*: in an action upon the policy to recover for the loss of the ship & cargo, the loss would have been a peril insured against within the meaning of the policy, but for the above exception; the facts showed an actual seizure of the ship by the Russians, & such seizure came within the meaning of the exception.

The exception extended to any capture or seizure whereby the ship was lost to the assured whether legal or altogether illegal & contrary to the law of nations (*LORD CAMPBELL, C.J.*).—*POWELL v. HYDE* (1855), 5 E. & B. 607; 25 L. J. Q. B. 65; 26 L. T. O. S. 74; 2 Jur. N. S. 87; 4 W. R. 51; 119 E. R. 606.

*Annotations*:—*Apld.* *Cory v. Burr* (1883), 8 App. Cas. 393. *Refd.* *Kleinwort v. Shepard* (1859), 1 E. & E. 447; *Robinson Gold Mining Co. v. Alliance Insee.*, [1902] 2 K. B. 489; *Leyland Shipping Co. v. Norwich Union Fire Insee. Soc.*, [1917] 1 K. B. 873; *Munro, Brice v. War Risks Assocn.*, [1918] 2 K. B. 78.

**1736.** ———. **Infringement of customs regulations.**]—In a time policy of marine insurance on ship the ordinary perils insured against, including "barratry of the master," were enumerated, & the ship was warranted "free from capture & seizure & the consequences of any attempts thereat." In consequence of the barratrous act of the master in smuggling, the ship was seized by Spanish revenue officers & proceedings were taken to procure her condemnation & confiscation. In an action on the policy to recover expenses incurred by the owner in obtaining her release:—*Held*: the loss must be imputed to "capture & seizure" & not to the barratry of the master, & the underwriter was not liable.

"Capture" would seem properly to include every act of seizing or taking by a belligerent. "Seizure" would seem to be a larger term than "capture" & goes beyond it & may reasonably be interpreted to embrace every act of taking forcible possession either by a lawful authority or by overpowering force (*LORD FITZGERALD*).—*CORY v. BURR* (1883), 8 App. Cas. 393; 52 L. J. Q. B. 657; 49 L. T. 78; 31 W. R. 894; 5 Asp. M. L. C. 109, H. L.

*Annotations*:—*Consd.* *Cossman v. West, Cossman v. British America Assee.* (1887), 13 App. Cas. 160. *Foldd.* *Robinson Gold Mining Co. v. Alliance Insee.*, [1902] 2 K. B. 489. *Refd.* *Miller v. Law Accident Insee.*, [1903] 1 K. B. 712; *Becker, Gray v. London Assee. Corpn.*, [1918] A. C. 101; *British & Foreign S.S. Co. v. R.*, [1918] 2 K. B. 879.

**1737.** ———. **By natives.**]—In an action on a policy of insurance upon a ship, in which the subject-matter was warranted "free from capture & seizure, & the consequence of any attempt thereat," it was proved that during the continuance of the risk some natives took forcible possession of the ship in the Brass River, plundered the cargo, & damaged her so that she became a constructive total loss, & their intention in so taking possession was only to plunder the cargo, & not to keep the ship:—*Held*: the acts of the natives constituted a "seizure" within the meaning of the warranty, & therefore the underwriters were not liable.—*JOHNSTON v. HOGG* (1883), 10 Q. B. D. 432; 52 L. J. Q. B. 343; 48 L. T. 435; 31 W. R. 768; 5 Asp. M. L. C. 51.

*Annotation*:—*Refd.* *Robinson Gold Mining Co. v. Alliance Insee.*, [1901] 2 K. B. 919.

**1738.** ———. **By foreign municipal law.**]—(1) A bull was insured on a voyage from New York to Buenos Ayres & for ten days after arrival. The risks insured against included mortality, jettison, & washing overboard. There was a clause "warranted free of capture, seizure, or detention."

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On arrival at Buenos Ayres the bull was found to be suffering from foot & mouth disease, & in accordance with Argentine law the bull was not allowed to be landed & the Argentine officials ordered it to be slaughtered on board ship. In an action on the policy:—*Held*: "mortality in the policy did not include the death of the bull caused by the action of the Argentine officials; & further, the loss, which was due to the ordinary municipal law, came within the clause "war-ranted free from capture & seizure."

(2) If there is necessarily a conflict in the same document, the document being one of this class, it is not improper, if there is a conflict of the clauses, to prefer the meaning given by a clause which is specially included in the contract as against a clause which forms the ordinary or normal part of the document (*KENNEDY, J.*).—*ST. PAUL FIRE & MARINE INSURANCE CO. v. MORICE* (1906), 22 T. L. R. 449; 11 Com. Cas. 153.

**1739.** ———.]—*VAN LAUN v. THAMES & MERSEY MARINE INSURANCE CO.* (1905), cited in 11 Com. Cas. at pp. 163, 165, 166; *on appeal, sub nom. THAMES & MERSEY MARINE INSURANCE CO., LTD. v. VAN LAUN & CO.* (1905), [1917] 2 K. B. 48, n., H. L.

*Annotations*:—*Consd.* *St. Paul Fire & Marine Insce. v. Morice* (1906), 11 Com. Cas. 153. *Mentd.* *Hood v. West End Motor Car Packing Co.*, [1917] 2 K. B. 38.

**Arrest or restraint of princes & peoples.]—***See Sub-sect. 4, D., post.*

**Seizure by pirates.]—***See Sub-sect. 4, E., post.*

#### *D. Restraint of Princes, People, etc.*

##### *(a) In General.*

*See Marine Insurance Act, 1906 (c. 41), sched. I., Rule 10.*

**1740. Meaning of "people" — "Governing power of country."]**—If an armed force board a ship, & take part of the cargo, the underwriters are not liable on a count, stating the loss to be by a seizure by people to pl'tfs. unknown; for "people" in the policy means "the governing power of the country." Where, after such a seizure, the vessel was stranded, & part of the cargo, consisting of corn, taken by the mob at their own price, the loss cannot be recovered, as for a general average, but for such part as in consequence of the stranding was damaged & thrown overboard, the insured may recover on a count stating the loss to be by stranding.—*NESBITT v. LUSHINGTON* (1792), 4 Term Rep. 783; 100 E. R. 1300.

*Annotations*:—*Refd.* *Burnett v. Kensington* (1797), 7 Term Rep. 210; *Wells v. Hopwood* (1832), 3 B. & Ad. 20; *Thames & Mersey Marine Insce. v. Pitts & King*, [1893] 1 Q. B. 476; *Bolivia Republic v. Indemnity Mutual Marine Asso.*, [1909] 1 K. B. 785. *Mentd.* *Silverwright v. Allen* (1906), 75 L. J. K. B. 476.

**1741. Meaning of "princes"—Nation of underwriter excluded.]—***KELLNER v. LE MESURIER*, No. 1722, *ante*.

##### *(b) In Case of Foreign Government.*

*See Marine Insurance Act, 1906 (c. 41), sched. I., Rule 10.*

**1742. What amounts to restraint—Seizure for disobedience to navigation law.]—**Where a policy of insurance is against restraint of princes, that extends not where the insured shall navigate against the law of countries, or where there shall be a seizure for not paying of custom or the like.—*ANON.* (1690), 2 Vern. 176; 23 E. R. 716.

**1743. ——— Seizure for customs.]—***ANON.* (1690), No. 1742, *ante*.

**1744. ——— Embargo.]—***ROTCH v. EDIE*, No. 2241, *post*.

**1745. ——— By government of assured—In time of war.]—**The clause in an ordinary policy of marine insurance on a ship & goods, which insures against losses occasioned by "arrests, restraints & detainments of all kings, princes & people, of what nation, condition or quality so-ever," applies to a seizure of the ship in consequence of an embargo laid on her by the sovereign of the country of the assured, for the purpose of carrying on a war with another power. There is a distinction in this respect between an embargo, in a time when there is peace between the countries of the insurer & the assured, laid on for a purpose wholly unconnected with hostility either existing or expected, & an embargo connected with such hostility.—*AUBERT v. GRAY* (1862), 3 B. & S. 169; 32 L. J. Q. B. 50; 7 L. T. 469; 9 Jur. N. S. 714; 11 W. R. 27; 1 Mar. L. C. 264; 122 E. R. 65, Ex. Ch.; *sub nom.* *GREY v. AUBER*, 1 New Rep. 33.

*Annotations*:—*Consd.* *Robinson Gold Mining Co. v. Alliance Insce.*, [1901] 2 K. B. 919. *Apld.* *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484. *Refd.* *Rodocanachi v. Elliott* (1874), 31 L. T. 239.

**1746. ——— In time of peace.]—***AUBERT v. GRAY*, No. 1745, *ante*.

**1747. ——— Detention of goods in besieged town—Overland transit.]—**In a policy of insurance on goods the voyage was thus described: "At & from Japan &/or Shanghai to Marseilles &/or Leghorn &/or London *via* Marseilles &/or Southampton, including all risks of craft to & from the steamers," etc. The risks insured against were, amongst others, of the seas, fire & thieves, arrests, restraints & detainments of all kings, princes & people, etc. In the margin of the policy was the following memorandum: "It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular & Oriental Co., Messageries Impériales steamers, &/or the steamers of the Mercantile Trading Co. of Liverpool only." The goods insured were shipped from Shanghai for London by the Messageries Impériales: the practice of that co. was to send such goods overland through France by the Lyons Ry. from Marseilles to Paris, & thence by the Northern Ry. to Boulogne, & thence to London; & this course of business was well known among underwriters. The goods in question arrived in Paris on their way on Sept. 13, 1870. At this time the German armies were advancing on Paris, & had seized parts of the Northern Ry., so that the goods could not be forwarded to Boulogne, & by Sept. 19, they completely surrounded & besieged Paris, preventing communication between it & all other places, by reason of which it was impossible to remove the goods from Paris. This state of things continued till after Oct. 7, on which day the assured gave notice of abandonment:—*Held*: the policy covered the overland transit from Marseilles to Boulogne; & there was a constructive loss by restraint or detainment of princes, within the meaning of the policy.—*RODOCONACHI v. ELLIOTT* (1874), L. R. 9 C. P. 518; 43 L. J. C. P. 255; 31 L. T. 239; 2 Asp. M. L. C. 399, Ex. Ch.

*Annotations*:—*Consd.* *Johnston v. Hogg* (1883), 10 Q. B. D. 432; *Ruys v. Royal Exchange Asso. Corp.*, [1897] 2 Q. B. 135; *Miller v. Law Accident Insce.*, [1903] 1 K. B. 712; *British & Foreign Marine Insce. v. Sanday*, [1916] 1 A. C. 650. *Fold.* *Furness, Withy v. Rederiaktlegolabet Banco*, [1917] 2 K. B. 873. *Refd.* *Nobel's Explosives Co. v. Jenkins*, [1896] 2 Q. B. 326; *Robinson Gold Mining Co. v. Alliance Insce.*, [1901] 2 K. B. 919; *Mitsui v. Mumford*, [1915] 2 K. B. 27; *Becker, Gray v. London*



Assce. Corpn., [1918] A. C. 101; Russian Bank for Foreign Trade v. Excess Insce., [1918] 2 K. B. 123. **Mentd.** Australian Agricultural Co. v. Saunders (1875), 44 L. J. C. P. 391; Wingate v. Foster (1878), 3 Q. B. D. 582; Wilson, Bobbin v. Green (1915), 31 T. L. R. 605.

**1748. — Operation of municipal law—Prohibition against landing cattle.]—**(1) The operation of the ordinary municipal law of a country affecting or preventing the delivery of insured goods at their port of destination is a "restraint of princes or people" within the meaning of a Lloyd's policy of marine insurance.

(2) A warranty in a policy of marine insurance against "capture, seizure, & detention" operates to release the insurers from liability under the words "arrests, restraints, & detentions of kings, princes, & people" in the body of the policy.—**MILLER v. LAW ACCIDENT INSURANCE CO.**, [1903] 1 K. B. 712; 72 L. J. K. B. 428; 88 L. T. 370; 51 W. R. 420; 19 T. L. R. 331; 47 Sol. Jo. 382; 9 Asp. M. L. C. 386; 8 Com. Cas. 161, C. A.

**Annotations:—As to (1) Folld.** Mansell v. Hoade (1903), 20 T. L. R. 150. **Apld.** British & Foreign Marine Insce. v. Sanday, [1916] 1 A. C. 650. **Consd.** Becker, Gray v. London Assce. Corpn., [1918] A. C. 101. **Refd.** St. Paul Fire & Marine Insce. v. Morice (1906), 22 T. L. R. 449. **As to (2) Refd.** Yull v. Robson, [1908] 1 K. B. 270; Adelaide S.S. Co. v. R. (1924), 93 L. J. K. B. 871.

**1749. — — — — —.]—MANSELL & CO. v. HOADE**, No. 2246, *post*.

*See, also*, No. 1738, *ante*.

**1750. — Closing of Dardanelles.]—**A parcel of barley shipped by plffs. on board a British steamship for carriage from Novorossisk to Falmouth was insured against the usual perils, including restraints of princes & the risks excluded by the free of capture & seizure clause, but excluding "all claims due to delay." Owing to the closing of the Dardanelles & the declaration of war against Turkey the ship was unable to make the voyage from Novorossisk to Falmouth, & the cargo was landed, & the ship remained at Novorossisk. Subsequently the ship, while at that port, was requisitioned by the Admiralty for the use of the Russian Govt. Plffs. claimed under the policy for a constructive total loss of the barley:—**Held**: the loss was not recoverable, on the grounds (a) that, although the closing of the Dardanelles was a restraint of princes, the claim based thereon was a claim due to delay within the exception in the policy; & (b) that the order requisitioning the ship was not within the Royal prerogative, & was *ultra vires* the Admiralty as the Proclamation of Aug. 3, 1914, only authorised the requisitioning of British ships within the British Isles or the waters adjacent thereto, & the compliance of the shipowners with the order, not having been brought about by threats, of use of force, was therefore not due to a restraint of princes.—**RUSSIAN BANK FOR FOREIGN TRADE v. EXCESS INSURANCE CO.**, [1918] 2 K. B. 123; 87 L. J. K. B. 872; 118 L. T. 645; 34 T. L. R. 383; 14 Asp. M. L. C. 316; 23 Com. Cas. 325; *affd.* on other grounds, [1919] 1 K. B. 39, C. A.

**Annotation:—Distd.** Roura & Forgas v. Townend, [1919] 1 K. B. 189.

(c) *In Case of British Government.*

*See* Marine Insurance Act, 1906 (c. 41), sched. I., Rule 10.

**1751. Embargo.]—**(1) If Govt. lays an embargo upon a ship while she is insured, seize her, & convert her into a fire-ship, the insurers are answerable for the damage the assured sustained thereby.

(2) If after a policy of insurance a damage

happens, & afterwards, in the same voyage, a deviation; yet the assured shall recover for what happened before the deviation; for the policy is discharged from the time of the deviation only.—**GREEN v. YOUNG** (1702), 2 Ld. Raym. 840; 2 Salk. 444; 92 E. R. 61; *sub nom.* ANON., 2 Salk. 444.

**Annotations:—As to (1) Refd.** Pole v. Fitzgerald (1752), Willes, 641; Touteng v. Hubbard (1802), 3 Bos. & P. 291; Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781.

**1752. — Foreign ship—Recovery of freight.]—**If a British merchant charter a Swedish ship on a voyage to St. Michael's for a cargo of fruit, & the charterparty contain the usual exception against the restraint of princes, & the ship be prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British Govt. the Swedish owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the British merchant.—**TOUTENG v. HUBBARD** (1802), 3 Bos. & P. 291; 127 E. R. 161.

**Annotations:—Apld.** Conway v. Gray, Conway v. Forbes, Maury v. Shedden (1809), 10 East, 536. **Consd.** Flindt v. Scott (1814), 5 Taunt. 674; Esposito v. Bowden (1857), 7 E. & B. 763; Geipel v. Smith (1872), L. R. 7 Q. B. 404; Jackson v. Union Marine Insce. (1874), L. R. 10 C. P. 125; Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781. **Refd.** Mennett v. Bonham (1812), 15 East, 477; Simcon v. Bazett (1813), 2 M. & S. 94; Ralli v. Compania Naviera Sota y Aznar, [1920] 1 K. B. 614. **Mentd.** Barrie v. Peruvian Corpn. (1896), 13 T. L. R. 101; Akt. General Gordon v. Cape Copper Co. (1921), 91 L. J. K. B. 112.

**1753. — British ship.]—AUBERT v. GRAY**, No. 1745, *ante*.

**1754. Detention.]—**Where the assured is a British subject, he may recover against a British underwriter for a loss by detention of the British Govt.—**PAGE v. THOMPSON** (1804), 1 Park on Marine Insurances, 8th ed. p. 175.

**1755. — Ship taken in tow by mistake.]—**HAGEDORN v. WHITMORE, No. 1973, *post*.

**1756. Outbreak of war—Rendering adventure illegal—Abandonment of voyage.]—**BRITISH & FOREIGN MARINE INSURANCE CO., LTD. v. SANDAY (SAMUEL) & CO., No. 2236, *post*.

**1757. — — — — —.]—**ASSOCIATED OIL CARRIERS, LTD. v. UNION INSURANCE SOCIETY OF CANTON, LTD., No. 2093, *post*.

**1758. Ultra vires requisition by Admiralty—Voluntary compliance of owners.]—**RUSSIAN BANK FOR FOREIGN TRADE v. EXCESS INSURANCE CO., No. 1750, *ante*.

### *E. Pirates.*

*See* Marine Insurance Act, 1906 (c. 41), sched. I., Rule 8.

**1759. Defined—Persons plundering for private gain.]—**Goods were shipped upon a vessel for carriage from a place at the mouth of the Amazon to a place far inland upon a tributary of a tributary of that river, situated in a remote territory belonging to Bolivia on the boundary between that country & Brazil. These goods were insured for the voyage by a policy in the form of a marine policy against, among other risks usually specified in such a policy, "pirates" & "all other perils" that should come to the hurt, detriment, or damage of the subject-matter of insurance. The policy contained the following clause: "Warranted free of capture, seizure, & detention, & the consequences thereof, or any attempt, thereat, piracy excepted, & also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration



*Sect. 20.—Perils insured against: Sub-sect. 4, E., F. & G. (a) & (b).]*

of war." The goods insured consisted of provisions & stores which belonged to the Bolivian Govt. & were intended for Bolivian troops engaged in establishing the authority of that Govt. in the before-mentioned territory. Certain malcontents, mostly Brazilians, who were desirous that the authority of the Bolivian Govt. should not be established there, had fitted out an expedition which ascended the Amazon in armed vessels for the purpose of resisting the Bolivian troops & establishing an independent republic in the before-mentioned territory. Those on board one of these vessels stopped the vessel on which the goods insured were shipped & seized those goods. In an action on the policy claiming as for a loss through pirates:—*Held*: (1) even assuming that the acts of those who seized the goods came within the legal definition of piracy for some purposes, the word "pirates," as used in the policy, must be construed in its popular sense, & in that sense it meant persons who plunder indiscriminately for their private gain, not persons who simply operate against the property of a particular State for a public political end, & therefore, there had not been a loss through "pirates" within the meaning of the policy; (2) having regard to the terms of the warranted free clause, the seizure of the goods could not be treated as coming within the general words "all other perils" as being *ejusdem generis* with piracy.—*BOLIVIA REPUBLIC v. INDEMNITY MUTUAL MARINE ASSURANCE CO., LTD.*, [1909] 1 K. B. 785; 78 L. J. K. B. 596; 100 L. T. 503; 25 T. L. R. 254; 53 Sol. Jo. 266; 11 Asp. M. L. C. 218; 14 Com. Cas. 156, C. A.

**1760. Rioters attacking ship from shore.]—***NESBITT v. LUSHINGTON*, No. 1740, *ante*.

**1761. Mutinous emigrants.]—**To a declaration on a policy of assurance on advances for the transport of Chinese emigrants from China to Peru, for their outfit & provisions, to be paid on the arrival of the emigrants at the port of destination, the perils insured against being "pirates, rovers, thieves, etc., barratry of the master & mariners & all other perils, losses, & misfortunes, etc." in the usual form; the declaration alleging a total loss by the emigrants piratically & feloniously murdering the captain & part of the crew, & feloniously stealing & carrying away the ship, defts. pleaded, first, that, as soon as the emigrant's had committed the murder & had obtained possession of the vessel, they steered for the nearest land, for the purpose of being landed, & refused to & would not proceed upon the voyage; & the vessel was then fit & able safely to proceed to the said port, & the remainder of her crew could have navigated her there, & were ready & willing to convey the emigrants there if they would have gone, but that they would not; & that, by reason of such refusal, & for no other cause whatsoever, the transport was never completed. As to the taking & carrying away of the vessel, that the emigrants were unwilling to be carried on the said voyage, & that they committed the murder & took possession of the vessel for the purpose of being landed & of escaping, & from being carried on the voyage, & for no other purpose which is the said piratical carrying away of the vessel:—*Held*: the murder of the captain & of part of the crew, & the seizure of the vessel by the emigrants, as alleged in the declaration & admitted by the pleas, was, if not a piratical act, one *ejusdem generis*, & therefore within the perils insured against; & as the loss was complete at

that moment & was never reduced, the unwillingness of the emigrants to proceed was not the cause of the loss, but was wholly immaterial & consequently the pleas were bad.—*PALMER v. NAYLOR* (1854), 10 Exch. 382; 2 C. L. R. 1202; 23 L. J. Ex. 323; 24 L. T. O. S. 83; 18 Jur. 901; 2 W. R. 621; 156 E. R. 492, Ex. Ch.; *affg.* S. C. *sub nom.* *NAYLOR v. PALMER* (1853), 8 Exch. 739.

*Annotations:—***Consd.** *Cory v. Burr* (1883), 8 App. Cas. 393. **Refd.** *Kleinwort v. Shepard* (1859), 1 E. & E. 447; *Lozano v. Jansen* (1859), 5 Jur. N. S. 1401; *Slvewright v. Allen* (1906), 75 L. J. K. B. 476; *Bolivia Republic v. Indemnity Mutual Marine Assce.*, [1909] 1 K. B. 785.

**1762. —.]—**Declaration on a voyage policy, from Macao to Havana, "warranted free from capture & seizure, & the consequences of any attempt thereat." The usual clause, stating the perils insured against, included "enemies, pirates, rovers, thieves," "surprisals, takings at sea," & barratry of the master & mariners." The insurance was declared to be on £7,300 expended in provisions for the use of Chinese emigrants, & in advances on freight. The declaration alleged that, while the ship was on her said voyage, on the high seas, with the emigrants on board, the said emigrants "piratically & feloniously" assaulted the captain & crew, "& piratically & feloniously took, stole, & carried away" the ship & provisions, "by reason of which piracy & theft" the ship & provisions were wholly lost:—*Held*: such taking possession of the vessel was a "seizure" within the meaning of the warranty; & the assurers were therefore not liable.—*KLEINWORT v. SHEPARD* (1859), 1 E. & E. 447; 28 L. J. Q. B. 147; 32 L. T. O. S. 313; 5 Jur. N. S. 863; 7 W. R. 227; 120 E. R. 977.

*Annotations:—***Apld.** *Cory v. Burr* (1883), 8 App. Cas. 393. **Refd.** *Robinson Gold Mining Co. v. Alliance Insce.*, [1902] 2 K. B. 489.

**1763. Rebels of foreign state.]—***BOLIVIA REPUBLIC v. INDEMNITY MUTUAL MARINE ASSURANCE CO., LTD.*, No. 1759, *ante*.

**1764. Effect of recapture by man of war—Sale by prize master.]—**A ship was insured on a time policy, for a year ending Apr. 21, 1852. In Dec. 1851, being on her homeward voyage from Valparaiso to Liverpool, she was captured by pirates in the Straits of Magellan: in Jan. 1852 she was recaptured by an English war steamer; & a prize master took the command, & brought her to Valparaiso. Intelligence of all these facts reached the owners, at one time, about the end of Apr. 1852; & they, on Apr. 30, 1852, gave notice of abandonment to the underwriters, stating that intelligence had arrived "of the condemnation at Valparaiso" of the vessel "as a prize to Her Majesty's steamer." The underwriters refused to accept. The vessel was sent home by the recaptors from Valparaiso, under the command of a prize master, with instructions to proceed to Liverpool, & obtain an adjudication in the Ct. of Admiralty. She met with bad weather, & put into Fayal on Aug. 19, 1852, where she was sold by the prize master, being then in a state not justifying the sale. In Dec. 1852, the owners commenced an action against the underwriters, claiming for a total loss:—*Held*: they were entitled to recover as for a total loss, there having been a total loss by the piratical seizure, in the first instance, & the owners not having afterwards up to the time of the commencement of the action had either actual possession or the means of obtaining it: & it being immaterial whether there was or was not a right of detainer against the owners.—*DEAN v. HORNBY* (1854), 3 E. & B. 180; 2 C. L. R. 1519; 23 L. J. Q. B. 129; 22 L. T.

O. S. 222 ; 18 Jur. 623 ; 2 W. R. 156 ; 118 E. R. 1108.

*Annotations* :—**Consd.** Ruys v. Royal Exchange Assee. Corp'n., [1897] 2 Q. B. 135. **Refd.** Rankin v. Potter (1873), L. R. 6 H. L. 83 ; Cory v. Burr (1883), 8 App. Cas. 393.

#### F. Thieves and Rovers.

See Marine Insurance Act, 1906 (c. 41), sched. I., Rule 9.

**1765. Strangers—Not of ship's company.]—**HARFORD v. MAYNARD (1785), 1 Park on Marine Insurances, 8th ed. p. 36.

**1766. ——— Whilst goods on shore after shipwreck.]—**Where, in a policy of insurance on goods the vessel is wrecked ; part of the goods are lost, & part got on shore, but, whilst on shore, are destroyed & plundered by the inhabitants of the coast, so that no portion of them comes again into the possession of the assured :—**Held** : this is a loss by perils of the sea, & no abandonment was necessary.—**BONDRETT v. HENTIGG** (1816), Holt, N. P. 149, N. P.

*Annotations* :—**Consd.** Hahn v. Corbett (1824), 2 Bing. 205 ; Ionides v. Universal Marine Insce. (1863), 14 C. B. N. S. 259. **Apld.** Dent v. Smith (1869), L. R. 4 Q. B. 414. **Refd.** Spence v. Union Marine Insce. (1868), L. R. 3 C. P. 427 ; Inman S.S. Co. v. Bischoff (1882), 7 App. Cas. 670 ; Leyland Shipping Co. v. Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873.

#### G. Barratry.

##### (a) In General.

See Marine Insurance Act, 1906 (c. 41), sched. I., Rule 11 ; SHIPPING & NAVIGATION.

**1767. Defined—Fraudulent act in fraud of owner or freighter.]—**(1) Barratry is every species of fraud or knavery in the master or mariners of a ship, by which the owners or freighters are injured ; & (2) a deviation, if such, is barratry, whether the loss happen during such fraudulent voyage, or after. (3) Otherwise, if the deviation be with their privity or consent.—**VALLEJO v. WHEELER** (1774), 1 Cowp. 143 ; Lofft, 631 ; 98 E. R. 1012.

*Annotations* :—**As to** (1) **Consd.** Earle v. Rowcroft (1806), 8 East, 126. **Expld.** Soares v. Thornton (1817), 7 Taunt. 627. **Refd.** Nutt v. Bourdieu (1786), 1 Term Rep. 323 ; Phyn v. Royal Exchange Assee. (1798), 7 Term Rep. 505 ; Hutton v. Bragg (1816), 7 Taunt. 14. **As to** (2) **Refd.** Lockyer v. Offley (1786), 1 Term Rep. 252 ; Cory v. Burr (1882), 9 Q. B. D. 463. **Generally, Mntd.** Frazor v. Marsh (1811), 13 East, 238 ; Trinity House v. Clark (1815), 4 M. & S. 288 ; Tate v. Meek (1818), 8 Taunt. 280 ; Saville v. Campion (1819), 2 B. & Ald. 503 ; Christie v. Lewis (1821), 2 Brod. & Bing. 410 ; Sandeman v. Scurr (1866), L. R. 2 Q. B. 86.

**1768. ———.]—**LOCKYER v. OFFLEY, No. 917, ante.

**1769. ———.]—**Barratry is any fraudulent or criminal conduct against the owners of ship or goods by the master or mariners, in breach of the trust reposed in them, & to the injury of the owners although it may not be done with intent to injure them, or to benefit at their expense the master or mariners, & therefore where a master had general instructions to make the best purchases with dispatch, this would not warrant him in going into an enemy's settlement to trade, which was permitted by the enemy, though his cargo could be more speedily & cheaply completed there ; but such act, in consequence of which the ship was seized & confiscated is barratrous.

#### PART II. SECT. 20, SUB-SECT. 4.— G. (a).

**1773 i. Necessity for fraud—Mistake of master insufficient.]—**A mere error or defect in judgment, or negligence on the part of the master, although the result is the total loss of the property insured, where there has been no criminal or fraudulent intent, is not barratry.—**WOLFF v. MERCHANTS IN-**

**SURANCE CO.** (1892), 31 N. B. R. 577.—**CAN.**

**1773 ii. ———.]—**Conduct on the part of a master of a vessel leading to loss of the vessel will not, though against the interest of the owners, & extremely careless, be adjudged barratrous in the absence of proof of fraud.—**WILSON, HARRAWAY & CO. v. NATIONAL FIRE & MARINE INSUR-**

**A fraudulent breach of duty by the master in respect to his owners, or, in other words, a breach of duty in respect to his owners, with a criminal intent, or ex maleficio, is barratry, & with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be owing to an act of the master, induced by motives of advantage to himself, notive to the owner, or a disregard to those laws which it was the master's duty to obey, & which, or it would not be barratry, his owners relied upon his observing (LORD ELLENBOROUGH, C.J.).—**EARLE v. ROWCROFT (1806), 8 East, 126 ; 103 E. R. 292.

*Annotations* :—**Consd.** Wilson v. Rankin (1865), 6 B. & S. 208. **Apld.** Cory v. Burr (1883), 8 App. Cas. 393. **Refd.** Grill v. General Iron Screw Collier Co. (1866), L. R. 1 C. P. 600 ; Australasian Insce. v. Jackson (1875), 33 L. T. 286 ; Westport Coal Co. v. McPhail, [1898] 2 Q. B. 130.

**1770. ———.]—**BOTTOMLEY v. BOVILL (1826), 5 B. & C. 210 ; 7 Dow. & Ry. K. B. 702 ; 4 L. J. O. S. K. B. 237 ; 108 E. R. 79.

**1771. ———.]—**JONES v. NICHOLSON, No. 1810, post.

**1772. ———.]—**MENTZ, DECKER & CO. v. MARITIME INSURANCE CO., No. 1052, ante.

**1773. Necessity for fraud—Mistake of master insufficient.]—**PHYN v. ROYAL EXCHANGE ASSURANCE CO., No. 1783, post.

**1774. ———.]—**Improper treatment of the vessel by the captain will not constitute barratry, although it tend to the destruction of the vessel, unless it be shown that he acted against his own judgment.—**TODD v. RITCHIE** (1816), 1 Stark. 240, N. P.

**1775. ———.]—**BOTTOMLEY v. BOVILL (1826), 5 B. & C. 210 ; 7 Dow. & Ry. K. B. 702 ; 4 L. J. O. S. K. B. 237 ; 108 E. R. 79.

**1776. ———.]—**The insurer of a ship is not liable for the expenses incurred by the delay of the vessel, for the purpose of recovering her cargo, when detained under process of a foreign country, if the ship itself be not detained by the process ; & the circumstances causing the detainer must be positively shown to have originated in the fraud of the master, in order to support an averment of loss by his barratry.—**BRADFORD v. LEVY** (1825), 2 C. & P. 137 ; Ry. & M. 331, N. P.

##### (b) Barratrous Deviation.

See Marine Insurance Act, 1906 (c. 41), sched. I., Rule 11.

Deviation, generally, see Sect. 14, ante.

**1777. Master forced to deviate by crew.]—**ELTON v. BROGDEN, No. 1063, ante.

**1778. Loss during or after deviation.]—**VALLEJO v. WHEELER, No. 1767, ante.

**1779. Deviation by master for own purposes.]—**(1) In an action by the assured of goods against the underwriters for a loss by the barratry of the master, proof that the person who was described in the policy as master, & who was treated with & acted as such, carried the ship out of her course for fraudulent purposes of his own *primâ facie*, is sufficient to entitle pltf. to recover, without

**ANCE CO. OF NEW ZEALAND** (1886), 4 N. Z. L. R. 343 (S. C.).—**N.Z.**

**h. Express exception not necessary—To relieve insurers.]—**It is not necessary that barratry should be expressly excepted in a marine policy to relieve the insurers from liability for such a loss.—**O'CONNOR v. MERCHANTS MARINE INSURANCE CO.** (1889), 16 S. C. R. 331.—**CAN.**



*Sect. 20.—Perils insured against: Sub-sect. 4, G. (b), (c), (d) & (e).]*

showing negatively that he was not the owner, or that any other person was. Such proof lies on deft., wishing to avail himself of it to establish. (2) Where the voyage insured was from Jamaica to New Orleans, which lies up the river Mississippi, & the captain proceeded on his voyage as far as the mouth of that river, & then dropped anchor & went up the river in his boat for a fraudulent purpose of his own:—*Held*: the dropping of his anchor with such fraudulent intent was an act of barratry, & not merely a deviation.—*ROSS v. HUNTER* (1790), 4 Term Rep. 33; 100 E. R. 879.

*Annotation*:—As to (2) *Refd.* *Phyn v. Royal Exchange Assce.* (1798), 7 Term Rep. 505.

**1780.** —.]—*MENTZ, DECKER & CO. v. MARITIME INSURANCE CO.*, No. 1052, *ante*.

**1781. Cruising for prize.**—*MOSS v. BYROM*, No. 1106, *ante*.

**1782. Deviation for benefit of owners.**—Where the master acts only for the benefit of his owners, it is not barratry though it may be a deviation or breach of contract.—*STAMMA v. BROWN* (1742), 2 Stra. 1173; 93 E. R. 1108.

*Annotations*:—*Consd.* *Vallejo v. Wheeler* (1774), 1 Cowp. 143; *Earle v. Roweroft* (1806), 8 East, 126. *Refd.* *Phyn v. Royal Exchange Assce.* (1798), 7 Term Rep. 505; *Samuel v. Dumas*, [1924] A. C. 431.

**1783. Deviation through ignorance of master.**—A deviation of a vessel from the voyage insured through the ignorance of the captain, or from any other motive not fraudulent though it avoids the policy, does not constitute an act of barratry.—*PHYN v. ROYAL EXCHANGE ASSURANCE CO.* (1798), 7 Term Rep. 505; 101 E. R. 1101.

(c) *Acts involving Forfeiture of Ship or Cargo.*

See Marine Insurance Act, 1906 (c. 41), sched. I., Rule 11.

**1784. Leaving port to evade dues.**—If the master of a ship, intending to avoid the payment of port duties, attempt to run her out of port, & is stopped, & the ship thereby forfeited, this is barratry in the master, & renders the underwriter of the ship liable, within the terms of a policy insuring against the barratry of the master.—*KNIGHT v. CAMBRIDGE* (1724), 8 Mod. Rep. 230; 2 Ld. Raym. 1349; 1 Stra. 581; 88 E. R. 165.

*Annotations*:—*Expld.* *Earle v. Roweroft* (1806), 8 East, 126. *Refd.* *Vallejo v. Wheeler* (1774), 1 Cowp. 143.

**1785.** —.]—*STAMMA v. BROWN* (1742), 2 Stra. 1173; 93 E. R. 1108.

*Annotations*:—*Refd.* *Vallejo v. Wheeler* (1774), 1 Cowp. 143; *Phyn v. Royal Exchange Assce.* (1798), 7 Term Rep. 505; *Earle v. Roweroft* (1806), 8 East, 126; *Samuel v. Dumas*, [1924] A. C. 431.

**1786. Smuggling by master.**—*LOCKYER v. OFFLEY*, No. 917, *ante*.

**1787.** —.]—If a ship be insured by the terms of the policy in any lawful trade, & the barratry of the master be mentioned as one of the risks to be borne by the insurer; the underwriters will be liable for a loss which happens by the barratry of the master by smuggling. For the stipulation respecting the employment of the ship in a lawful trade must be applied to the trade in which the owners employ her.—*HAVELOCK v. HANCILL* (1789), 3 Term Rep. 277; 100 E. R. 573.

*Annotations*:—*Apprvd.* *Cory v. Burr* (1883), 8 App. Cas. 393. *Refd.* *Robinson Gold Mining Co. v. Alliance Insce.*, [1902] 2 K. B. 489.

**1788. Smuggling by crew—Negligence of owner.**—(1) If through the negligence of the owner of a ship insured, the mariners barratrously carry smuggled goods on board, whereby the ship is

seized as forfeited, the underwriters are not liable for the loss.

(2) If a ship is justly seized as forfeited for smuggling & afterwards restored, the underwriters are not liable for any damage happening to the ship by the perils of the sea, in the interval between the seizure & restoration.—*PIPON v. COPE* (1808), 1 Camp. 434, N. P.

*Annotations*:—As to (1) *Refd.* *Stuart v. Isemonger*, The *Diana* (1842), 4 Moo. P. C. C. 12; *Trinder, Anderson v. Thames & Mersey Marine Insce.*, *Trinder, Anderson v. North Queensland Insce.*, *Same v. Weston, Crocker*, [1898] 2 Q. B. 114.

**1789. Trading with enemy.**—*EARLE v. ROWCROFT*, No. 1769, *ante*.

**1790. Breach of blockade.**—A sentence condemning as enemy's property a cargo, which the master had barratrously carried into an enemy's blockaded port, although it may be conclusive evidence that the cargo was enemy's property at the time of capture & condemnation, does not disprove the allegation that the cargo was lost by the captain's barratrously carrying the cargo to places unknown, whereby the goods became liable to & were confiscated.—*GOLDSCHMIDT v. WHITMORE* (1811), 3 Taunt. 508; 128 E. R. 202.

**1791. Kidnapping native labourers—Knowledge of illegality.**—(1) Pacific Islanders Protection Act, 1872 (c. 19), having prohibited the carrying of Polynesian native labourers in ships without a licence, under penalty of forfeiture of the ship, a master who, without the authority of his owners, but with a knowledge of the prohibition, ships & carries native labourers, & so brings about the seizure & condemnation of his ship, commits an act of barratry in respect of which his owners may recover against their underwriters.

(2) Where a master ships & carries Polynesian native labourers without a licence, against the provisions of the above Act, proof that the master, although he may never have seen the Act itself, or the proclamation thereof in the Australasian Colonies, was informed before shipping the labourers that such an Act existed, & that it was illegal to carry them, is sufficient evidence to justify a jury in finding that he shipped & carried the labourers wilfully & with knowledge of the prohibition, so as to make his act barratrous.—*AUSTRALASIAN INSURANCE CO. v. JACKSON* (1875), 33 L. T. 286; 3 Asp. M. L. C. 26, P. C.

**1792. Restoration after forfeiture—Damage incurred between seizure & restoration.**—*PIPON v. COPE*, No. 1788, *ante*.

(d) *Ship run away with by Master or Crew.*

See Marine Insurance Act, 1906 (c. 41), sched. I., Rule 11.

**1793. Barratry of crew—In conjunction with prisoner of war.**—The underwriters on a policy of insurance are not discharged by an act on the part of the assured, which to a certain degree increases the risk, if it does not amount to culpable negligence. Therefore, where Spanish prisoners of war were received on board a ship, & allowed the free range of it, & might have been reasonably expected to conduct themselves peaceably during the voyage, but who joined in a mutiny, & assisted to run away with the ship:—*Held*: the underwriters were liable for a loss so happening.—*TOULMIN v. INGLIS* (1808), 1 Camp. 421, N. P.

**1794. S. P. TOULMIN v. ANDERSON** (1808), 1 Taunt. 227; 127 E. R. 820.

*Annotations*:—*Mentd.* *Gray v. Lloyd* (1811), 4 Taunt. 136; *Wilkinson v. Loudonsack* (1814), 3 M. & S. 117; *Hentig v. Staniforth* (1816), 5 M. & S. 122.

**1795.** ——— **Question for jury.**—A vessel with liberty to chase & capture prizes, has some



Spanish prisoners on board. By means, which did not appear, they break loose, rise upon, & imprison the crew, with the exception of one sailor, who is heard upon the deck in conversation with them. The captain & crew, with the exception of this sailor, are put on shore, & the Spaniards run away with the ship. Upon a loss alleged to be by barratry of the mariners, this is evidence to be left to the jury that such barratry was committed.—*HUCKS v. THORNTON* (1815), Holt, N. P. 30, N. P.

*Annotations*:—*Mentd.* *Gibson v. Small* (1853), 4 H. L. Cas. 353; *Thompson v. Hopper* (1856), 6 E. & B. 172.

1798. —.]—*BROWN v. SMITH*, No. 2216, *post*.

1797. — **Recapture.**]—*FALKNER v. RITCHIE*, No. 2217, *post*.

1798. — **Loss of cargo.**]—Where a ship & cargo was barratrously taken out of her course by the crew, & the ship & part of the cargo sold, & the remainder sent home by another vessel:—*Held*: this was a total loss of the cargo from the time of the committing of the act of barratry.—*DIXON v. REID* (1822), 5 B. & Ald. 597; 1 Dow. & Ry. K. B. 207; 106 E. R. 1309.

1799. **Barratry of master.**]—A count on a policy of insurance laying the loss by capture, is sustained by evidence, that the ship was captured by a privateer; although this happened from a collusion between the master of the ship & the commander of the privateer, & pltf. might have recovered under a count laying the loss by the barratry of the master.

To prove a warranty, that a ship insured was of a particular nation, it is *prima facie* evidence, that she carried the flag of that nation at times when she was free from all danger of capture, & that the captain addressed himself to the consul of that nation in a foreign port.—*ARCANGELO v. THOMPSON* (1811), 2 Camp. 620, N. P.

*Annotation*:—*Consd.* *Cory v. Burr* (1882), 9 Q. B. D. 463.

1800. —.]—The captain of a vessel, in the due course of his voyage, put into port for the purpose of repairing damage, & while the repairs were proceeding, was absent, & continued absent for a much longer time than was necessary to finish the repair; &, during his absence, procured forged papers. He afterwards returned to the vessel, & instead of proceeding on the voyage, carried the vessel to a foreign port:—*Held*: the act of barratry was committed during the absence of the captain, while the vessel was repairing.—*ROSCOW v. CORSON* (1819), 8 Taunt. 684; 129 E. R. 550.

1801. — **Part owner.**]—*JONES v. NICHOLSON*, No. 1810, *post*.

#### (e) Effect of Privity or Consent.

1802. **Privity of ship-owner.**]—*VALLEJO v. WHEELER*, No. 1767, *ante*.

1803. —.]—*LOCKYER v. OFFLEY*, No. 917, *ante*.

1804. —.]—Barratry can only be committed against the owner of the ship, & without his consent.—*NUTT v. BOURDIEU* (1786), 1 Term Rep. 323; 99 E. R. 1119.

*Annotations*:—*Refd.* *Earle v. Rowcroft* (1806), 8 East, 126; *Atkinson & Hewitt v. Great Western Insee.* (1872), 27 L. T. 103; *Samuel v. Dumas*, [1924] A. C. 431.

1805. —.]—Where the master of a vessel condemned for a breach of blockade swore he was bound for another destination:—*Held*: this did not so disaffirm his owner's privity & consent to the breach of blockade as to enable pltf. to recover as for a loss by barratry.—*EVERTH v. HANNAM* (1815), 6 Taunt. 375; 2 Marsh. 72; 128 E. R. 1080.

#### 1806. — **Ship fully laden—Right of freighters.**]

—If the owner of a vessel fully laden by the freighters collude with the captain to run her on shore:—*Held*: this amounts to barratry although by the terms of a charterparty entered into between such owner & the freighters the former was entitled to put goods on board during a previous part of the voyage.—*SOARES v. THORNTON* (1817), 7 Taunt. 627; 1 Moore, C. P. 373; 129 E. R. 250.

*Annotations*:—*Refd.* *Christie v. Lewis* (1821), 2 Brod. & Bing. 410; *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86; *Samuel v. Dumas, Graham Joint Stock Shipping Co. v. Merchants Marine Insee.* (No. 2), [1923] 1 K. B. 592.

1807. — **Scuttling—Overvaluation.**]—Where a vessel had been deliberately thrown away with the knowledge & consent of the owners, an action to recover on a marine insurance policy would not lie.—*VISSCHERIJ MAATSCHAPPIJ NIEUW ONDERNEMING v. SCOTTISH METROPOLITAN ASSURANCE CO., LTD.* (1922), 38 T. L. R. 458; 27 Com. Cas. 198, C. A.

1808. — — — **Without knowledge of freighter.**]—V. the owner of the ship, & D. shipped goods on a voyage from Hamburg to a port in Asiatic Russia. The adventure was expected to be enormously profitable. The whole cargo shipped was valued at £8,000, but the total insurances effected amounted to £20,000, the profits being variously estimated at from 80 per cent. to 125 per cent. To secure these profits, it was admitted that the goods had been overvalued to the extent of 25 per cent. to 30 per cent., & there were heavy insurances of commissions. Amongst the cargo was a shipment of spirits costing £1,000, but valued at £2,800. The ship went down in fine weather in mid-ocean without any known cause. D. brought an action to recover commission, profits on charter, & £1,800 of the £2,800, insured on spirits. It was pleaded that the loss was not the consequence of perils of the sea; that the concealment of the over insurance was concealment of a material fact, & that the goods were shipped with the fraudulent design of sinking the ship:—*Held*: (1) an insurance on profits must be taken to mean possible profits; (2) scuttling a ship with the knowledge of V., the shipowner, but without the knowledge of D., the freighter, was barratry, in respect of which D. might recover against the underwriters.—*IONIDES v. PENDER* (1872), 27 L. T. 244; 1 Asp. M. L. C. 432, N. P.; *previous proceedings*, 26 L. T. 970; *subsequent proceedings* (1874), L. R. 9 Q. B. 531.

1809. — — —.]—Pltfs., a Spanish Bank, made loans to A. & co., a firm of cloth manufacturers. A. & co. gave to pltfs. as security a quantity of cloth & a number of shares in a shipping co., known as the B. co., controlled by A. & co. As their loans to A. & co. were not repaid pltfs. took over all the remaining stocks of cloth belonging to A. & co., & assumed the general control of A. & co.'s business. Pltfs. then purported to sell a quantity of the cloth to purchasers in Rumania & dispatched it from B. for G. on a steamer, the C., belonging to the B. co. The C. sank, many miles out of her course, & became with the cargo, a total loss. Pltfs. had insured the cloth with defts. & brought this action to obtain payment; defts. refused to pay, on the ground that the steamer had been wilfully sunk with pltfs.' connivance:—*Held*: upon the evidence, the steamer had been scuttled with pltfs.' connivance, & the claim must fail.—*BANCO DE BARCELONA, ETC. v. UNION MARINE INSURANCE CO., LTD.* (1925), 69 Sol. Jo. 747; 30 Com. Cas. 316.

*Sect. 20.—Perils insured against: Sub-sect. 4, G. (e), & H. (a), (b) & (c); sub-sect. 5.]*

**1810. Privity of part owner.]**—The master of a ship, who is also part owner, may commit barratry of the goods. Where the master, a part owner, writers were held liable on the words "barratry of the master," under the words, "all other perils, losses, misfortunes."

Barratry is cheating, which might be done by a part owner, but not by a *part owner* (ATKINSON, B.).—JONES v. NICHOLSON (1854), 10 28; 2 C. L. R. 1236; 23 L. J. Ex. 330; 23 L. T. O. S. 146; 156 E. R. 342.

*Annotations:—*Consd. Westport Coal Co. v. McPhail, [1898] 2 Q. B. 130. Refd. Australasian Insce. v. Jackson (1875), 33 L. T. 286; Small v. United Kingdom Marine Mutual Insce. Assn., [1897] 2 Q. B. 42; Samuel v. Dumas, Graham Joint Stock Shipping Co. v. Merchants Marine Insce. (No. 2), [1923] 1 K. B. 592.

**1811. — After mortgage of share—Innocent mortgagee.]**—SMALL v. UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCN., No. 656, *ante*.

**1812. Privity of freighter—Innocent ship-owner.]**—BOUTFLOWER v. WILMER (1748), 2 Selwyn's N. P. 13th ed. p. 903.

*Annotation:—*Refd. Jones v. Nicholson (1854), 2 C. L. R. 1236.

**1813. Privity of charterer—Without knowledge of shipowner.]**—HOBBS v. HANNAM, No. 622, *ante*.

**1814. —.]**—MENTZ, DECKER & CO. v. MARITIME INSURANCE CO., No. 1052, *ante*.  
See SHIPPING.

#### H. "All Other Perils."

##### (a) In General.

See, now, Marine Insurance Act, 1906 (c. 41), sched. I., r. 12.

**1815. Definition—All losses of marine character similar to cases enumerated.]**—On a policy of insurance on goods in the common form, where the ship & goods were sunk at sea by another ship's firing upon her, mistaking her for an enemy:—*Held*: the insured was entitled to recover upon a special count, stating the particular circumstances; for this was within the general words of the policy, "All other perils, losses," etc. *Semble*: such a loss is not a peril of the sea.

The extent & meaning of the general words have not yet been the immediate subject of any judicial construction in our cts. of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, & may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material & operative words, & to have the due effect assigned to them in the construction of this instrument; & which will be done by allowing them to comprehend & cover other cases of marine damage of the like kind with those which are specially enumerated & occasioned by similar causes (LORD ELLENBOROUGH, C.J.).—CULLEN v. BUTLER (1816), 5 M. & S. 461; 105 E. R. 119; *previous proceedings* (1815), 4 Camp. 289, N. P.

*Annotations:—*Consd. Butler v. Wildman (1820), 3 B. & Ald. 398; West India & Panama Telegraph Co. v. Home & Colonial Marine Insce. (1880), 6 Q. B. D. 51; Thames & Mersey Marine Insce. v. Hamilton, Fraser (1887), 12 App. Cas. 484; Knutsford S.S. v. Tillmanns (1908), 99 L. T.

#### PART II. SECT. 20, SUB-SECT. 4.—H. (a).

**k. Barratry not included unless expressly mentioned.]**—The general terms in a policy of marine insurance, "all other perils, losses or misfortunes

that have or shall serve to the hurt, detriment or damage of the aforesaid vessel, or any part thereof," are not sufficient to entitle the insured to recover for a loss occasioned by the barratry of the master, where barratry

399. *Expld.* Thorman v. Dowgate S.S. Co., [1910] 1 K. B. 410. *Consd.* Samuel v. Dumas, [1924] A. C. 431. *Refd.* Jones v. Nicholson (1854), 10 Exch. 28; Davidson v. Burnand (1868), L. R. 4 C. P. 117; Antony v. Etna Insce. (1869), 21 L. T. 473; Hamilton, Fraser v. Pandorf (1887), 57 L. J. Q. B. 24; Wilson v. Xantho (Cargo Owners) (1887), 12 App. Cas. 503; Jackson v. Mumford (1902), 8 Com. Cas. 61; Stott (Baltic) Steamers v. Marten [1916] 1 A. C. 304; Leyland Shipping Co. v. Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873; Akt. Frank v. Namaqua Copper Co. (1920), 90 L. J. K. B. 36. *Mentd.* N. B. Ry. v. Budhill Coal & Sandstone Co., [1910] A. C. 116; Maghild S.S. v. McIntyre, [1920] 3 K. B. 321.

**1816. — All losses incident to ship as such.]**—THAMES & MERSEY MARINE INSURANCE CO. v. HAMILTON, FRASER & CO., No. 1575, *ante*.

##### (b) Perils ejusdem generis.

See Marine Insurance Act, 1906 (c. 41), sched. I., r. 12.

**1817. Jettison.]**—The captain of a Spanish ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw the same into the sea, & was immediately afterwards captured. In an action upon a policy of insurance upon Spanish property, subscribed by British underwriters who, at the time of effecting the policy, knew that the assured were Spaniards, & that Spain was at war with the State to whom the capturing vessel belonged:—*Held*: (1) this was a loss by jettison, that term, in a policy of insurance, signifying any throwing overboard of the cargo for a justifiable cause; (2) it was a loss by enemies; (3) if not by jettison, in the strictest sense, it was something of the same kind, & therefore came within the words "all other losses & misfortunes."—BUTLER v. WILDMAN (1820), 3 B. & Ald. 398; 106 E. R. 708.

*Annotations:—*As to (1) *Refd.* Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362. As to (2) *Distd.* Kacianoff v. China Traders Insce., [1914] 3 K. B. 1121. *Consd.* Becker, Gray v. London Assoc. Corp., [1918] A. C. 101. As to (3) *Consd.* Phillips v. Nairne (1847), 4 C. B. 343; Thames & Mersey Marine Insce. v. Hamilton, Fraser (1887), 12 App. Cas. 484; The Knight of St. Michael, [1898] P. 30. *Generally, Refd.* Australasian Insce. v. Jackson (1875), 33 L. T. 286.

**1818. Stranding.]**—Where, in an action on a policy of insurance on ship, in the usual form, for twelve months, at sea & in port, the loss averred was as follows; that the ship having arrived at the harbour of St. J., & discharged her cargo, it became necessary to place her, & she was accordingly placed, in a graving-dock, there to be repaired, & near to a certain wharf in the graving-dock; & that, whilst she was there, by the violence of the wind & weather she was thrown over on her side, whereby she struck the ground with great violence, & was bilged, etc.:—*Held*: (1) this was a loss within the general words of the policy, "all other perils, losses, & misfortunes, etc." for which the underwriters were liable; (2) the above facts, with the additional circumstance of there being two or three feet water in the graving-dock when the accident happened, did not amount to a loss by perils of the sea.—PHILLIPS v. BARBER (1821), 5 B. & Ald. 161; 106 E. R. 1151.

*Annotations:—*As to (1) *Appld.* Devaux v. J'Anson (1839), 5 Bing. N. C. 519. *Consd.* Thames & Mersey Marine Insce. v. Hamilton, Fraser (1887), 12 App. Cas. 484; Stott (Baltic) Steamers v. Marten, [1914] 3 K. B. 1262. As to (2) *Consd.* Thames & Mersey Marine Insce. v. Hamilton, Fraser (1887), 12 App. Cas. 484. *Refd.* Magnus v. Buttemer (1852), 11 C. B. 876. *Generally, Refd.* Davidson v. Burnand (1868), 38 L. J. C. P. 73.

**1819. Barratry.]**—JONES v. NICHOLSON, No. 1810, *ante*.

has not been expressly mentioned in the policy, as one of the risks insured against.—O'CONNOR v. MERCHANTS MARINE INSURANCE CO. (1889), 20 N. S. R. (8 R. & G.) 514; 9 C. L. T. 209; *affd.* 16 S. C. R. 331.—CAN.

**1820. Piracy.]—PALMER v. NAYLOR**, No. 1761, *ante*.

**1821. — Seizure by rebels of foreign power.]—BOLIVIA REPUBLIC v. INDEMNITY MUTUAL MARINE ASSURANCE CO., LTD.**, No. 1759, *ante*.

**1822. Inflow of water through open valve.]—DAVIDSON v. BURNAND**, No. 1538, *ante*.

**1823. Explosion of boiler.]—**The explosion of the boiler of a steamer is a peril insured against by a marine policy in the ordinary form. A steamer insured by a time policy became a wreck, by reason of the explosion of her boiler in ordinary weather under ordinary pressure of steam. The *causa sine qua non* of the explosion was that the boiler had become from external & internal corrosion by bilge water & "scale," too thin to resist the steam. The corrosion might have been discovered, & in some measure prevented, by ordinary care:—*Held*: though unseaworthiness was a *causa sine qua non* of the loss, the explosion was a proximate cause, & a peril insured against.—**WEST INDIA TELEGRAPH CO. v. HOME & COLONIAL INSURANCE CO.** (1880), 6 Q. B. D. 51; 50 L. J. Q. B. 41; 43 L. T. 420; 29 W. R. 92; 4 Asp. M. L. C. 341, C. A.

*Annotations*:—**Overd.** Thames & Mersey, Marine Insce. v. Hamilton, Fraser (1887), 12 App. Cas. 484. *Refd.* Ballantyne v. Mackinnon, [1896] 2 Q. B. 455; Knutsford S.S. v. Tellmanns (1908), 99 L. T. 399; Stott (Baltic) Steamers v. Marten, [1914] 3 K. B. 1262.

**1824. Bursting of air chamber.]—THAMES & MERSEY MARINE INSURANCE CO. v. HAMILTON, FRASER & CO.**, No. 1575, *ante*.

*See, also*, Sub-sect. 4, H. (c), *post*.

**1825. Fire—Cargo of coal becoming heated.]—THE KNIGHT OF ST. MICHAEL**, No. 1718, *ante*.

**1826. Loss of ship by scuttling.]—SAMUEL (P.) & CO. v. DUMAS**, No. 666, *ante*.

#### (c) *The Inchmaree Clause.*

**1827. Whether part of Lloyd's perils clause—Addition to Lloyd's perils clause.]—**Weakness in the design of a connecting rod of a marine engine is not a "latent defect" within the meaning of a policy of insurance against "latent defects in the machinery." A connecting rod is not *ejusdem generis* with a shaft. Their functions are different, inasmuch as they transmit power by strains which are of an essentially different character.

The Inchmaree clause in a policy of marine insurance cannot be treated as a part of the ordinary Lloyd's perils clause, nor can the general words in the Lloyd's perils clause be added to the Inchmaree clause, inasmuch as the latter clause is, as its opening words, "This insurance is also specially to cover loss of," etc., show, a special clause to cover certain particular risks which it proceeds to enumerate.

A time policy of marine insurance upon the hull & machinery of a vessel, a torpedo-boat destroyer, contained a clause "against fire in ships & on board on stocks, trials & all marine risks to completion & acceptance by the Admiralty." The policy also contained the ordinary Lloyd's perils clause covering damage or loss by fire, & expressly provided that there was leave to go on trial trips in ballast or otherwise:—*Held*: (1) the words "trials" denoted a risk insured against, & not merely, like the preceding expressions "in shops" & "on board on stocks," a period or state of things during which the vessel was to be insured against fire; (2) loss through breakage of a connecting rod under the stress of a trial was a misfortune covered by the word "trials."—**JACKSON v.**

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**MUMFORD** (1904), 52 W. R. 342; 20 T. L. R. 172; 9 Com. Cas. 114, C. A.

*Annotation*:—*Generally*, *Refd.* Stott (Baltic) Steamers v. Marten, [1914] 3 K. B. 1262.

**1828. —.]—**A steamer was insured by a time policy against perils "of the seas . . . & of all other perils, losses, & misfortunes." The policy also included the conditions of the Institute time clauses as attached. Clause 3 of the attached clauses provided as follows:—"In port & at sea, in docks & graving docks . . . in all places, & on all occasions, services & trades whatsoever & wheresoever. . . ." Clause 7 provided "This insurance also specially to cover . . . loss of or damage to hull or machinery . . . through any latent defect in the machinery or hull." The steamer while lying in dock was taking on board a boiler weighing 30 tons from a floating crane. The boiler as it descended caught upon the coamings of the hatch. This caused the strain upon the chain to be lessened & the floating structure upon which the crane was mounted listed away from the steamer by the operation of a counter-balance, the boiler came free with a jerk, & the pin of the shackle attached to the rope by which the boiler was being lifted broke, & the boiler fell into the hold & damaged the ship:—*Held*: the loss was not covered by the general words in the body of the policy, as it was not due to a peril, loss, or misfortune of a marine character, or of a character incident to a ship as such; nor by clause 3 of the attached clauses, as that clause could not be read as enlarging the risks covered by the policy; nor by clause 7 of the attached clauses as that clause could not be read into the ordinary Lloyd's perils clause in the policy so as to make the general words in that clause applicable to clause 7.—**STOTT (BAL TIC) STEAMERS, LTD. v. MARTEN**, [1916] 1 A. C. 304; 85 L. J. K. B. 97; 114 L. T. 91; 32 T. L. R. 85; 60 Sol. Jo. 57; 13 Asp. M. L. C. 200; 21 Com. Cas. 144, H. L.

**1829. Latent defect in machinery.]—**A policy of insurance for one year from May 18, 1902, upon a vessel while in port, provided: "This insurance also specially to cover loss of &/or damage to hull or machinery . . . through explosions, bursting of boilers, breaking of shafts, or through any latent defect in the machinery or hull." While the vessel was in port in 1902 during the currency of the policy the shaft was drawn, & a fracture was discovered which caused the condemnation of the shaft. The shaft had previously been examined in 1900, when no defect was discovered. Between 1900 & 1902 the vessel had been on several voyages. The fracture discovered in 1902 was the direct result of an imperfect weld in 1891 which left a latent defect:—*Held*: the assured not having proved that the defect first became patent while the vessel was in port during the currency of the policy, they were not entitled to recover from the underwriters the cost of replacing the defective shaft.—**OCEANIC S.S. CO. v. FABER** (1907), 97 L. T. 466; 23 T. L. R. 673; 10 Asp. M. L. C. 515; 13 Com. Cas. 28, C. A.

*Annotation*:—*Folld.* Hutchins v. Royal Exchange Assce. Corp., [1911] 2 K. B. 398.

**1830. Latent defect in hull.]—HUTCHINS BROTHERS v. ROYAL EXCHANGE ASSURANCE CORPN.**, No. 791, *ante*.

#### SUB-SECT. 5.—"ALL RISKS."

**1831. Scope of clause—Addition to ordinary perils.]—**By a policy of insurance a fox terrier dog which had taken several prizes was insured from the Mersey to Bombay, & thence by rail to



**Sect. 20.—Perils insured against: Sub-sects. 5 & 6, A. & B.]**

Lahore. The policy was i. . . . .  
Lloyd's policy, with the addition of the following written clause—"This insurance is against all risks, including mortality from any cause, jettison, & washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival." During the transit, the dog was injured, & in consequence of the injury was unable upon arrival at Lahore to use one of its legs, being, therefore, only capable of locomotion upon three legs:—*Held*: (1) the risk of the injury was covered by the policy, inasmuch as the insurance against "all risks" was an addition to the ordinary perils; (2) the words "walking at Lahore, Punjab, to be deemed a safe arrival" did not merely qualify the risk of mortality, but had reference also to the other risks insured against, so that if the dog walked at Lahore within the meaning of the policy no claim under it could be made; (3) "walking" at Lahore meant that the dog must be capable of locomotion in the usual way, upon four legs, & as it was unable to use one leg, the insurers were liable under the policy.—*JACOB v. GAVILLER* (1902), 87 L. T. 26; 50 W. R. 428; 18 T. L. R. 402; 7 Com. Cas. 116.

*Annotations*:—As to (1) *Refd.* *Century Bank of New York City v. Mountain* (1913), 30 T. L. R. 166; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41. *Generally, Refd.* *Schloss v. Stevens*, [1906] 2 K. B. 665.

**1832. — All accidental risks whatsoever.]—**

(1) By a policy of insurance in the printed form of an ordinary Lloyd's policy, with the addition of the following clauses in type or writing, goods were insured at & from "on board the import vessel at Savanilla &/or Cartagena to any place or places in the interior of the Republic of Colombia with liberty to proceed to any place or places in the interior irrespective of what may be stated in the invoices &/or elsewhere. Including all risks of robbery with or without violence, all risks of damage by insects & all clauses as attached." The attached clauses contained (*inter alia*) the following provisions: "Including . . . all risks by land & by water" & "Including risk from the act of God, the King's enemies, fire & all other dangers & accidents of the seas, rivers & navigation, & errors & default thereof"; also "Including all risks excepted by the negligence clause which may be inserted in or attached to charter-party &/or bill of lading."

During the transit between Savanilla, a port in the Republic of Colombia, & Medellin, a town in the interior of the Republic, fourteen bales of the goods were damaged; twelve of them by an abnormal delay in the transit which necessarily involved exposure of the goods to damp, one by accidental wetting, & another by accidental wetting & injury by worms:—*Held*: the words "all risks by land & by water" must be read literally as meaning all risks whatsoever. The words were intended to cover all losses by any accidental cause of any kind, & as the damage to the goods was a loss within that category the underwriters were liable for it.

(2) Damage by insects would not in my opinion, be covered by the ordinary printed risks in a Lloyd's policy (*WALTON, J.*).—*SCHLOSS BROTHERS v. STEVENS*, [1906] 2 K. B. 665; 75 L. J. K. B. 927; 96 L. T. 205; 22 T. L. R. 774; 10 Asp. M. L. C. 331; 11 Com. Cas. 270, C. A.

*Annotations*:—As to (1) *Consd.* *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41. *Refd.* *Vincentelli v. Rowlett* (1911), 105 L. T. 411; *Century Bank of New York City v. Mountain* (1913), 30 T. L. R. 166. *Generally, Refd.* *Tannenbaum v. Heath*, [1908] 1 K. B. 1032.

**1833. — All lawful risks.] — BRITISH & FOREIGN MARINE INSURANCE CO. v. GAUNT, No. 527, ante.**

**1834. Confiscation by government of assured.]—**

A neutral insuring against all risks until safely warehoused in the warehouse of the consignee, an adventure in furtherance of the objects of British commerce, is protected by the policy against confiscation by the act of his own govt. under the Berlin & Milan decrees.—*BAZETT v. MEYER* (1814), 5 Taunt. 824; 128 E. R. 917.

*Annotation*:—*Refd.* *Aubert v. Gray* (1862), 32 L. J. Q. B. 50.

**1835. Damage during land transit.]—SCHLOSS BROTHERS v. STEVENS, No. 1832, ante.**

**SUB-SECT. 6.—WAR RISKS.**

**A. Definitions.**

**1836. "The war region."]**—By a supplemental agreement to a charterparty, if the vessel was ordered by the charterers to trade "in the war region" war risks insurance premiums paid by the owners were to be refunded to them by the charterers.

In Oct. 1916, while the vessel was trading in American waters, a German submarine destroyed in a few days six vessels & then was not seen again, within the area approximate to that in which the vessel was trading, & would in future be trading by the orders of the charterers. The owners insured the ship against war risks, & sued for the premiums so paid:—*Held*: the words "in the war region" indicated the area where from time to time war affected the risk which vessels would run. Although these words were not capable of a fixed geographical meaning, nevertheless the circumstances were such that it was reasonable to hold that at the time that the premiums were paid the ship was trading in the war region & plffs. were therefore entitled to recover.—*DOMINION COAL CO., LTD. v. MASKINONGE S.S. CO., LTD.* (1918), 87 L. J. K. B. 459; 118 L. T. 115; 34 T. L. R. 212; 14 Asp. M. L. C. 237, H. L.

**1837. "Warlike operations"—How determined.]**—*HARRISONS, LTD. v. SHIPPING CONTROLLER*, No. 1861, *post*.

**1838. — Transport of war materials.]**—The transport of war material from one war base to another is a "warlike operation" within the meaning of that expression when contained in a policy of marine insurance.—*COMMONWEALTH SHIPPING REPRESENTATIVE v. PENINSULAR & ORIENTAL BRANCH SERVICE*, [1923] A. C. 191; 92 L. J. K. B. 142; 39 T. L. R. 133; 67 Sol. Jo. 182; 28 Com. Cas. 296, H. L.; *affg.* *S. C. sub nom. Re PENINSULAR & ORIENTAL BRANCH SERVICE & COMMONWEALTH SHIPPING REPRESENTATIVE*, [1922] 1 K. B. 706, C. A.; *sub nom. PENINSULAR & ORIENTAL BRANCH SERVICE v. COMMONWEALTH SHIPPING REPRESENTATIVE* (1921), 38 T. L. R. 93.

*Annotations*:—*Folld.* *Atlantic Transport Co. v. Transports Director* (1921), 38 T. L. R. 160. *Refd.* *Charente S.S. Co. v. Transports Director* (1921), 38 T. L. R. 148; *A.-G. v. Adelaide S.S. Co.*, [1923] A. C. 292.

**1839. — Damage by agent of enemy government.]**—A policy of reinsurance upon goods per named steamship from Bahia to New York contained the usual f.c. & s. clause, the material words of which were "Warranted free from all consequences of hostilities or warlike operations whether before or after the declaration of war":—*Held*: the word "hostilities," as used in the clause, meant hostile acts, by persons acting as the agents of

sovereign powers, or of such organised & considerable forces as were entitled to the name of rebels, as contrasted with mobs or rioters, & did not cover the act of a mere private individual acting entirely on his own initiative, however hostile his action might be; (2) the word "agent" in this connection was not limited to the strictness with which the words agent & principal are used in business transactions.

A person is acting as the agent of his govt. within the meaning of the clause, when, knowing that the settled & concerted policy of that govt. is to avail itself of the efforts of all its subjects, whether naval, military, or civilian, to destroy enemy life & property as occasion offers, he uses such opportunity as presents itself in furtherance of that policy.—ATLANTIC MUTUAL INSURANCE Co. v. KING, [1919] 1 K. B. 307; 88 L. J. K. B. 1001; 120 L. T. 191; 35 T. L. R. 164; 14 Asp. M. L. C. 430; 24 Com. Cas. 107.

**1840.** — **Sailing without lights.**—ATLANTIC TRANSPORT CO., LTD. v. TRANSPORTS DIRECTOR (1921), 38 T. L. R. 160.

*Annotation*:—**Refd.** Adelaide S.S. Co. v. R., [1923] 1 K. B. 59.

#### *B. Presumption in Case of Missing Vessel.*

Ordinary presumption in case of missing vessels, see Sect. 16, sub-sect. 1, C., *ante*.

**1841. Ship missing in war region—Ordinary presumption displaced by evidence.**—The steamship *Oriole* was insured by deft. co. against ordinary marine perils, war risks being excluded, & she was insured by deft. J. against war risks. She left London for Havre in a seaworthy condition on Jan. 29, 1915, & was last seen on Jan. 30, off Dungeness. Two other steamers were torpedoed off Havre by a German submarine on Jan. 30:—**Held**: on the evidence the *Oriole* had been lost by a war risk, & therefore deft. J. was liable on his policy, but deft. co. were not liable on their policy.—GENERAL STEAM NAVIGATION CO., LTD. v. COMMERCIAL UNION ASSURANCE CO., LTD., SAME v. JANSON (1915), 31 T. L. R. 630.

**1842.** — — —.]—By a policy of insurance a vessel was insured against all perils of the sea for twelve months. Loss in consequence of hostilities & warlike operations was excepted. During the currency of the policy, & during the continuance of a state of war between England & Germany, the vessel in fair weather commenced a voyage from Hull to the Tyne. After leaving the mouth of the Humber she was never seen again. In an action by the assured upon the policy in respect of her total loss:—**Held**: in these circumstances, the vessel must be presumed to have been lost by being torpedoed or by striking a floating mine, & not by ordinary perils of the sea, & deft. was accordingly entitled to judgment.—MACBETH & CO. v. KING (1916), 86 L. J. K. B. 1004; 115 L. T. 221; 32 T. L. R. 581; 13 Asp. M. L. C. 442.

*Annotation*:—**Refd.** Compania Maritima of Barcelona v. Wishart (1918), 87 L. J. K. B. 1027.

**1843.** — — —.]—BRITISH & BURMESE STEAM NAVIGATION CO., LTD. v. LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCN., LTD. & BRITISH & FOREIGN MARINE INSURANCE CO., LTD., No. 1633, *ante*.

.]—Pltfs., who were the owners of a steamship, insured the hull & machinery

against war risks, defts. being the underwriters. Pltfs. also insured her against marine perils with other underwriters. On Jan. 7, 1917, during the currency of the policies, the vessel, while steaming up the east coast of England with a cargo of copper pyrites, passed Great Yarmouth & nothing was heard of her afterwards. In an action on the policies against war risks the defence was that the vessel was lost by perils of the sea:—**Held**: on the evidence, in all probability the vessel struck a mine or was torpedoed, & pltfs. were entitled to recover.—EUTERPE S.S. Co., LTD. v. NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCN., LTD. (1917), 33 T. L. R. 540.

**1845.** — — —.]—COMPANIA MARITIMA OF BARCELONA v. WISHART, No. 1635, *ante*.

**1846.** — — —.]—A well-found sailing ship laden with timber left Gulf Port in Mar. 1917, for Fleetwood, but never arrived. For a considerable part of her voyage she would have had to pass through an area off the Irish coast where German submarines were operating freely. From the time when the ship started to the time when she might have reached the area infested by submarines there was bad weather, but not such as would render it probable that the ship had foundered owing to bad weather, though there was just a possibility that this might have occurred. Other vessels with a similar starting point & a similar destination at the same time had been destroyed by submarines in the area in question. The owners had insured against marine perils, excluding war perils, & the War Risks Insurance Office had issued a certificate of insurance against war perils. The owners brought an action against the marine risks underwriters, & presented against the Crown a petition of right in which they alleged that the loss was due to a war peril. The two cases were heard together, & the judge held that the owners had failed to prove a loss by war risks, & that therefore the loss must be attributed to perils of the sea, & he gave judgment against the marine risks underwriters & dismissed the petition of right:—**Held**: as on the facts there was only a bare possibility that the vessel had not reached the area infested by submarines the proper conclusion was that the loss was due to a war risk, & judgment should be entered for the marine risks underwriters in the action & for the suppliants on the petition of right.—MUNRO, BRICE & CO. v. MARTEN, MUNRO, BRICE & CO. v. R., [1920] 3 K. B. 94; 89 L. J. K. B. 1009; 123 L. T. 562; 36 T. L. R. 241; 15 Asp. M. L. C. 45; 25 Com. Cas. 112, C. A.

*Annotations*:—**Refd.** Zachariessen v. Importers & Exporters Marine Insee. (1924), 40 T. L. R. 297. **Mentd.** Gibbs v. Gibbs & Heathcote (1920), 123 L. T. 206; Smith v. G. W. Ry., [1921] 2 K. B. 237; Falcon v. Famous Players Film Co. (1925), 42 T. L. R. 91.

**1847.** — — — "Mine risks only, including missing."—A marine insurance policy, issued in 1920, was "against mine risks only as per Norwegian conditions, including missing," for a voyage from Newport News to Gothenburg. The vessel left Newport News for Gothenburg on Oct. 1, 1920, & was never heard of again. In an action on the policy:—**Held**: the underwriters had in effect agreed that, if the ship were missing, & if nothing else were known, it should be presumed that the loss was attributable to a

#### PART II. SECT. 20, SUB-SECT. 6.—B.

**1. Ship missing in war region.**—A vessel was repairing in a foreign port when last heard of, & under circumstances which gave room to believe that she would not sail till a remittance

to pay for the repairs was made from this country. A declaration of war was issued by the foreign power; & no accounts arriving of the vessel, nor any letters from the master or any of the marines, the declaration of war, & the acknowledged fact that

other vessels had been seized, as being the best proof that the nature of the case admitted of:—**Held**: sufficient to subject the underwriters.—FERRIER v. SANDEMAN (1809), 15 Fac. Coll. 373.—SCOT.



**Sect. 20.—Perils insured against: Sub-sect. 6, B. C. & D.]**

mine, & therefore plffs. were entitled to recover.—**ZACHARIESSEN v. IMPORTERS & EXPORTERS MARINE INSURANCE CO.** (1924), 40 T. L. R. 297; 29 Com. Cas. 202, C. A.

**C. Collision.**

**1848. Collision result of warlike operation—Ramming supposed enemy submarine.]**—A steamer which was insured by a marine policy containing the f.c. & s. clause, & by two policies covering risks excluded by the f.c. & s. clause, met a semi-submerged object which the captain took to be a German submarine. He rammed the object in order to destroy it, & his ship was injured & sank. In an action against the marine risks underwriters & against the war risks underwriters:—**Held**: whether the object was a German submarine or not the captain honestly believing it to be a German submarine took the reasonable course, & his act was a warlike operation or a consequence of hostilities & the action succeeded against the war risks underwriters & failed against the marine risks underwriters.—**HENRY & MACGREGOR, LTD. v. MARTEN & NORTH OF ENGLAND PROTECTION & INDEMNITY ASSOCN.** (1918), 34 T. L. R. 504.

**Annotation**:—**Refd.** *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Asscn.*, [1921] 1 A. C. 99.

**1849. — Steaming full speed without lights—By Admiralty orders.]**—In Mar. 1915, the steamship *St. Oswald* was requisitioned by the Director of Transports & taken into the service of the Admiralty on the terms of a charterparty which provided that "the Admiralty shall not be liable if the vessel be lost . . . in consequence of . . . any . . . cause arising as a sea risk," but the Admiralty took the risk of "all consequences of hostilities or warlike operations." On Dec. 31, 1915, in pursuance of instructions from the Admiralty, the ship was steaming at full speed on a very dark night with her lights obscured, being engaged in the operation of evacuating troops from Gallipoli, when she sighted on her star-board bow a French battleship which was also steaming without lights, but almost immediately disclosed them. The *St. Oswald* ported her helm & disclosed her port light, & the battleship almost simultaneously star-boarded her helm. The ships were thus brought on to courses forming intersecting circles, & a collision occurred which caused the *St. Oswald* to sink & become a total loss. It was admitted that neither vessel was to blame:—**Held**: the loss of the ship was a "consequence of warlike operations" within the meaning of the charterparty, & the Admiralty were liable.—**BRITISH & FOREIGN S.S. Co. v. R.**, [1918] 2 K. B. 879; 87 L. J. K. B. 910; 118 L. T. 640; 34 T. L. R. 546; 62 Sol. Jo. 701; 14 Asp. M. L. C. 270, C. A.

**Annotations**:—**Distd.** *Larchgrove S.S. v. R.* (1919), 36 T. L. R. 108; *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Asscn.*, [1921] 1 A. C. 99; *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122. **Consd.** *A.-G. v. Ard Coasters, Liverpool & London War Risks Insee. Asscn. v. S.S. Richard De Larrinaga Marine Underwriters*, [1921] 2 A. C. 141; *A.-G. v. Adelaide S.S. Co.*, [1923] A. C. 292. **Refd.** *Atlantic Transport Co. v. Transports Director* (1921), 38 T. L. R. 160; *Charente S.S. Co. v. Transports Director* (1921), 38 T. L. R. 148; *Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service*, [1923] A. C. 191.

**1850. — — — — —.]**—In 1916 the steamship *W.* was taken over by the Admlty. for use as a

hospital ship upon the terms of charterparty T.99, the Admlty. accepting liability for all war risks, including "all consequences of hostilities or warlike operations," while the owners undertook the maritime risks. The *W.* was used as an ambulance transport, & was armed with a gun, & had on board a few Royal Navy men to work it. Her master was instructed that if he were attacked by a submarine & saw an opportunity of ramming it, he should do so. While carrying wounded men with doctors & nurses from Havre to Southampton, & being navigated without lights on a dark & hazy night, & proceeding at full speed by the orders of the Admiralty, the *W.* collided with another ship & was damaged. The *W.* was found to be alone to blame for the collision, which was due to the negligence of those in charge of her:—**Held**: (1) the *W.* was engaged in a warlike operation at the time of the collision; (2) the dominant & effective cause of the loss was the operation in which the *W.* was engaged &, whether it was skilfully or unskilfully conducted, the liability therefor attached to the Crown under the terms of the charterparty.—**A.-G. v. ADELAIDE S.S. Co.**, [1923] A. C. 292; 92 L. J. K. B. 537; 39 T. L. R. 333; 67 Sol. Jo. 455; 28 Com. Cas. 315; *sub nom.* *ADELAIDE S.S. Co. v. R.*, 129 L. T. 161; 16 Asp. M. L. C. 178, H. L.; *subsequent proceedings, sub nom.* *ADELAIDE S.S. Co. v. R.* (1924), 93 L. J. K. B. 871, C. A.

**1851. — Collision with destroyer on patrol duty—Both ships without lights.]**—A merchant ship was insured by one set of underwriters against sea risks & by another set against war risks, including "all consequences of hostilities or warlike operations." On the night of July 23, 1917, she was sailing in convoy from the United States to England, & at the same time a British war ship was proceeding on a voyage to pick up another convoy. The war ship ran into the merchant ship & damaged her. The night was dark & both vessels were sailing without lights. Neither ship was to blame for the collision:—**Held**: at the time of the collision the war ship was engaged in a warlike operation & the collision was directly caused by that operation; consequently the war risks underwriters were liable for the damage.—**A.-G. v. ARD COASTERS, LTD., LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCN., LTD. v. S.S. RICHARD DE LARRINAGA MARINE UNDERWRITERS**, [1921] 2 A. C. 141; 91 L. J. K. B. 31; 125 L. T. 548; 37 T. L. R. 692; 15 Asp. M. L. C. 353; 26 Com. Cas. 352, H. L.; *affg.* *S. C. sub nom. RICHARD DE LARRINAGA (OWNERS) v. ADMIRALTY COMRS.*, [1920] 3 K. B. 65, C. A.; *affg.* *S. C. sub nom. ARD COASTERS, LTD. v. R.* (1919), 35 T. L. R. 604; (1920), 36 T. L. R. 555, C. A.

**Annotations**:—**Distd.** *Larchgrove S.S. v. R.* (1919), 36 T. L. R. 108. **Consd.** *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Asscn.*, [1921] 1 A. C. 99; *Adelaide S.S. Co. v. R.*, [1923] 1 K. B. 59. **Refd.** *Charente S.S. Co. v. Transports Director* (1921), 38 T. L. R. 148; *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122; *Admiralty Comrs. v. Brynawel S.S. Co.* (1923), 40 T. L. R. 78; *Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service* [1923] A. C. 191.

**1852. — Collision between vessels in convoy.]**—A vessel sailing in convoy during the war was sunk by collision caused by confusion in which the convoyed vessels were involved through the leading vessel being blown up. Neither of the colliding vessels was guilty of negligence:—**Held**: as the blowing up of the leading vessel was a warlike operation, & as the loss of the sunk vessel followed as the direct & natural result, the loss was



consequent on a warlike operation within the f.c. & s. clause, & the war risk underwriters were liable.—*THE CAROLINE* (1921), 37 T. L. R. 617.

**1853. Collision result of negligence.**—A vessel belonging to suppliants was requisitioned by the Admiralty on the terms of the charterparty known as T.99, under which the owners took marine risks & the Crown took war risks. The vessel, having loaded a cargo of iron ore & having joined a convoy, came into collision at night with an American vessel, which was a cargo ship, chartered to the United States navy, manned by naval ratings, & carrying munitions for the American Army in France. Both vessels were by govt. orders navigating without lights. Suppliants' vessel was lost. There was negligence on the part of the American vessel, & no negligence on the part of suppliants' vessel. On a petition of right, which alleged that the loss was due to a war risk:—*Held*: the negligence on the part of those navigating the American vessel was negligence in their capacity as ordinary seamen & not in their capacity as members of the armed forces of the United States, & therefore the loss was due to a marine risk & the petition must be dismissed.—*LARCHGROVE (OWNERS) v. R.* (1919), 36 T. L. R. 108.

*Annotations*:—**Consd.** *A.-G. v. Adelaide S.S. Co.*, [1923] A. C. 292. **Refd.** *Britain S.S. Co. v. R.*, *Green v. British India Steam Navigation Co.*, *British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Assocn.*, [1921] 1 A. C. 99; *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122.

#### D. Stranding.

**1854. Whether war operation proximate cause—Extinction of lights.**—Goods consisting of six thousand five hundred bags of coffee, valued at £25,000, on board the ship *Linwood*, were insured on a voyage from Rio de Janeiro to New Orleans, & thence to New York; the policy containing the following warranty, "Warranted free from capture, seizure, & detention, & all the consequences thereof or of any attempt thereat, & free from all consequences of hostilities, riots, or commotions." At the time of the ship's departure from Rio, the Northern States of America, called "federals" were at war with the Southern States, called "confederates." The ship was a federal ship; the cargo the property of neutrals. On his voyage from New Orleans to New York, the master of the *Linwood*, being out of his reckoning, & supposing that he had passed Cape Hatteras, a dangerous headland on the coast of North Carolina, instead of keeping his course N. N. E., changed it to W., & consequently went on shore about ten miles south of the Cape, without any possibility of getting off again. It appeared that until recently a light had always been kept burning at Cape Hatteras, which in ordinary weather was visible at a distance of from 20 to 30 miles; but that, North Carolina being at this time in the possession of the confederates, they had extinguished the light for the purpose of harassing the federal shipping. The *Linwood* being thus on shore a short distance from the land, the confederate officers came off to her & took the captain & his papers on shore, & detained him & ultimately the rest of the crew on shore as prisoners. The wreck took place on July 17. On July 18, the weather was rough, & nothing could be done. But, on July 19, certain persons called "wreckers," or "salvors," officers appointed by the federal government for that purpose, came down & got one hundred & fifty bags of coffee on shore, apparently, undamaged; & it was proved that they might have got on shore one thousand more, but for the interference of the

confederate troops, who wanted to obtain the cargo for themselves. On July 20, the weather becoming again boisterous, the ship broke up, & all the cargo on board was lost:—*Held*: under these circumstances, the insurers were liable as for a partial loss in respect of the coffee which remained on board incapable of being saved, the proximate cause of the loss being a peril of the sea, & not the hostile act of the confederate troops in extinguishing the light; but that, as to so much of the cargo as was actually saved, & as to that which would have been saved but for the interference of the troops, this was a loss by a "consequence of hostilities," within the warranty, & for this the insurers were not liable.

The maxim *causa proxima non remota spectatur* is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it (*ERLE, C.J.*).—*IONIDES v. UNIVERSAL MARINE INSURANCE CO.* (1863), 14 C. B. N. S. 259; 2 New Rep. 123; 32 L. J. C. P. 170; 8 L. T. 705; 10 Jur. N. S. 18; 11 W. R. 858; 1 Mar. L. C. 353; 143 E. R. 445.

*Annotations*:—**Distd.** *British & Foreign S.S. Co. v. R.*, [1918] 2 K. B. 879. **Apprvd.** *British S.S. Co. v. R.*, *Green v. British India Steam Navigation Co.*, *British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Assocn.*, [1921] 1 A. C. 99. **Consd.** *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122; *A.-G. v. Adelaide S.S. Co.*, [1923] A. C. 292. **Refd.** *Marsden v. City & County Assee.* (1865), L. R. 1 C. P. 232; *Dent v. Smith* (1869), L. R. 4 Q. B. 414; *Taylor v. Dunbar* (1869), L. R. 4 C. P. 206; *Cory v. Burr* (1882), 47 L. T. 181; *Inman S.S. Co. v. Bischoff* (1882), 7 App. Cas. 670; *Andersen v. Marten*, [1908] A. C. 334; *Coxe v. Employers' Liability Assee. Corpn.*, [1916] 2 K. B. 629; *Leyland Shipping Co. v. Norwich Union Fire Insee. Soc.*, [1918] A. C. 350; *Munro, Brice v. War Risks Assocn.*, [1918] 2 K. B. 78; *Wilson Shipping Co. v. British & Foreign Insee.*, [1920] 2 K. B. 25; *Adelaide S.S. Co. v. R.* (1924), 93 L. J. K. B. 871. **Mentd.** *Lloyd v. General Iron Screw Collier Co.* (1864), 3 H. & C. 284; *Lidgett v. Secretan* (1870), L. R. 5 C. P. 190.

**1855.** ———.]—Pltfs. insured their vessel the *A.*, with deft. & other underwriters against "war risks, French conditions, including extinction of lights," etc. A week later, while on a voyage from Rouen to the Bristol Channel, the *A.* run on the rocks of the Cape de la Hogue, the light on which owing to the war had been extinguished. The master of the *A.* admitted that he had not attempted to steer & would not have steered by the light, but said that if it had been burning he would have seen it & thus realised that he had left his course. In an action by pltfs. on the policy:—*Held*: as it was impossible to conclude that the presence of the light would have certainly led to the saving of the vessel, the loss could not be said to result from the "extinction of lights," & therefore, deft. was not liable under the policy.—*LE QUELLEC ET FILS v. THOMSON* (1916), 86 L. J. K. B. 712; 115 L. T. 224; 13 Asp. M. L. C. 445.

**1856.** ———.]—*FRANCE (WILLIAM), FENWICK & CO., LTD. v. NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCN.*, No. 1628, *ante*.

**1857.** ———.]—The Admty. requisitioned a ship on condition that they would pay for the loss of the ship if it was excluded from an ordinary marine policy with the f.c. & s. clause. The ship was torpedoed & was towed some distance but ultimately was driven ashore by a storm & became a total wreck:—*Held*: as the storm would not have caused the loss of the ship if she had not been torpedoed, the loss was excluded from a marine policy & fell on the Admty.—*LOBITOS OIL FIELDS, LTD. v. ADMIRALTY COMRS.* (1918), 34 T. L. R. 466, D. C.

**1858.** ———.]—A ship was insured against among other things perils of the sea by a time

*Sect. 20.—Perils insured against: Sub-sect. 6, D.; sub-sect. 7. Sect. 21: Sub-sects. 1 & 2, A.]*

policy containing a warranty against all consequences of hostilities. The ship, while on a voyage from South America to Havre, was torpedoed by a German submarine twenty-five miles from Havre. The torpedo struck her well forward & she began to settle down by the head, but with the aid of tugs she reached Harve on the evening of the same day, when she was taken alongside the quay in the outer harbour. A gale sprung up, causing her to bump against the quay, & the harbour authorities fearing that she would sink & block the quay, ordered her to a berth inside the outer breakwater, where she was moored. She remained there for two days, taking the ground at each ebb tide, but floating again with the flood, & finally her bulkheads gave way, & she sank & became a total loss. The shipowners brought an action on the policy claiming to recover as for a loss by perils of the sea:—*Held*: the grounding was not a *novus casus interveniens*, & the torpedoing was the proximate cause of the loss; & consequently the underwriters were protected by the warranty against all consequences of hostilities.—*LEYLAND SHIPPING CO. v. NORWICH UNION FIRE INSURANCE SOCIETY*, [1918] A. C. 350; 87 L. J. K. B. 395; 118 L. T. 120; 34 T. L. R. 221; 62 Sol. Jo. 307; 14 Asp. M. L. C. 258, H. L.; *affg.*, [1917] 1 K. B. 873, C. A.

*Annotations:—Consd.* France, Fenwick v. North of England Protecting & Indemnity Asscn., [1917] 2 K. B. 522; *Stoomvaart M. Sophie H. v. Merchants' Marine Insee.* (1918), 35 T. L. R. 25; *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122; *Samuel v. Dumas*, [1924] A. C. 431. *Refd.* Becker, Gray v. London Assee. Corp., [1918] A. C. 101; *British & Foreign S.S. Co. v. R.*, [1918] 2 K. B. 879; *British S.S. Co. v. R.*, *British India Steam Navigation Co. v. Green & Liverpool & London War Risks Insee.*, [1919] 2 K. B. 670; *Mountain v. Whittle*, [1921] 1 A. C. 615; *Adelaide S.S. Co. v. R.*, [1923] 1 K. B. 59; *Compañia Martiartu v. Royal Exchange Assee.*, [1923] 1 K. B. 650; *Royal Exchange Assee. v. Kingsley Navigation Co.*, [1923] A. C. 235; *The Christel Vinnen*, [1924] P. 208. *Mentd.* Curtis v. Mathews, [1918] 2 K. B. 825; *Re Hookey Hill Rubber & Chemical Co. & Royal Insee.*, [1920] 1 K. B. 257; *Wilson v. United Counties Bank*, [1920] A. C. 102.

**1859. — Deviation to avoid mine—Vessel out of course.]—**Pltfs.' vessel was insured by a marine policy & also by a war risk policy, & when she was on a voyage during the currency of the policies, & when owing to a mistake in the navigation she was out of her course, suddenly a floating mine was seen on the port bow, and to avoid it the helm was put hard a-port, with the result that the vessel ran on a sandbank and became a total loss:—*Held*: as the true reason for the grounding of the vessel was that at the time the captain did not know where he was, the loss fell on the marine risk underwriters & not on the war risk underwriters.—*MOOR LINE, LTD. v. KING* (1920), 36 T. L. R. 799.

**1860. —.]—**By a time policy a steamship was insured against perils of the sea & stranding, & the policy contained the usual f.c. & s. clause. By another time policy the steamship was insured against the risks excluded by the f.c. & s. clause including "all consequences of hostilities or warlike operations by or against the King's enemies." During the currency of these policies the steamship, one of four merchant ships carrying cargoes of cotton, while proceeding under convoy, ran upon a reef of rocks & became a total wreck. The vessels were zigzagging & were upon an unaccustomed course, the night was dark, & the currents were variable & of unknown direction & force. The master was under the orders of the naval officer in charge of the convoy, & was not responsible for the course taken. There was no negligence

on the part of either the master or the naval officer. The vicinity was infested by submarines, but no submarine was known or suspected to be present at the time:—*Held*: the loss was not the proximate consequence of a warlike operation & consequently fell upon the marine underwriters.—*BRITAIN S.S. Co. v. R.*, *GREEN v. BRITISH INDIA STEAM NAVIGATION CO.*, *BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCN.*, [1921] 1 A. C. 99; 89 L. J. K. B. 881; 123 L. T. 721; 36 T. L. R. 791; 64 Sol. Jo. 737; 15 Asp. M. L. C. 58; 25 Com. Cas. 301, H. L.; *affg.*, [1919] 2 K. B. 670, C. A.

*Annotations:—Apld.* S.S. Larchgrove v. R. (1919), 36 T. L. R. 108; *Harrisons v. Shipping Controller*, [1921] 1 K. B. 122. *Distd.* A.-G. v. Ard Coasters, Liverpool & London War Risks Insee. Asscn. v. S.S. Richard De Larrinaga Marine Underwriters, [1921] 2 A. C. 141. *Consd.* Charente S.S. Co. v. Transports Director (1921), 38 T. L. R. 148; *Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service*, [1923] A. C. 191. *Refd.* A.-G. v. Adelaide S.S. Co., [1923] A. C. 292.

**1861. — Following escort into harbour.]—**In determining whether a vessel is engaged in a warlike operation, the dominant features of the ship & the dominant object of the voyage must be looked at. The presence of a few soldiers aboard, whether wounded or unwounded, would not turn a merchantman into a transport or change an otherwise peaceful voyage into a warlike undertaking.

The steamship *Inkonka* was requisitioned by the Admty. on the terms of the charterparty T. 99 which provided that the Admty. were not to be held liable if the steamer should be injured by a sea risk, but that the Admty. took the risk of "all consequences of hostilities or warlike operations." By the terms of the charterparty the *Inkonka* was bound to obey the orders of the Admty. & its officers. She sailed under Admty. orders from Salonica bound to Taranto in Italy, having on board hospital stores for the British Govt. & a few British troops & officers. When proceeding towards Taranto she was navigating the war region, & was therefore sailing without lights, & was escorted by a British destroyer. She was ordered by the destroyer to follow a pilot escort which had come out of Taranto to escort the vessels into the port. She did so, although the master would not have attempted without the destroyer's orders to enter the port, & he only sought to do so in the darkness in reliance on the pilot escort. After following the pilot escort for upwards of half an hour the master of the *Inkonka* suddenly lost sight of the pilot escort's lights & seeing a red light on his port bow immediately put his helm hard aport & almost immediately afterwards ran ashore & sustained damage. There was no negligence on the part of the master of the *Inkonka*:—*Held*: the Admty. were not liable for the damage to the *Inkonka*, inasmuch as although she was stranded whilst being navigated under war conditions, the damage to her did not arise in consequence of warlike operations.—*HARRISONS, LTD. v. SHIPPING CONTROLLER*, [1921] 1 K. B. 122; 90 L. J. K. B. 384; 124 L. T. 540; 36 T. L. R. 880; 15 Asp. M. L. C. 270.

*Annotation:—Refd.* Adelaide S.S. Co. v. R., [1923] 1 K. B. 59.

**Proximate cause of loss.]—**See Sect. 20, sub-sect. (2), *ante*.

#### SUB-SECT. 7.—OTHER LOSSES.

**1862. "Explosions & other causes whatever on shore or otherwise"—Ship sunk by mines.]—**



Pltfs. insured a steamship & the freight with defts. by identical policies which contained the clause, "warranted free from capture, seizure, detention, & all other consequences of hostilities, piracy, riots, civil commotions & barratry excepted," & also the clause, "This insurance also specially to cover loss . . . through explosions, riots, or other causes of whatever nature arising either on shore or otherwise howsoever." The vessel struck three mines & the third mine sank her. There was a Russian minefield 28 miles from the point where she was sunk. In an action on the policies:—*Held*: the whole contract was subject to the clause exempting from liability for consequences of hostilities, & this clause applied to all warlike acts resulting in the owners being deprived of their ship, whether by destruction or not, & pltfs. could not recover.—*STOOMVART MAATSCHAPPIJ SOPHIE II. v. MERCHANTS' MARINE INSURANCE CO., LTD.* (1919), 89 L. J. K. B. 834; 122 L. T. 295; 36 T. L. R. 73; 64 Sol. Jo. 99; 14 Asp. M. L. C. 497, H. L.

*Annotation*:—*Refd.* Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Assocn., [1921] 1 A. C. 99.

**1863. "Stoppage of refrigerating machinery"—Inefficiency of machinery—No actual stoppage.**—Pltfs. took out a policy of marine insurance on produce, including chickens & ducks, shipped from Hankow to the United Kingdom. The policy insured against loss "caused by a stoppage of refrigerating machinery for more than 24 consecutive hours." On the voyage the refrigerating machinery was losing its carbon dioxide, & in order to limit the consumption the engineer cut off one of the compressors, but the machinery as a whole did not stop or threaten to stop. Pltfs. brought an action against the insurance co. for loss which they alleged to have been caused by a breakdown of the machinery within the policy:—*Held*: the mere inefficiency of the refrigeration did not constitute a stoppage of the machinery within the policy, & pltfs. were not entitled to recover.—*VESTHEY BROTHERS v. UNION INSURANCE SOCIETY OF CANTON* (1918), 34 T. L. R. 232, C. A.

**1864. Mortality.**—*ST. PAUL FIRE & MARINE INSURANCE CO. v. MORICE*, No. 1738, *ante*.

**1865.** ———.]—*VAN LAUN v. THAMES & MERSEY MARINE INSURANCE CO.* (1905), cited in 11 Com. Cas. at pp. 163, 165, 166; *on appeal sub nom. THAMES & MERSEY MARINE INSURANCE CO., LTD. v. VAN LAUN & CO.* (1905), [1917] 2 K. B. 48, n., H. L.

*Annotations*:—*Consd.* St. Paul Fire & Marine Insee. v. Morice (1906), 11 Com. Cas. 153. *Mentd.* Hood v. West End Motor Car Packing Co., [1917] 2 K. B. 38.

**General average losses.**—*See* Sect. 21, *post*.

**Salvage charges.**—*See* Sect. 22, sub-sect. 2, *post*.

**Particular charges.**—*See* Sect. 22, sub-sect. 2, *post*.

**Suing & labouring charges.**—*See* Sect. 22, sub-sect. 3, *post*.

## SECT. 21.—GENERAL AVERAGE.

### SUB-SECT. 1.—WHAT IS GENERAL AVERAGE.

*See* SHIPPING.

### SUB-SECT. 2.—LIABILITY OF INSURER.

#### A. In General.

*See* Marine Insurance Act, 1906 (c. 41), s. 66 (4), s. 2 (5), (6).

**1866. Insurer not guarantor of contribution to general average.**—*HICK v. LONDON ASSURANCE*, No. 1889, *post*.

**1867.** ———.]—*STEAMSHIP BALMORAL CO. v. MARTEN*, No. 1876, *post*.

**1868. Liability not dependent on words of policy.**—*STEAMSHIP BALMORAL CO. v. MARTEN*, No. 1876, *post*.

**1869. General average expenditure—Liability for assured's proportionate share.**—Action on a policy on ship at & from London to the East Indies, until her arrival at her port of discharge on the outward voyage. Loss by perils of the seas. Ship was chartered from London to the East Indies, there to deliver her outward cargo & return thence with a cargo for England into the Thames, & there make a true delivery, etc., & it was agreed that the charterers should, upon condition that the ship performed her voyage & arrived at London & not otherwise, pay freight for every ton of goods that should be brought home at so much per ton; the ship sailed on the voyage insured & in the course of her outward voyage incurred an average loss, but was repaired & afterwards performed her voyage, & the freight was received:—*Held*: the freight was liable to contribute to general average, & the underwriter was entitled to deduct in respect of such contribution.—*WILLIAMS v. LONDON ASSURANCE CO.* (1813), 1 M. & S. 318; 105 E. R. 119.

*Annotations*:—*Expld.* Cox v. May (1815), 4 M. & S. 152.

*Folld.* Carisbrook S.S. Co. v. London & Provincial Marine & General Insee., [1902] 2 K. B. 681.

**1870.** ———.]—A ship was chartered to proceed to a foreign port, there load a cargo & bring it home, the chartered freight being payable on delivery of the cargo. While the ship was proceeding in ballast to her port of loading she grounded, & a general average sacrifice was made. She subsequently continued her voyage, loaded her cargo, delivered it, & received the freight:—*Held*: the chartered freight was liable to contribute to the general average sacrifice.—*STEAMSHIP CARISBROOK CO. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO.*, [1902] 2 K. B. 681; 71 L. J. K. B. 978; 87 L. T. 418; 50 W. R. 691; 18 T. L. R. 783; 46 Sol. Jo. 699; 9 Asp. M. L. C. 332; 7 Com. Cas. 235, C. A.

**1871.** ———.]—*Foreign adjustment.*—*THE MARY THOMAS*, No. 1888, *post*.

**1872. General average sacrifice—Liability excluded by custom—Jettison of goods on deck.**—(1) In an action by the owner of a steam vessel against the underwriter upon a policy on the vessel for time, the declaration stated that certain pigs were thrown overboard for the safety of the ship, & that pltf. was afterwards forced to contribute to the general average. Plea, that the pigs were laden on deck, by reason whereof defts. were not liable to contribute to the average:—*Held*: bad for not showing that such lading was improper under the circumstances.

(2) *Semble*: a plea of a custom of trade in London may be supported by proof of a custom prevailing in London & other English ports.

(3) *Semble*: where a record states a custom that the jettison of goods stowed on deck shall not

## PART II. SECT. 21, SUB-SECT. 2.—A.

**18691. General average expenditure—Liability for assured's proportionate share.**—*ROBINOWS & MARJORIBANKS*

*v. EWING'S TRUSTEES* (1876), 3 R. (Ct. of Sess.) 1134; 13 Sc. L. R. 692.—*SCOT.*

*m.* ———.]—*SPOONER v. WESTERN*

*ASSURANCE CO.* (1876), 38 U. C. R. 62.—*CAN.*

*n.* ———.]—*STEINHOFF v. ROYAL CANADIAN INSURANCE CO.* (1877), 42 U. C. R. 307.—*CAN.*





Asp. M. L. C. 254 ; 6 Com. Cas. 298, C. A. ; *affd.*, [1902] A. C. 511, H. L.

*Annotations* :—**Refd.** Thames & Mersey Marine Insce. v. British & Chilian S.S. Co., [1915] 2 K. B. 214. **Mentd.** The Commonwealth, [1907] P. 216.

**1877. — Increased value policy—Contributory valuation in excess of policy valuation.**—A steamship was insured by ordinary policies for £39,000, & was therein valued at the same sum. By another policy a sum of £1,855, was insured, & was to be upon increased value of hull, machinery, etc., & the policy, both in the body of the document & upon a slip attached, was designated as being “against the risk of total, constructive or compromised total loss as settled on hull & machinery policies but including as per clause attached liability for general average, salvage charges, sue & labour expenses or claims under the running-down clause in excess of the declared value in hull & machinery policies. . . .”

During the time covered by the policies salvage services were rendered to the steamer, & there was a general average expenditure, & by reason of the value of the steamer adopted in the salvage action & the contributory value in respect of the general average expenditure being each in excess of £39,000, the proportions of the salvage award & of the ship's contribution to the general average expenditure borne by the ordinary policies were respectively less than the salvage award & the ship's contribution to the general average expenditure ; & , therefore, an excess liability in both cases attached to the shipowner :—**Held** : the policy for £1,855, was one of the usual marine policies upon a *res* with the ordinary ancillary clauses, & not one of the unusual policies against a liability ; & therefore the basis upon which the assurers under the policy for £1,855, were liable to contribute to the excess amount of salvage general average respectively was the payment by them of proportionate parts thereof in the proportions that the £1,855 bore to the total excess valuation & total excess contributory value of the steamship respectively.—**HOLMAN & SONS, LTD. v. MERCHANTS MARINE INSURANCE CO.**, [1919] 1 K. B. 383 ; 88 L. J. K. B. 435 ; 120 L. T. 478 ; 35 T. L. R. 138 ; 14 Asp. M. L. C. 433 ; 24 Com. Cas. 102.

**1878. Loss not incurred through peril insured against—Mistaken assumption of fire.**—Under a mistaken assumption of fire the captain of a ship caused steam to be turned into the hold to extinguish the supposed fire, & so damaged pl'tfs.' goods. On a claim by them for a general average loss against defts. as insurers :—**Held** : (1) the “peril” being in fact non-existent there was no general average loss, & , even if there were, defts. were not liable as the loss had not been caused through a peril insured against, such a peril having never existed ; (2) the words “loss . . . incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against” in Marine Insurance Act, 1906 (c. 41), s. 66 (6), did not operate to cover such a loss as this, but

only losses collateral to the main process of avoiding a peril insured against.—**WATSON (JOSEPH) & SON, LTD. v. FIREMEN'S FUND INSURANCE CO. OF SAN FRANCISCO**, [1922] 2 K. B. 355 ; 92 L. J. K. B. 31 ; 127 L. T. 754 ; 38 T. L. R. 752 ; 66 Sol. Jo. 648 ; 16 Asp. M. L. C. 93 ; 28 Com. Cas. 73.

**Foreign adjustment.**—*See* Sub-sect. 3, *post*.

**B. Where Separate Interests belong to Same Party.**

*See* Marine Insurance Act, 1906 (c. 41), s. 66 (7).

**1879. Whether insurer liable—General average loss—Ship & freight.**—Where the chartered freight of a vessel proceeding in ballast to a loading port in pursuance of a charterparty is insured, & the only persons interested in the vessel & the freight insured are the owners of the vessel, there cannot be any general average loss, or any loss to be treated as a general average loss, for which the underwriters are liable, & this is so even though the policy contains a clause providing that general average charges should be payable as per foreign statement if required.—**THE BRIGELLA**, [1893] P. 189 ; 62 L. J. P. 81 ; 69 L. T. 834 ; 7 Asp. M. L. C. 403 ; 1 R. 616 ; *sub nom.* **TEMPERLEY v. MACKINNON, THE BRIGELLA**, 9 T. L. R. 399.

*Annotation* :—**Consd.** **Montgomery v. Indemnity Mutual Marine Insce.**, [1902] 1 K. B. 734.

**1830. — Ship & cargo.**—A loss caused by the cutting away of a ship's mast for the safety of the whole adventure is a general average loss to which the underwriters of a policy of insurance on cargo against perils of the sea are bound to contribute, although the assured is owner of both ship & cargo, & , therefore, as between those interests, there can be no contribution to general average.—**MONTGOMERY & CO. v. INDEMNITY MUTUAL MARINE INSURANCE CO.**, [1902] 1 K. B. 734 ; 71 L. J. K. B. 467 ; 86 L. T. 462 ; 50 W. R. 440 ; 18 T. L. R. 479 ; 46 Sol. Jo. 410 ; 9 Asp. M. L. C. 289 ; 7 Com. Cas. 120, C. A.

### SUB-SECT. 3.—ADJUSTMENT.

#### A. Place of Adjustment.

*See* SHIPPING.

#### B. Foreign Adjustment.

##### (a) According to Foreign Usage.

**1881. Foreign usage different from English law—Underwriters liable.**—**NEWMAN v. CAZALET** (*circa* 1780), 2 Park on Marine Insurances, 8th ed. p. 900.

*Annotation* :—**Refd.** **Simonds v. Hodgson** (1829), 6 Bing. 114.

**1882. — — — — —**—**WALPOLE v. EWER** (1789), 2 Park on Marine Insurances, 8th ed. p. 898.

*Annotation* :—**Refd.** **Simonds v. Hodgson** (1829), 6 Bing. 114.

**1883. — — — — — If contract upon footing of foreign usage.**—The insurer of goods to a foreign

as a set-off to an action on the premium note. The average as adjusted at New York amounted to a larger sum than if adjusted in N. S. :—**Held** : the underwriter was bound to reimburse all such general average charges as had been assessed on the insured by a foreign adjustment if correctly settled according to the law of the port of adjustment.—**AVON MARINE INSURANCE CO. v. BARTEAUX** (1871), 8 N. S. R. 195.—**CAN.**

**O. — — — — —**—**McGIVERN v. STYMEST** (1862), 10 N. B. R. (5 All.) 320.—**CAN.**

### PART II. SECT. 21, SUB-SECT. 2.—B.

**1880 i. Whether insurer liable—General average loss—Ship & cargo.**—Where the owner of a ship is also the owner of part of the cargo, which was thrown overboard for the preservation of the ship in the course of the voyage, on which insurance was effected :—**Held** : such owner might recover from the insurer on the ship the average proportion which the ship would be liable to contribute to the loss sustained by such jettison of cargo.—**MARKS v. WATSON** (1843), 4 N. B. R. (2 Kerr)

### 211.—CAN.

### PART II. SECT. 21, SUB-SECT. 3.—B. (a).

**1881 i. Foreign usage different from English law—Underwriters liable.**—**Deft.**, a British subject resident in N. S., insured his brigantine on a time policy with pl'tfs. The vessel while on a voyage from Liverpool to New York, sustained damage which was the subject of general average. The average was adjusted at the port of destination & was pleaded by **deft.**



**Sect. 21.—General average: Sub-sect. 3, B. (a) & (b).]**

country is not liable to indemnify the assured, a subject of that country, who is obliged by the decree of a ct. there, to pay contribution to a general average, which by the law of this country could not have been demanded, where it does not appear that the parties contracted upon the footing of some usage among merchants, obtaining in the foreign country, to treat the same as general average, but such usage is to be collected merely from the recitals & assumption made in the decree.—**POWER v. WHITMORE** (1815), 4 M. & S. 141; 105 E. R. 787.

**Annotations:—Distd.** *Simonds v. White* (1824), 2 B. & C. 805. **Consd.** *Dent v. Smith* (1869), L. R. 4 Q. B. 414; *Harris v. Scaramanga* (1872), L. R. 7 C. P. 481; *Atwood v. Sellar* (1880), 5 Q. B. D. 286. **Refd.** *Simonds v. Hodgson* (1829), 6 Bing. 114; *Messina v. Petrocchino* (1872), L. R. 4 P. C. 144; *Stewart v. West India & Pacific S.S. Co.* (1873), 27 L. T. 820. **Mentd.** *Hallett v. Wigram* (1850), 9 C. B. 580; *Hall v. Janson* (1855), 4 E. & B. 500; *Wilson v. Bank of Victoria* (1867), 8 B. & S. 290; *Walthew v. Mavrojani* (1870), L. R. 5 Exch. 116; *Harrison v. Bank of Australasia* (1872), L. R. 7 Exch. 39; *Svensden v. Wallace* (1884), 13 Q. B. D. 69; *The Bona*, [1895] P. 125.

**(b) Incorporation of Foreign Adjustment Clause.**

**1884. Foreign adjustment binding—Though at variance with English law—On insurer.]—**Sugars were insured from Java to Holland by an English policy which contained this clause, "To cover only the risks excepted by the clause 'warranted free from particular average unless the vessel be stranded, sunk, or burnt'; to pass all claims & losses on Dutch terms & according to statement made up by official *dispatcheur* in Holland." There was already a policy effected in Holland on the same goods; but of this the English underwriters had no notice, except so far as it could be implied from the above words. On her voyage to Holland the vessel took the ground in circumstances which would amount to a stranding according to English, but not according to Dutch, law; & a Dutch average-stater, a particular average loss having been incurred, made up a statement of average, which statement it was admitted was properly made up according to the facts & according to the law of Holland:—**Held:** the terms of the policy sued on did not amount to notice to defts. of an existing Dutch policy, & therefore it was to be construed as if it stood alone, & according to English law; by the latter words of the clause defts. were bound to pay according to the foreign average statement, & consequently pltf. was entitled to recover.—**HENDRICKS v. AUSTRALASIAN INSURANCE CO.** (1874), L. R. 9 C. P. 460; 43 L. J. C. P. 188; 30 L. T. 419; 22 W. R. 947; 2 Asp. M. L. C. 44.

**Annotations:—Folld.** *Mavro v. Ocean Marine Insee.* (1874), L. R. 9 C. P. 595. **Refd.** *De Hart v. Compania Anonima de Seguros Aurora* (1902), 87 L. T. 716.

**1885. ————.]—**A policy of insurance on a cargo of wheat shipped from Varna to Marseilles contained the usual memorandum against average unless general, & the following term "general average as per foreign statement." The ship, after starting from Varna, met with heavy weather, & was forced to carry a great press of canvas to avoid a lee shore. This caused her to strain very much, & having sprung a leak & become otherwise disabled, she was brought to the port of Constantinople. It was found, on a survey, that a fifth of the wheat had been damaged; & the surveyors recommended that the voyage should end at Constantinople, & the damaged part of the wheat should be sold, & the rest transhipped to Marseilles. It appeared that the repairs necessary

for the ship would have taken from one or two months. In these circumstances, the recommendation of the surveyors was carried out & an adjustment of average in respect of ship & cargo was made at Constantinople. In such adjustment the damage which the cargo of wheat had sustained was treated as general average, & in accordance with such average adjustment a certain sum of money became payable by the underwriters upon the policy. The law by which the adjustment ought to have been regulated according to the law & usages prevailing at Constantinople in the circumstances was the law of France, & the average adjustment was made up in all respects in conformity with such law. In an action on the policy by the owners of the wheat, defts. paid into ct. sufficient to cover pltf.'s claim on all the items of the average adjustment except the damage to the wheat which, by the law of England, would not in the circumstances be a general average loss:—**Held:** the voyage was rightly brought to an end at Constantinople, & the average adjusted there, & defts. were liable in respect of the damage done to the wheat.—**MAVRO v. OCEAN MARINE INSURANCE CO.** (1875), L. R. 10 C. P. 414; 44 L. J. C. P. 229; 32 L. T. 743; 23 W. R. 758; 2 Asp. M. L. C. 590, Ex. Ch.

**Annotations:—Consd.** *Hill v. Wilson* (1879), 4 C. P. D. 329; *De Hart v. Compania Anonima de Seguros Aurora*, [1903] 2 K. B. 503. **Mentd.** *Assicurazioni Generali & Schenker v. S.S. Bessie Morris Co. & Browne* (1892), 61 L. J. Q. B. 754.

**1886. ———— Loss not due to peril insured against.]—**Pltfs., owners of goods on a voyage from Taganrog to Bremen, insured them with defts. by a policy in the ordinary form used at Lloyd's, except that it contained a marginal note "to pay general average as per foreign statement, if so made," & certain warranties as to being free from particular average & capture & seizure. From stresses of weather the ship had to put into ports of distress, & the master had to charge the ship, freight & cargo by bottomry bonds. On arrival at Bremen, B. & Co. purchasers of the cargo had to pay the bonds to get the cargo. A foreign adjustment was made, apportioning this charge between ship & freight & cargo. The shipowner & master being unable to pay the part apportioned to the ship & freight, & the ship on sale only realising part thereof, & a supplemental adjustment having been made, including the residue as against cargo, pltfs. as trustees for B. & Co., sought to recover payment thereof from defts.:—**Held:** pltfs. were entitled to recover because defts. had bound themselves to repay whatever had to be paid by the owners of the cargo & was general average according to the foreign statement, whether or not it were really general average by English or Bremen law, or arose from perils, not being those specially excepted, insured against, & in view of the particular findings of the case, such a statement had been made as to the sum in question.—**HARRIS v. SCARAMANGA** (1872), L. R. 7 C. P. 481; 41 L. J. C. P. 170; 26 L. T. 797; 20 W. R. 777; 1 Asp. M. L. C. 339.

**Annotations:—Folld.** *Mavro v. Ocean Marine Insee.* (1874), L. R. 9 C. P. 595. **Consd.** *Hendricks v. Australasian Insee.* (1874), L. R. 9 C. P. 460; *The Brigella*, [1893] P. 189. **Appld.** *De Hart v. Compania Anonima de Seguros Aurora*, [1903] 2 K. B. 503. **Refd.** *Mavro v. Ocean Marine Insee.* (1875), 32 L. T. 743; *The Mary Thomas*, [1894] P. 108.

**1887. ———— Special provision in charterparty.]—**Pltf., a shipowner, effected with defts. a time policy of insurance upon his ship containing the following clause: "General average



payable according to foreign statement if so made up." Pltf. chartered the ship to third persons, & by the terms of the charterparty it was provided that the ship might carry a deckload of timber, & "In case of average . . . jettison of deck cargo for the common safety shall be allowable as general average." The ship sailed for Antwerp with a deckload of timber, & in the course of the voyage & during the currency of the policy she suffered damage, so that it became necessary for the common safety, in consequence of perils insured against, to jettison part of the deck cargo. On her arrival at Antwerp an average statement was there made up, & the average adjuster, in accordance with the terms of the charterparty, included the jettison of deck cargo in general average. By the Belgian law, apart from contract, the jettison of deck cargo is not the subject of general average; but that law recognises any special provisions in a charterparty as to what shall be the subject of general average:—*Held*: as the statement had been made up in good faith & the charterparty imported no terms of a special & unusual character such as could not reasonably have been contemplated by the parties to the policy of insurance, debts., the underwriters were bound by the statement, & were therefore liable to indemnify pltf. against the ship's proportion of the loss on the jettison of the deck cargo.—*DE HART v. COMPAÑIA ANONIMA DE SEGUROS AURORA*, [1903] 2 K. B. 503; 72 L. J. K. B. 818; 89 L. T. 154; 52 W. R. 36; 19 T. L. R. 642; 47 Sol. Jo. 709; 9 Asp. M. L. C. 454; 8 Com. Cas. 314, C. A.

**1888.** — — — *On assured.*—Pltfs. effected with debts. two policies of insurance, one on the hull & machinery of their vessel & the other on freight. Under both policies general average was payable as per foreign statement, if in accordance with the contract of affreightment. The policy on ship specially covered loss or damage through the negligence of the master & both policies incorporated the ordinary suing & labouring clause. Pltfs.' vessel whilst carrying a cargo of grain from Nicolaieff to Rotterdam, under bills of lading which excepted strandings, even when occasioned by the negligence of the master, stranded on a reef off Malta. To get the vessel off, a portion of the cargo had to be discharged into lighters, taken to Valetta & warehoused. The vessel was then towed to Valetta &, to enable her to be placed in the pontoon dock, the remainder of the cargo was discharged & warehoused.

On the completion of the repairs the two portions of cargo were reshipped, & the vessel sailed for Rotterdam, where, after the cargo was delivered, an average statement was prepared showing, according to the law & practice in Holland, the amount of general average sacrifices & expenses, & the proportions due from ship, cargo & freight. Debts., as underwriters on ship & freight paid their proportion; but, on suing the consignees of cargo in the Dutch Cts. pltfs. failed to recover from them their proportion, on the ground that, notwithstanding the negligence clause in the bill of lading, as the stranding was attributable to the negligent navigation of the master, there was no liability on the part of the cargo owners to contribute in general average. Pltfs. thereupon sued debts. upon the policy on ship, to recover the portion, debited per foreign statement to cargo, of expenses incurred in relation to the refloating of the vessel, the subsequent towage into, & the discharge at, Malta, &, under the suing & labouring clause in the policy on freight, for the portion, debited per foreign state-

ment to cargo, of expenses incurred in warehousing & reshipping cargo:—*Held*: debts. were not liable, as the foreign adjustment was conclusive as to what were general average expenses, & as to the apportionment of those expenses, so that pltfs. could not, as against debts., select out of those expenses certain items & claim them on the ground that, according to English Law, they would be charged as particular average on ship, as or being particular charges recoverable under the suing & labouring clause.—*THE MARY THOMAS*, [1894] P. 108; 71 L. T. 104; 7 Asp. M. L. C. 495; *sub nom.* *THE MARY THOMAS, MARY THOMAS S.S. CO., LTD. v. GLOBE MARINE INSURANCE CO., LTD.*, 63 L. J. P. 49; 10 T. L. R. 154; 6 R. 792, C. A.

*Annotations*:—*Expld.* *Balmoral S.S. Co. v. Marten*, [1901] 2 K. B. 896. *Refd.* *Milburn v. Jamaica Fruit Importing & Trading Co. of London*, [1900] 2 Q. B. 540; *De Hart v. Compañia Anonima de Seguros Aurora*, [1903] 2 K. B. 503; *Chellev v. Royal Commission on Sugar Supply*, [1922] 1 K. B. 12.

**1889. No foreign adjustment made or able to be made.**—A policy made in England on an English ship containing the clause "general average . . . payable according to foreign statement, or per York-Antwerp rules if in accordance with the contract of affreightment" binds the underwriter to pay general average according to English law where no foreign statement has been, or could be made, according to foreign law. Charges which are particular average according to the law of the port of destination, but are not particular average according to English law, are not recoverable from the underwriter. The contributing value of the ship is her value at the time when the general average expenses are incurred. The costs of litigation in respect of salvage services are to be distributed in proportion to the contributing values of the ship, freight & cargo.

The underwriters on ship do not guarantee that owners of cargo will pay their contribution to general average.—*HICK v. LONDON ASSURANCE* (1895), 12 T. L. R. 117; 1 Com. Cas. 244.

**1890.** — — — Pltfs., who owned goods which were part of the cargo of a German steamer at the beginning of Aug. 1914, insured them with debts. by marine policies to which were attached the 1920 Institute Cargo Clauses, F.P.A., clause 4 being as follows: "General average & salvage charges payable according to foreign statement, or per York-Antwerp rules if in accordance with the contract of affreightment." On the outbreak of war between Great Britain & Germany the master put into an Italian port for shelter, & while the vessel was there she & part of her cargo were damaged by fire, but pltfs.' goods were not affected. Subsequently, Italy having become a belligerent, the Italian Govt. seized the ship & cargo & refused to release pltfs.' goods unless pltfs. paid forty per cent. of the value of their goods as a deposit for general average contribution. Pltfs. paid the forty per cent. deposit & claimed from the underwriters the sum so paid as general average expenditure. The York-Antwerp rules did not apply & the underwriters refused to pay on the ground that no foreign statement had been made out. The ct. found that no average adjustment had been or would be made & that pltfs. would never get back their deposit:—*Held*: under clause 4, read with Marine Insurance Act, 1906 (c. 41), s. 66 (5), the claim could not be enforced in the absence of an adjustment.—*BRANDEIS GOLDSCHMIDT & CO. v. ECONOMIC INSURANCE CO., LTD.* (1922), 38 T. L. R. 609.

## SECT. 22.—MEASURE OF LOSS FOR WHICH INSURERS LIABLE.

### SUB-SECT. 1.—INSURABLE VALUE.

See Marine Insurance Act, 1906 (c. 41), ss. 13, 16, 67, 68.

**1891. Insurance on goods—Fluctuation in rate of exchange.]**—In a policy of insurance [on goods] the underwriter does not insure against any loss that may arise from the difference of exchange.—THELLUSSON v. BEWICK (1793), 1 Esp. 77, N. P.

**1892. Insurance on freight—Open policy—Actual freight obtainable—But for peril insured against.]**—FORBES v. ASPINALL, No. 2035, *post*.

**1893. ——— Adjustment according to gross, not net freight.]**—The general principle of insurance, that the insured shall, in case of a loss, recover no more than an indemnity, may be controlled by a mercantile usage clearly established to the contrary: & usage, that the loss in an open policy on freight shall be adjusted on the gross, & not on the net amount of the freight, is a legal usage.—PALMER v. BLACKBURN (1822), 1 Bing. 61; 7 Moore, C. P. 339; 1 L. J. O. S. C. P. 1; 130 E. R. 25.

*Annotations:—*Consd. The Gazelle (1844), 2 Wm. Rob. 279. *Mentd.* Maxwell v. Deare (1854), 23 L. T. O. S. 1.

**1894. ——— Assured charterer or owner.]**—The rule established in *Palmer v. Blackburn*, No. 1893, *ante*, that the loss in an open policy on freight shall be adjusted on the gross, & not on the net, amount of the freight, applies not only to cases where the assured is the owner, but also where he is the charterer of the ship.

Pltfs. chartered a ship for twelve months & effected an open policy on freight &/or chartered freight. During the currency of the policy the ship was sub-chartered from pltfs. for a voyage. The ship stranded through perils insured against, & pltfs. suffered a loss of part of the freight which they would otherwise have earned under the sub-charterparty, but they were saved the expense of two days' charterparty hire. Pltfs. had paid a commission on obtaining the sub-charterparty:—*Held*: (1) the hire saved could not be deducted from the amount recoverable on the policy; (2) in the absence of any evidence of custom, the amount of the commission could not be added to the amount of the loss.

In the absence of any evidence of custom I am bound to hold that the commission is not recoverable under the policy, unless it is a commission for getting a premium (CHANNELL, J.).—UNITED STATES SHIPPING CO. v. EMPRESS ASSURANCE CORPN., [1907] 1 K. B. 259; 76 L. J. K. B. 225; 23 T. L. R. 137; 12 Com. Cas. 142; *affd.*, [1908] 1 K. B. 115.

**1895. Insurance charges included.]**—TUTE v. ROYAL EXCHANGE ASSURANCE CO. (1747), 1 Park's Marine Insurances, 8th ed. p. 224.

**1896. ———.]**—FORBES v. ASPINALL, No. 2035, *post*.

**1897. ———.]**—UNITED STATES SHIPPING CO. v. EMPRESS ASSURANCE CORPN., No. 1894, *ante*.

### SUB-SECT. 2.—PARTICULAR AVERAGE, PARTICULAR CHARGES AND SALVAGE CHARGES.

See Marine Insurance Act, 1906 (c. 41), ss. 64, 65.

**Particular average—What is.]**—See SHIPPING.

**1898. Particular charges—Distinguished from**

**particular average—Expenses incurred in preserving subject-matter of insurance.]**—Pltf., the owner of the ship *Sebastopol*, having chartered it for a voyage from the Chincha Islands to a port in Great Britain, effected an insurance on the freight for the voyage; the policy contained a warranty against particular average, & also the usual suing & labouring clause. The ship in the course of the voyage encountered severe weather, & put into the port of Rio so damaged as not to be worth repairing. She was thereupon sold, being then a total loss; the cargo was landed in safety, & subsequently shipped on board a vessel chartered by pltf., & conveyed to England at an agreed freight, which pltf. paid:—*Held*: (1) upon the loss of the *Sebastopol* at Rio, inasmuch as by the law of England no freight *pro rata itineris* could be claimed, there was a total loss of freight, unless it could be averted by forwarding the cargo by another vessel; (2) the expense of forwarding the cargo was "a particular charge" within the meaning of the suing & labouring clause; (3) the loss was not converted from a total to a partial loss, so as to be within the warranty against "particular average," & the expense of forwarding being within the suing & labouring clause, & incurred for the benefit of the underwriters to preserve the subject of the insurance, it was recoverable under the policy; (4) evidence was admissible to show that according to the usage among underwriters, expenses incurred in recovering or preserving the subject-matter of insurance were designated as "particular charges," & not as "particular average"; but as the usage thus proved was in affirmance of the common law of England, the decision would have been the same if no such evidence had been given.

(5) It must be admitted that it is not unreasonable that if the owner of freight insured fails to earn it by any default of his own, he should be disentitled to recover it against the insurer (KELLY, C.B.).—KIDSTON v. EMPIRE MARINE INSURANCE CO. (1867), L. R. 2 C. P. 357; 36 L. J. C. P. 156; 16 L. T. 119; 15 W. R. 769; 2 Mar. L. C. 468, Ex. Ch.

*Annotations:—*As to (2) *Apld.* Lee v. Southern Insee. (1870), L. R. 5 C. P. 397. *Refd.* Aitchison v. Lohre (1879), 4 App. Cas. 735; Johnston v. Salvage Assn. (1887), 19 Q. B. D. 458. As to (3) *Refd.* Xenos v. Fox (1869), L. R. 4 C. P. 665; Meyer v. Ralli (1876), 1 C. P. D. 358; Dixon v. Whitworth (1879), 4 C. P. D. 371; The Brigella, [1893] P. 189.

**Recovery of—Under suing & labouring clause.]**—See Sub-sect. 3, *post*.

**Salvage charges—What are.]**—See SHIPPING.

**1899. ——— How assessed.]**—(1) The doctrine that a policy of marine insurance is a contract of indemnity is subject to some qualifications. A policy of marine insurance is not a contract of mere indemnity.

(2) General average & salvage do not come within either the words or the object of the suing & labouring clause of a policy of marine insurance. Salvage expenses are not assessed upon the *quantum meruit* principle, but on the general principle of maritime law, rewarding persons who by great, & perhaps dangerous, exertions bring in a ship, for which exertions, if not successful, nothing would have been paid. The assured, who had not abandoned, but had elected to repair, after damage sustained from perils of the sea, was held, therefore, not entitled to recover under that

becoming stranded, the crew were engaged by the master to work about her. The master afterwards sought to recover the sum so paid from the underwriters:—*Held*: the crew were

**PART II. SECT. 22, SUB-SECT. 1.**  
p. Insurance on vessel—Temporary depression in value of steamers generally Not to be taken into account.]—v. QUAKER CITY INSURANCE

Co. (1859), 18 U. C. R. 130.—CAN.

**PART II. SECT. 22, SUB-SECT. 2.**  
q. Particular charges—When liability of insurer arises.]—A ship



clause the expenses of salvage. But held that, up to the amount insured, he was entitled to recover the costs of repair, with a reduction of one-third new for old, even although the amount, calculated upon that principle, should exceed the amount that would be payable upon a total loss with benefit of salvage, & should equal the whole sum insured. The ship *Crimea* was insured with deft. for £1,200, being valued in the policy at £2,600. It encountered very bad weather, & was in danger of sinking: it was rescued by a steamer which obtained from the Irish Ct. of Admty. £800 as salvage money. The owner did not abandon, but elected to repair. Deft.'s proportion of the repair expenses amounted, after the deduction of one-third new for old, to £1,200, the full sum he had insured, & he was held liable to that amount; but was held not to be liable to any part of the salvage expenses. There were cross appeals. Neither party was completely successful. No costs were given.

The object of [the suing & labouring clause] is to encourage & induce the assured to exert themselves, & therefore the insurers bind themselves to pay in proportion any expense incurred, whenever such expense is reasonably incurred, for the preservation of the thing from loss, in consequence of the efforts of the assured or their agents. It is all one whether the labour is by the assured or their agents themselves, or by persons whom they have hired for the purpose, but the object was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery, by the assured, of indemnity for a loss which was by the maritime law, a consequence of the peril (LORD BLACKBURN), p. 765.

(3) I think that it is clearly established by a long course of practice, & by many decisions, that, for the purpose of avoiding the expense of litigation, a custom of trade has arisen which, though not written in the policy, is implied in it. The parties to a policy of insurance on a ship tacitly agree that, in case of repairs fairly executed to replace damage occasioned by one of the underwriters fails to a ship of the age & character to which the custom applies, the loss shall be estimated at two thirds of the cost of the repairs, neither more nor less (LORD BLACKBURN).—*AITCHISON v. LOHRE* (1879), 4 App. Cas. 755; 49 L. J. Q. B. 123; 41 L. T. 323; 28 W. R. 1; 4 Asp. M. L. C. 168, H. L.; *varying S. C. sub nom. LOHRE v. AITCHISON* (1878), 3 Q. B. D. 558, C. A.

*Annotations:—As to* (2) *Folld. Dixon v. Whitworth, Same v. Lea Insee.* (1880), 49 L. J. Q. B. 408. *Consd. Pitman v. Universal Marine Insee.* (1882), 9 Q. B. D. 192; *The Solway Prince*, [1896] P. 120; *Montgomery v. Indemnity Mutual Marine Insee.*, [1901] 1 K. B. 147; *Angel v. Merchants Marine Insee.*, [1903] 1 K. B. 811; *Western Assee. of Toronto v. Poole*, [1903] 1 K. B. 376; *Pyman S.S. Co. v. Admiralty Comrs.*, [1919] 1 K. B. 49. *Refd. Johnston v. Salvage Assocn.* (1887), 19 Q. B. D. 458; *The Mary Thomas*, [1894] P. 108; *Buchanan v. London & Provincial Marine Insee.* (1895), 65 L. J. Q. B. 92; *The Gas Float Whittin No. 2* (1895), 65 L. J. P. 17; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455; *Nourse v. Liverpool Sailing Ship Owners' Mutual Protection & Indemnity Assocn.*, [1896] 2 Q. B. 16. *Generally, Rsfid. Macbeth v. Maritime Insee.*, [1908] A. C. 144. *Mentd. Re Roshier, Roshier v. Roshier* (1884), 26 Ch. D. 801.

**1900. — Recovery of—As loss under policy.]—***AITCHISON v. LOHRE*, No. 1899, *ante*.

**1901. — Life salvage paid under Merchant Shipping Act, 1894 (c. 60).]**—Life salvage paid under above Act, Sect. 544, is not recoverable upon a Lloyd's policy in the usual form.—*NOURSE v. LIVERPOOL SAILING SHIP OWNERS' MUTUAL PRO-*

*TECTION & INDEMNITY ASSOCN.*, [1896] 2 Q. B. 16; 65 L. J. Q. B. 507; 74 L. T. 543; 44 W. R. 500; 12 T. L. R. 406; 8 Asp. M. L. C. 144; 1 Com. Cas. 388, C. A.

**1902. — In addition to claim for total loss.]—**Pltfs., insurance brokers, insured goods on the ship *C.* with defts. & other underwriters. Salvage services were performed to the *C.* & cargo by an English ship, & a salvage suit was instituted by the salvors abroad. The manager of pltfs. paid the salvors in England a sum to settle their claim, after consultation with the secretary of the Salvage Assocn., & collected from defts. & the other underwriters proportionate contributions to this sum. The share of defts. was £297 10s. & their policy was indorsed "settled a claim on account." The *C.* & cargo were afterwards sold by order of the foreign ct. In an action for total loss:—*Held*: pltfs. were entitled to recover for a total loss, & the underwriters were not entitled to credit for the £297 10s.—*BUCHANAN & CO. v. LONDON & PROVINCIAL MARINE INSURANCE CO., LTD.* (1895), 65 L. J. Q. B. 92; 1 Com. Cas. 165.

**1903. — Increased value policy—Salvage valuation greater than policy valuation.]—***HOLMAN & SONS, LTD. v. MERCHANTS MARINE INSURANCE CO., No. 1877, ante.*

**Under suing & labouring clause.]—***See Sub-sect. 3, post.*

#### SUB-SECT. 3.—SUING AND LABOURING CLAUSE.

##### A. In General.

*See Marine Insurance Act, 1906 (c. 41), s. 78.*

**1904. Clause independent of main contract.]—**(1) The clause is a wholly independent contract in the policy from the contract to pay a certain sum in respect of damage done to the subject-matter of insurance, & consequently, it applies whatever be the amount of such damage, & whether indeed any such damage occur or not (*BRETT, L.J.*).

(2) The dispute thus raised is one with regard to the mode of ascertaining the amount of a loss under a policy in ordinary form & of adjusting that amount when ascertained. Such disputes have for a long period been determined according to recognised rules. . . . They are rules which originated either in decisions of the cts. upon the construction or upon the mode of applying the policy or in customs proved before the cts. so clearly or so often as to have been long recognised by the cts. without further proof. Since those decisions & the recognition of those customs merchants & underwriters have for many years continued to enter into policies in the same form. According to ordinary principle then the later policies must be held to have been entered into upon the basis of those decisions & customs. If so the rules determined by those decisions & customs are part of the contract. & although a ct. now might differ from the correctness of the rules as originally laid down it must yet now act upon those rules as parts of the contract or as agreed modes of carrying it out (*BRETT, L.J.*).

(3) According to the recognised rules, there cannot be a total loss of ship when she is safe in the hands of the owners, still bearing the character of a ship, however greatly damaged. There is an actual total loss, if by perils insured against, the ship has wholly disappeared, or is so damaged

only entitled to remuneration for such work as was performed by them after abandonment by the owner of the ship,

& when their exertions were solely in the interest of the underwriters. All efforts to save the ship before

abandonment were covered by their original contract.—*WALSH v. SMITH* (1875), 6 Nfld. L. R. 35.—**NFLD.**



**Sect. 22.—Measure of loss for which insurers liable:**  
**Sub-sect. 3, A. & B.]**

as to have lost the character of a ship, or, though still a ship, has, by capture, or a justifiable sale or otherwise, become wholly lost to her owners. But in the present case, the ship was saved & restored to her owners as a ship, though greatly damaged; salvage indeed has been awarded to salvors for saving her as a ship; & there has been no sale. Moreover, if there had been a sale, it could not have been justified, or this loss made by it a total loss: because the rule as to that is, that a sale by the master cannot be justified as against his owners, or as against underwriters, nor a sale even by the owners, constitute a total loss as against underwriters, if the ship being disabled can be repaired so as to be a sea-going ship at an expense less than her value when repaired. The contrary is found in this case. It was further argued that the ship was, if not an actual, at least a constructive total loss. The rule for determining this question is also a settled rule. It would, in the circumstances of this case, be the sale as that just enunciated with regard to a justifiable sale (BRETT, L.J.).—LOHRE v. AITCHISON (1878), 3 Q. B. D. 558; 47 L. J. Q. B. 534; 38 L. T. 802; 26 W. R. 780; 4 Asp. M. L. C. 11, C. A.; *on appeal*, *sub nom.* AITCHISON v. LOHRE (1879), 4 App. Cas. 755, H. L.

**Annotations:—As to (1) Consd.** Dixon v. Whitworth (1879), 4 C. P. D. 371; The Mary Thomas, [1894] P. 108; Montgomery v. Indemnity Mutual Marine Insce., [1901] 1 K. B. 147. **Refd.** Johnston v. Salvage Asscn. (1887), 19 Q. B. D. 458; The Solway Prince, [1896] P. 120; Western Asce. of Toronto v. Poole, [1903] 1 K. B. 376. **As to (2) Refd.** Re Rosher, Rosher v. Rosher (1884), 26 Ch. D. 801; Buchanan v. London & Provincial Marine Insce. (1895), 65 L. J. Q. B. 92; Ballantyne v. Mackinnon, [1896] 2 Q. B. 455; Nourse v. Liverpool Sailing Ship Owners' Mutual Protection & Indemnity Asscn., [1896] 2 Q. B. 16; Pyman S.S. Co. v. Admiralty Comrs., [1919] 1 K. B. 49. **As to (3) Consd.** Pitman v. Universal Marine Insce. (1882), 9 Q. B. D. 192. **Refd.** Angel v. Merchants Marine Insce., [1903] 1 K. B. 811; Macbeth v. Maritime Insce., [1908] A. C. 144. **Generally, Mentd.** The Gas Float Whitton No. 2 (1895), 65 L. J. P. 17.

**1905. Object of clause.]—**AITCHISON v. LOHRE, No. 1899, *ante*.

**1906. Application of clause—Goods not in peril.]—**GREAT INDIAN PENINSULA RY. CO. v. SAUNDERS, No. 1930, *post*.

**1907. — Warrant free from particular average loss.]—**(1) Where perishable goods are insured by a policy of marine insurance in the general form, with the addition of the clause "Warranted free from average, except general," etc., this warranty includes expenses incurred in rescuing the goods from a state of peril which might have resulted in a total loss, but did not.

(2) Nor can these expenses be recovered from the underwriter under the usual clause authorising the assured to sue & labour for the preservation of the subject-matter of the insurance.—BOOTH v. GAIR (1863), 15 C. B. N. S. 291; 3 New Rep. 121; 33 L. J. C. P. 99; 9 L. T. 386; 9 Jur. N. S. 1326; 12 W. R. 105; 1 Mar. L. C. 393; 143 E. R. 796.

**Annotations:—As to (1) Consd.** Kidston v. Empire Marine Insce. (1867), L. R. 2 C. P. 357. **As to (2) Consd.** The *Providence*, [1895] P. 349. **Generally, Refd.** Meyer v. D. 358.

**1908. — Preservation from total loss.]—**KIDSTON v. EMPIRE MARINE INSURANCE CO., No. 1898, *ante*.

**1909. — Whether or not damage incurred under policy.]—**LOHRE v. AITCHISON, No. 1904, *ante*.

**1910. — Expenses incurred by persons other than assured—Or agents of assured.]—**UZIELLI v. BOSTON MARINE INSURANCE CO., No. 712, *ante*.

**1911. — By underwriters—Right to**

**recover from assured.]—**By a policy of insurance a vessel was insured against "total or constructive total loss only." The policy contained the usual suing & labouring clause. The vessel having struck on a reef her owner abandoned her, & the underwriters incurred expense in floating her off & bringing her to land. In an action on the policy in which the owner claimed as for a total loss, & the underwriters counter-claimed for the expenses to which they had been put in salving the vessel, the jury found that the vessel was not a total loss, & that the underwriters were not liable on the policy:—**Held:** the underwriters were not entitled to recover the expenses of salving the vessel, either at common law, since those expenses were within the suing & labouring clause in the policy, or as a salvage award, since the underwriters were parties interested in the vessel.—CROUAN v. STANIER, [1904] 1 K. B. 87; 73 L. J. K. B. 102; 19 T. L. R. 664; 9 Com. Cas. 27; *sub nom.* CRONON v. STANIER, 52 W. R. 75; 47 Sol. Jo. 728.

**1912. — Shipowner's liability to cargo owner.]—**A number of mules exceeding £20,000 in value, having been shipped on pltf.'s steamship for carriage, under a contract which contained no clause exempting pltf's. from liability for loss of the mules through the negligence of pltf's. servants, pltf's. effected an insurance with deft. & other underwriters at Lloyd's, to protect pltf's. against "liability of any kind to the owners of the mules up to £20,000 owing to the omission of the negligence clause" from the contract. The policy was in the printed form of an ordinary Lloyd's policy, containing the usual suing & labouring clause. During the voyage the vessel was stranded through the negligence of pltf's. servants, & expenses were incurred by pltf's. in saving some of the mules, & in attempting to save others which were lost. Pltf's. sought to recover these expenses, not as a direct loss under the policy, but under the suing & labouring clause as expenses incurred to avert or reduce the amount of the loss:—**Held:** the suing & labouring clause was inapplicable to & formed no part of the contract of insurance, & pltf's. were not entitled to recover in the action.—CUNARD S.S. CO. v. MARTEN, [1903] 2 K. B. 511; 72 L. J. K. B. 754; 89 L. T. 152; 52 W. R. 39; 19 T. L. R. 634; 47 Sol. Jo. 708; 9 Asp. M. L. C. 452; 9 Com. Cas. 9, C. A.

**Annotations:—Consd.** Holman v. Merchants' Marine Insce., [1919] 1 K. B. 383. **Refd.** Western Asce. of Toronto v. Poole, [1903] 1 K. B. 376; Re United London & Scottish Insce., Newport Navigation Co.'s Claim, [1915] 1 Ch. 578; Adelaide S.S. Co. v. R. (1924), 93 L. J. K. B. 871.

**Reinsurance policy.]—**See Nos. 712, 731, *ante*.

**1913. Duty of assured—To safeguard against or minimise risk.]—**KIDSTON v. EMPIRE MARINE INSURANCE CO., No. 1898, *ante*.

**1914. — —.]—**(1) Suit brought to recover the amount of two policies of insurance upon the cargo & disbursements respectively of a ship; both policies being for a total loss. The ship having become a wreck, the captain, without taking any steps to save or discharge the cargo, deeming such impracticable, proceeded to dismantle the ship, & gave notice to the insurers of abandonment of the cargo, & sold both ship & cargo by public auction. A large part of the cargo was afterwards saved. The ct. below held, that as the cargo might have been, & was, in fact, partially saved, there was no such total loss of the cargo & freight as entitled the assured to recover on either of the policies. Such ruling, as regarded the cargo, affirmed, but as the ship when she was reduced to a wreck was incapable of earning any freight, the

ct. was of opinion that there was such a total loss of the disbursements, to be paid out of the freight, as to entitle the assurers to recover on that policy.

When a ship & cargo are in peril of being lost, the captain is called upon to act for the benefit of all concerned—he is not at liberty to prefer the interests of one of the parties to another (LORD CHELMSFORD).

(2) There can be no doubt . . . that the sums borrowed by the captain from the charterer at the port of loading to be repaid by deductions from the freight must be considered as advances of freights, & that the charterer had therefore an insurable interest (LORD CHELMSFORD).

(3) But whatever strictness of construction may have been applied to notices of abandonment in former times, it never could have been absolutely necessary to use the technical word “abandon”; any equivalent expressions which informed the underwriters that it was the intention of the assured to give up to them the property insured upon the ground of its having been totally lost, must always have been sufficient (LORD CHELMSFORD).

(4) What is a reasonable time in a case of this description must depend upon the particular circumstances of each case. On the one hand, the assured is not to delay his notice when a total loss occurs, in order to keep his chance of doing better for himself by keeping the subject insured, & then, when he finds it will be more to his advantage to do so, throwing the burden upon the underwriters; while, on the other, the underwriters cannot complain of a suspense of judgment fairly exercised on the part of the assured, to enable him to determine whether the circumstances are such as entitled him to abandon (LORD CHELMSFORD).—

*3 & Co. v. BOMBAY NATIVE INSURANCE CO.* (1869), L. R. 3 P. C. 72; 6 Moo. P. C. C. N. S. 302; 39 L. J. P. C. 1; 22 L. T. 317; 18 W. R. 296; 3 Mar. L. C. 369; 16 E. R. 740.

*Annotations:—As to (3) Consd. Cohen v. Standard Marine Insce.* (1925), 30 Com. Cas. 139. *As to (4) Refd. Russian Bank for Foreign Trade v. Excess Insce.*, [1918] 2 K. B. 123.

*See, now, Marine Insurance Act, 1906 (c. 41), s. 78 (4).*

#### *B. What Recoverable thereunder.*

*See Marine Insurance Act, 1906 (c. 41), s. 78.*

**1915. Particular charges.]—**KIDSTON *v.* EMPIRE MARINE INSURANCE CO., No. 1898, *ante*.

**1916. Expenses minimising or averting loss.]—**LE CHEMINANT *v.* PEARSON, LE CHEMINANT *v.* ALLNUTT, No. 1398, *ante*.

**1917. —.]—**AITCHISON *v.* LOHRE, No. 1899, *ante*.

**1918. — Unshipping & forwarding goods.]—**KIDSTON *v.* EMPIRE MARINE INSURANCE CO., No. 1898, *ante*.

**1919. —.]—**A ship with a cargo of palm oil for Liverpool was stranded near Pwllheli on the coast of Wales. It became necessary to land the cargo there, & this was properly done. The ship after some temporary repair on the beach, was towed to Carnarvon, the nearest port, & repaired so as to be thoroughly seaworthy for the completion of the voyage. The oil was forwarded by railway to Liverpool, at a cost to the shipowner of £212 15s. 1d.; & the freight was received by him. The oil might have been kept at Pwllheli until the ship was repaired & then re-shipped at T., a place about seven miles from Pwllheli. This would have been a reasonable course to adopt, & would have cost the shipowner £70. In an action

against the insurers on freight:—*Held*: the shipowner, having incurred expense for the purpose of averting a loss of freight, was entitled to recover, under the suing & labouring clause, so much thereof as was reasonably incurred; & the proper measure was the sum it would have cost to re-ship the oil at T.—*LEE v. SOUTHERN INSURANCE CO.* (1870), L. R. 5 C. P. 397; 39 L. J. C. P. 218; 22 L. T. 443; 18 W. R. 863; 3 Mar. L. C. 393.

**1920. —.]—**MEYER *v.* RALLI, No. 2254, *post*.

**1921. — Storage for reasonable time.]—**By a policy of marine insurance underwritten by deft. plffs. were insured in respect of a wood cargo laden on a Norwegian ship for a voyage from a Baltic port to an English port. The policy which contained the usual suing & labouring clause, was against war risk only & excluded all claims arising from delay. Shortly after sailing in Nov. 1914, the ship was stopped by German war vessels, the master was told that as wood had been declared contraband by the German govt. the ship would not be allowed to pass the Sound. The ship put into a Norwegian port, where the cargo was discharged & stored for some time, but it was subsequently re-shipped & forwarded to its destination in England:—*Held*: (1) under the suing & labouring clause plffs. were entitled to recover the cost of storage for a reasonable time & the proper cost of forwarding the cargo to its port of destination at the expiration of that time; (2) plffs. had not proved a constructive total loss of the goods within Marine Insurance Act, 1906 (c. 41), s. 60, as on Dec. 3 it could not be said that the total loss of the venture was unavoidable, or that it was unlikely that the goods would reach their destination in England.—*WILSON BROTHERS BOBBIN CO., LTD. v. GREEN*, [1917] 1 K. B. 860; 86 L. J. K. B. 713; 116 L. T. 637; 14 Asp. M. L. C. 119; 22 Com. Cas. 185.

**1922. General average.]—**AITCHISON *v.* LOHRE, No. 1899, *ante*.

**1923. Salvage expenses.]—**AITCHISON *v.* LOHRE, No. 1899, *ante*.

**1924. —.]—**D. entered into an agreement by which he was to receive £10,000 if he succeeded in transporting from Egypt & erecting uninjured in London an obelisk belonging to the British nation. D. expended £4,000 in constructing a vessel or case for the obelisk, in properly stowing it therein, & in providing for its transport. He then insured the obelisk & the vessel it was in with one underwriter for £2,000, & with another for £1,000. The vessel & obelisk had to be cast off in a storm in the Bay of Biscay by the steamship that was towing them. Another steamer subsequently found them, & towed them into Ferrol, where they were refitted, & were afterwards towed to London. The salvors brought an action in the Admty. Div. of the High Ct., & were awarded £2,000 salvage, the obelisk being estimated at £25,000. D. having paid the sum awarded, brought actions to recover this payment from the underwriters. The policies, which were against total loss only, contained a provision that the vessel & obelisk, “for so much as concerns the assured” should by agreement be valued at £4,000, & a sue & labour clause in the ordinary form:—*Held*: on the authority of *Aitchison v. Lohre*, No. 1899, *ante*, the underwriters were not liable to repay D. the £2,000, awarded as salvage, salvage expenses not being within the sue & labour clause.—*DIXON v. WHITWORTH, DIXON v. SEA INSURANCE CO.* (1880), 49 L. J. Q. B. 408; 43 L. T. 365; 4 Asp. M. L. C. 327, C. A.

*Annotations:—Refd. The Mary Thomas*, [1894] P. 108; *Western Assce. of Toronto v. Poole*, [1903] 1 K. B. 376.



**Sect. 22.—Measure of loss for which insurers liable:**  
*Sub-sect. 3, B.; sub-sect. 4, A. & B. (a), (i. & ii.)*

**1925. Costs of action—Defended successfully by assured.]—**XENOS *v.* FOX. No. 1710, *ante*.

**1926. Conditioning damaged goods.]—**FRANCIS *v.* BOULTON, No. 1993, *post*.

**1927. Fodder supplied to cattle—During delay in port.]—**A marine policy of insurance on live cattle against all risks, including mortality from any cause whatsoever, renders the insurer liable, under the suing & labouring clause, for the extra cost of fodder supplied to the cattle whilst the vessel in which they are shipped is detained in a port of refuge for necessary repairs due to perils of the sea, for there is danger of total loss unless the expense is incurred.—THE POMERANIAN, [1895] P. 349; 65 L. J. P. 39.

#### SUB-SECT. 4.—THE MEMORANDUM.

##### A. Specification of Articles.

See Sect. 3, sub-sect. 4, C., *ante*.

##### B. Construction.

###### (a) "Free from Average."

**1928. "Unless general"—Goods damaged by storm.]—**Insurance free from average unless general does not extend to the damage received by the goods in a storm.—WILSON *v.* SMITH (1764), 3 Burr. 1550; 1 Wm. Bl. 507; 97 E. R. 975.

*Annotations:—*Consd. Burnett *v.* Kensington (1797), 7 Term Rep. 210; Price *v.* A1 Ships' Small Damage Insee. Assocn. (1889), 22 Q. B. D. 580.

**1929. ——— Warranty free from partial loss—Except general average loss.]—**PRICE & CO. *v.* A1 SHIPS' SMALL DAMAGE INSURANCE ASSOCN., No. 1979, *post*.

**1930. "Free from particular average"—Equivalent to insurance against total loss & general average.]—**(1) Where goods are insured by a policy of marine insurance in the ordinary form, the expression "warranted free from particular average" is not confined to losses arising from injury to, or deterioration of, the goods themselves; but is equivalent to a stipulation against total loss & general average only; & consequently, includes expenses incurred in relation to the goods.

(2) A quantity of iron rails was shipped to be carried to a certain place, for a sum to be paid here, ship lost or not lost. The shippers insured them by a policy in the ordinary form "warranted free from particular average, unless the ship be stranded, sunk or burnt"; with the usual clause authorising the assured to "sue, labour & travel for, in, & about, the defence, safeguard & recovery of the goods." The ship was neither stranded, sunk nor burnt; but there was a constructive total loss of her by perils of the sea. The rails were saved, & sent on in other vessels to their destination, for which the assured was compelled to pay freight to an amount not exceeding the value of the rails:—*Held*: this freight was not

recoverable under the policy.—GREAT INDIAN PENINSULA RY. CO. *v.* SAUNDERS (1862), 2 B. & S. 266; 31 L. J. Q. B. 206; 6 L. T. 207; 9 Jur. N. S. 198; 10 W. R. 520; 1 Mar. L. C. 211; 121 E. R. 1072, Ex. Ch.

*Annotations:—*As to (2) *Folld.* Booth *v.* Gair (1863), 15 C. B. N. S. 291. *Distd.* Kidston *v.* Empire Marine Insee. (1867), L. R. 2 C. P. 357; Wilson Bobbin Co. *v.* Green, [1917] 1 K. B. 860. *Refd.* Meyer *v.* Ralli (1876), 1 C. P. D. 358; Dixon *v.* Whitworth (1879), 4 C. P. D. 371; The Pomeranian, [1895] P. 349. *Generally, Mentd.* The Glenlivet, [1893] P. 164.

**1931. "Free from particular average & loss"—Free from loss total or partial—Unless by perils specifically mentioned.]—**OTAGO FARMERS' CO-OPERATIVE ASSOCN. OF NEW ZEALAND *v.* THOMPSON, No. 296, *ante*.

###### (b) "Unless Stranded."

###### i. Application of Clause.

**1932. Insurance on goods—Loss not attributable to act of stranding.]—**BOWRING *v.* ELMSLIE (1790), 7 Term Rep. 216, n.; 101 E. R. 939.

**1933. ———.]—**If an insurance be effected on fruit, & the policy contain the usual memorandum, "corn, fruit, etc. warranted free from average unless general, or the ship be stranded," & the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the sea, though no part of the loss arise from the act of stranding.—BURNETT *v.* KENSINGTON (1797), 7 Term Rep. 210; 101 E. R. 937.

*Annotations:—**Apld.* Barrow *v.* Bell (1825), 4 B. & C. 736. *Consd.* The Alsace Lorraine, [1893] P. 209. *Refd.* Dyson *v.* Roweroft (1803), 3 Bos. & P. 474; Hearn *v.* Edmunds (1819), 4 Moore, C. P. 15; Kingsford *v.* Marshall (1832), 8 Bing. 458; Wells *v.* Hopwood (1832), 3 B. & Ad. 20; Roux *v.* Salvador (1836), 4 Scott, 1; The Glenlivet, [1893] P. 164; Thames & Mersey Marine Insee. *v.* Pitts & King, [1893] 1 Q. B. 476.

**1934. ——— Goods must be on board.]—**Pltfs. effected, with defts., an insurance on a parcel of rice on a voyage from Calcutta to Demerara, or Barbados, in a named ship. The policy contained the common memorandum, by which rice is warranted free from average unless general or the ship be stranded, & a special memorandum by which the rice was "warranted free from particular average unless the ship be stranded. . . ." The ship, which was chartered by pltfs. to carry a cargo of rice, including the parcel in question, was of French nationality. She encountered heavy weather, obliging her master to jettison some of the rice, & subsequently to put into Mauritius for repairs. To effect these repairs the cargo was discharged, & part of it, including some of the rice in question, being damaged, was condemned as unfit to be forwarded & sold. Whilst the vessel was being repaired, & whilst the whole of the cargo was on shore, a cyclone burst over the island, during which the vessel stranded, & was found to have sustained such damage that she was condemned & abandoned. The remainder of her cargo was subsequently shipped on board a British vessel, & after a portion of it, including some of the rice in question, had been, in the course of the

#### PART II. SECT. 22, SUB-SECT. 4.—B. (a).

**1929 i. "Unless general"—Warranty free from partial loss—Except general average loss.]—**Where goods of the same species, shipped in packages, are insured, free from average, unless general, & it is not distinctly expressed that the packages are separately insured, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, not being general average, though one or more package or pack-

ages be entirely lost or destroyed by the specific perils.—MOORE *v.* PROVINCIAL INSURANCE CO. (1873), 23 C. P. 383.—CAN.

*r.* ———.]—An insurance was effected on goods against loss. The policy contained the usual memorandum "All goods being warranted free from average unless general." The goods thus insured consisted of properties of various descriptions in separate cases & in bulk, some of which, by a peril insured against, were totally lost & others saved:—*Held*: the

insured was not entitled to recover.—SILLARS *v.* ROYAL INSURANCE CO. (1882), 6 Nfld. L. R. 410.—NFLD.

*t.* "Free from particular average."]—BEEROOPPO SETTY *v.* HURSMULL RAMCHUND (1864), 2 Hyde, 74.—IND.

*a.* ———.]—ESMAIL *v.* SHAMJEE POONJANI (1878), 1 L. R. 2 Bom. 550.—IND.

*b.* ———.]—DE PASS & CO. *v.* FRONTIER FIRE & MARINE INSURANCE CO. TRUSTEES (1868), Buch. 28.—S.A.F.



voyage, damaged by sea perils, it was finally delivered at Barbados. Freight *pro rata itineris* was, according to French law, paid by plffs. on all the rice discharged from the French vessel at Mauritius. Defts. paid their proportion of general average & forwarding charges, but disputed plffs.' claim for £153 13s. 3d. for a particular average loss on the rice sold at Mauritius. & on that subsequently damaged in the British vessel, including the *pro rata* freight charged against the rice:—*Held*: defts. were not liable, as the stranding took place at a time when the insured goods were not on board the vessel, & therefore, the warranty against particular average remained in force.—*THE ALSACE LORRAINE*, [1893] P. 209; 62 L. J. P. 107; 69 L. T. 261; 42 W. R. 112; 9 T. L. R. 484; 7 Asp. M. L. C. 362; 1 R. 632.

1935. ———.]—A cargo of maize was insured from San Nicolas & Buenos Ayres to a port in Europe; the subject-matter of the insurance was described in the policy to be "26,910 bags of maize from San Nicolas, £6,065 at 1 per cent.; 8299 bags of maize from Buenos Ayres, £1,875 at  $\frac{7}{8}$  per cent."; & the policy contained a further statement that by agreement the goods were valued at "£7,940 (included £1,361 6s. 6d. for advance on freight)." The policy covered all risks in craft, & contained a warranty against particular average, unless the ship or craft should be stranded. The 26,910 bags were shipped at San Nicolas; but while on her way down the river to Buenos Ayres the ship was stranded; at that time the 8,299 bags were in lighters in Buenos Ayres roads awaiting her arrival. Ultimately the ship was got off & proceeded to Buenos Ayres, where she was surveyed & found to be seaworthy; the cargo from San Nicolas, which had been taken out, was re-shipped, the 8,299 bags waiting in the lighters were put on board, & the ship proceeded on her voyage to Europe, in the course of which a large part of the cargo was damaged by water owing to perils of the seas. It was admitted that a claim for particular average in consequence of the stranding arose in respect of the bags shipped at San Nicolas; but the assured claimed to be entitled to recover also in respect of the bags shipped at Buenos Ayres; they further contended that the loss should be calculated upon the full £7,940 without any deduction in respect of freight advanced:—*Held*: (1) as at the time of the stranding of the ship the 8,299 bags were only at risk in the craft & not at risk in the ship, the warranty attached, & the assured were not entitled to recover a particular average loss in respect of such bags; (2) the policy was to be treated as one policy upon valued goods, & not as a policy by which advanced freight was separately insured, & therefore the particular average loss should be calculated upon the full amount of £7,940.—*THAMES & MERSEY MARINE INSURANCE CO. v. PITTS, SON & KING*, [1893] 1 Q. B. 476; 68 L. T. 524; 41 W. R. 346; 37 Sol. Jo. 216; 7 Asp. M. L. C. 302; 5 R. 168, D. C.

*Annotations*:—As to (1) *Consd.* *The Alsace Lorraine*, [1893] P. 209. As to (2) *Refd.* *Mansell v. Hoade* (1903), 20 T. L. R. 150.

1936. **Whether applicable only to ship—Lighter.** —By a policy of insurance assurance was made "including risk of craft to & from the ship" on linseed oil cakes, "free of particular average, unless general or the ship was stranded." The cakes were put on board a lighter to be landed at

their destination; & the lighter stranded & sunk, whereby a particular average loss was sustained:—*Held*: the underwriters were not liable.—*HOFFMAN v. MARSHALL* (1835), 2 Bing. N. C. 383; 2 Scott, 559; 5 L. J. C. P. 70; 132 E. R. 150; *sub nom.* *HOFMAN v. MARSHALL*, 1 Hodg. 330.

*Annotation*:—*Distd.* *Russell & Erwin Manufacturing Co. v. Lodge* (1890), 6 T. L. R. 353.

1937. ——— **Barge.**—*RUSSELL & ERWIN MANUFACTURING CO. v. LODGE*, No. 1944, *post*.

1938. ———.]—*THAMES & MERSEY MARINE INSURANCE CO. v. PITTS, SON & KING*, No. 1935, *ante*.

## ii. *What is Stranded.*

1939. **Must be bonâ fide.**—*BOWRING v. ELM-SLIE* (1790), 7 Term Rep. 216, n.; 101 E. R. 939.

1940. **Must be accidental—Out of ordinary course of voyage.**—*BISHOP v. PENTLAND*, No. 1655, *ante*.

1941. **Ship run ashore for safety.**—*BOWRING v. ELM-SLIE* (1790), 7 Term Rep. 216, n.; 101 E. R. 939.

1942. ——— **After collision.**—*STURGE v. THOMPSON* (1843), 1 L. T. O. S. 259.

1943. ———.]—(1) A cargo of salt, worth together with prepaid freight about £1,900 was insured from Liverpool to Calcutta, the policy containing the usual memorandum warranting "corn, fish, salt, etc., free from average unless general or the ship be stranded." Having encountered bad weather, lost both her anchors, & had her masts cut away, the ship was taken in tow by salvors & placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, & sustained considerable further injury. The salt was landed in a damaged state, & the ship repaired, though at an expense which exceeded her value when repaired. About one-fifth of the salt might have been made saleable, but would have realised no profit. Suits were instituted by the salvors in the Admlty. Ct., & the salt sold under a decree, the entire proceeds being absorbed by the costs:—*Held*: (1) there was a partial loss of the salt, but not a total loss, the seizure & sale under the decree of the Admlty. Ct. not being a natural or necessary consequence of a peril insured against; (2) there was a stranding within the meaning of the memorandum.

(3) The assured had subsequently to the date of the policy executed a deed of inspectorship under Bkpcy. Act, 1861 (c. 134), s. 192, & was suing on behalf of third persons who had made advances upon the shipping documents:—*Held*: pltf. was entitled to recover, & the underwriters were not entitled to set off the amount of a debt due from pltf. to them under Bkpcy. Act, 1849 (c. 106), s. 171.—*DE MATTOS v. SAUNDERS* (1872), L. R. 7 C. P. 570; 27 L. T. 120; 20 W. R. 801; 1 Asp. M. L. C. 377.

*Annotations*:—As to (1) *Distd.* *Cossmann v. West*, *Cossmann v. British America Assco.* (1887), 13 App. Cas. 160. *Refd.* *Fooks v. Smith*, [1924] 2 K. B. 508. As to (2) *Consd.* *The Countess*, [1921] P. 279. *Refd.* *Letchford v. Oldham* (1880), 5 Q. B. D. 538. *Generally, Mentd.* *Polurrian S.S. Co. v. Young*, [1915] 1 K. B. 922.

1944. ———.]—(1) I cannot conceive that the barge was grounded merely for repairs. It is quite clear that it would have been lost if it had not been so grounded (DAY, J.).

(2) As to the second point taken by deft., the word "craft" in this policy clearly was intended to cover both steamer & barge (DAY, J.).—*RUSSELL & ERWIN MANUFACTURING CO. v. LODGE* (1890), 6 T. L. R. 353.

## PART II. SECT. 22, SUB-SECT. 4.—B. (b) ii.

c. *Ship striking obstruction.*—*MITCHELL & GRAY v. CALDER* (1822), 20 Fac. Coll. 538; 1 Sh. (Ct. of Sess.) 298.—*SCOT. J.—VOL. XXIX.*

*Sect. 22.—Measure of loss for which insurers liable:*  
*Sub-sect. 4, B. (b) ii., (c) & (d), & C. (a).]*

**1945. Ship driven aground—By collision.]—**

*BARING v. HENKLE* (1801), 1 Marshall on Marine Insurances, 3rd ed. 232.

*Annotations:—Dtd. Wells v. Hopwood* (1832), 3 B. & Ad. 20. *Refd. Corcoran v. Gurney* (1853), 1 E. & B. 456.

**1946. — By wind—No damage suffered.]—**

Where there is a warranty in a policy of insurance against average, "unless general, or the ship be stranded," if during the voyage the ship is forced ashore by the wind, or is driven on a bank, & remains fast for any time, this is a sufficient stranding to do away the effect of the warranty, although the ship is not proved to have thereby received any material damage.—*HARMAN v. VAUX* (1813), 3 Camp. 429, N. P.

*Annotation:—Refd. Wells v. Hopwood* (1832), 3 B. & Ad. 20.

**1947. Ship striking obstruction—Must settle for some time—What amounts to settling.]—**

*DOBSON v. BOLTON* (1799), 1 Marshall on Marine Insurances, 3rd ed. 231; 1 Park on Marine Insurances, 8th ed., p. 239.

*Annotations:—Dtd. Corcoran v. Gurney* (1853), 20 L. T. O. S. 221. *Refd. Wells v. Hopwood* (1832), 3 B. & Ad. 20.

**1948. — — —.]—**To constitute a stranding it is essential that the vessel should be stationary, the striking on a rock where the vessel remains for a minute & a half only, is not a stranding, though she thereby receives an injury, which eventually proves fatal.—*M'DOUGLE v. ROYAL EXCHANGE ASSURANCE CO.* (1816), 4 M. & S. 503; 105 E. R. 921; *previous proceedings* (1815), 4 Camp. 283, N. P.

*Annotations:—Apld. The Glenlivet*, [1893] P. 164. *Refd. Hearn v. Edmunds* (1819), 4 Moore, C. P. 15; *Wells v. Hopwood* (1832), 3 B. & Ad. 20.

**1949. — — —.]—**A vessel strikes upon a rock & remains fixed there for the space of fifteen or twenty minutes, in consequence of which she sustains a material injury. This constitutes a stranding.—*BAKER v. TOWRY* (1816), 1 Stark. 436, N. P.

*Annotation:—Refd. Wells v. Hopwood* (1832), 3 B. & Ad. 20.

**1950. — — —.]—***BRYANT & MAY, LTD. v. LONDON ASSURANCE CORPN.* (1886), 2 T. L. R. 591.

*Annotation:—Refd. The Glenlivet*, [1893] P. 164.

**1951. Damage through taking ground—In ordinary course of navigation.]—**Where a vessel, being under the conduct of a pilot, in going up a harbour took the ground in the ordinary course of navigation, & afterwards, being moored at a quay, on the ebb of the tide took the ground, fell over on her side, & was injured, & her cargo damaged:—*Held*: this was not a stranding, for which the insurer was liable.—*HEARNE v. EDMUNDS* (1819), 1 Brod. & Bing. 388; 4 Moore, C. P. 15; 129 E. R. 772.

*Annotations:—Distd. Rayner v. Godmond* (1821), 5 B. & Ald. 225. *Consd. Wells v. Hopwood* (1832), 3 B. & Ad. 20. *Refd. Bishop v. Pentland* (1827), 7 B. & C. 219; *Letchford v. Oldham* (1880), 5 Q. B. D. 538.

**1952. — — —.]—**A ship having on board goods which were insured on a voyage from London to Hull, but "warranted free from average, unless general, or the ship should be stranded," arrived in Hull Harbour, which is a tide harbour, & proceeded to discharge her cargo at a quay on the side of it: this could be done at high water only, & could not be completed in one tide. At the first low tide, the vessel grounded on the mud, but, on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour, stretched, & the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended

she should do, but her forepart got on a bank of stones, rubbish, & sand, near to the quay, & the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel:—*Held*: this was a stranding within the meaning of that word within the policy.

Where a vessel takes the ground in the ordinary & usual course of navigation & management in a tide river or harbour, upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But when the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the meaning of the memorandum (*LORD TENTERDEN, C.J.*).—*WELLS v. HOPWOOD* (1832), 3 B. & Ad. 20; 110 E. R. 8.

*Annotations:—Consd. Kingsford v. Marshall* (1832), 8 Bing. 458. *Fold. Corcoran v. Gurney* (1853), 1 E. & B. 456. *Apld. De Mattos v. Saunders* (1872), L. R. 7 C. P. 570. *Fold. Letchford v. Oldham* (1880), 5 Q. B. D. 538.

**1953. — — —.]—**Upon the ebbing of the tide, a vessel took the ground in a tide harbour, in the place where it was intended she should; but, in so doing, struck against some hard substance, by which two holes were made in her bottom, & the cargo damaged:—*Held*: not a stranding for which the underwriters were liable upon an insurance on corn warranted free from average, unless general, or the ship be stranded.—*KINGSFORD v. MARSHALL* (1832), 8 Bing. 458; 1 Moo. & S. 657; 1 L. J. C. P. 135; 131 E. R. 470.

*Annotations:—Fold. Corcoran v. Gurney* (1853), 1 E. & B. 456; *Letchford v. Oldham* (1880), 5 Q. B. D. 538.

**1954. — — —.]—***MAGNUS v. BUTTEMER*, No. 1600, *ante*.

**1955. — Not in ordinary course of navigation—Negligence of pilot.]—**Where a ship, being under conduct of a pilot, in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock-basin, by a rope to the shore, & left there, & she took the ground, & when the tide left her, fell over on her side & bilged, in consequence of which when the tide rose she filled with water, & the goods were wetted & damaged:—*Held*: this was a stranding to entitle the assured to recover for an average loss upon the goods. The assured shall not be prevented from recovering against the underwriter an average loss upon a damage by stranding occasioned by the neglect of a Liverpool pilot appointed under 37 Geo. 3, c. 78, while the ship is under his conduct.—*CARRUTHERS v. SYDEBOTHAM* (1815), 4 M. & S. 77; 105 E. R. 764.

*Annotations:—Distd. Hearne v. Edmunds* (1819), 1 Brod. & Bing. 388. *Fold. Rayner v. Godmond* (1821), 5 B. & Ald. 225. *Consd. Wells v. Hopwood* (1832), 3 B. & Ad. 20. *Refd. Bishop v. Pentland* (1827), 7 B. & C. 219; *Kingsford v. Marshall* (1832), 8 Bing. 458; *Devaux v. J'Anson* (1839), 5 Bing. N. C. 519; *Thames & Mersey Marine Insce. v. Hamilton, Fraser* (1887), 12 App. Cas. 484. *Mentd. The Girolamo* (1831), 3 Hag. Adm. 169; *The Maria* (1839), 1 Wm. Rob. 95; *The Protector* (1839), 1 Wm. Rob. 45; *The Agricola* (1843), 2 Notes of Cases, 113; *The Eden* (1846), 4 Notes of Cases, 460; *The Bilbao* (1860), Lush. 149; *Tyne Improvement Comrs. v. General Steam Navigation Co.* (1866), 15 L. T. 487.

**1956. — — — Forced entry into harbour.]—**Where, in *assumpsit* on a policy of insurance on goods warranted free from average, unless the ship were stranded, it appeared that in the course of the voyage the ship was, by tempestuous weather, forced to take shelter in a harbour, & in entering it, struck upon an anchor, & being brought to her moorings, was found leaky & in danger of sinking & on that account was hauled with warps higher



up the harbour, where she took the ground & remained fast there for half an hour:—*Held*: this was a stranding within the meaning of the policy.—*BARROW v. BELL* (1825), 4 B. & C. 736; 7 Dow. & Ry. K. B. 244; 4 L. J. O. S. K. B. 47; 107 E. R. 1234.

*Annotations*:—*Reid. Kingsford v. Marshall* (1832), 8 Bing. 458; *Wells v. Hopwood* (1832), 3 B. & Ad. 20.

1957. ———— *Contributory negligence of crew.*—*BISHOP v. PENTLAND*, No. 1655, *ante*.

1958. ———— *Where a ship under stress of weather is run into a tidal harbour by the captain, & is there grounded in consequence of its being low water*:—*Held*: such grounding is a stranding within the meaning of the memorandum in the policy, the ship having never at any time been in safety.—*FALKNER v. GURNEY* (1853), 1 W. R. 129.

1959. ———— *A cargo of barley insured, subject to the usual memorandum, sustained an average loss. The ship sailed from Nantes to Dublin: by stress of weather she was driven into the bay of Palais on the north coast of France, where she anchored. The wind increasing, the anchor dragged: &, for the preservation of all on board, the captain slipped the chains, got the ship under sail, & succeeded in entering Sanzon, which is a tidal harbour; where, by reason of its being then low water, the ship took the ground. On a case stating these facts & raising the question whether the ship was stranded*:—*Held*: she was stranded within the meaning of the memorandum, as she had not taken the ground in the ordinary course of management in a tidal harbour, but from an unusual state of things.

I can see no difference between the case of the ship being forced, for her safety, to run aground outside the harbour, & her being forced to enter the harbour in such a state of tide that she runs aground in doing so (LORD CAMPBELL, C.J.).—*CORCORAN v. GURNEY* (1853), 1 E. & B. 456; 22 L. J. Q. B. 113; 20 L. T. O. S. 221; 17 Jur. 1152; 118 E. R. 507.

*Annotation*:—*Reid. Letchford v. Oldham* (1880), 5 Q. B. D. 538.

1960. ———— *Water drained off canal.*—Where, during the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; & the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there:—*Held*: this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of such voyage.—*RAYNER v. GODMOND* (1821), 5 B. & Ald. 225; 106 E. R. 1175.

*Annotations*:—*Consd. Wells v. Hopwood* (1832), 3 B. & Ad. 20. *Reid. Bishop v. Pentland* (1827), 7 B. & C. 219.

1961. ———— *Grounding not as intended.*—*WELLS v. HOPWOOD*, No. 1952, *ante*.

1962. ———— *A policy of marine insurance on cargo contained the usual warranty against average unless the ship were stranded. The place of discharge was in a tidal harbour, where vessels of the size of the ship in question can only get to the quay to unload during high spring tides. A ship arriving in the port is brought towards the quay as soon as in the pilot's judgment there will be water enough to float her there, &, if in the course of getting her to the quay the depth of water proves insufficient, she takes the*

ground to wait until the next tide admits of her being floated farther. The ship in question was in the course of being brought to the quay, but it was found that she could not get within twenty feet of it, & consequently she was left where she was to await a higher tide. As the tide receded & she settled down, instead of resting on an even keel she pitched by the head into a hole, & remained in such a position as to cause her timbers to be strained, by reason whereof she made water & damage resulted to the cargo. It afterwards appeared that there was an elevation in the bottom of the harbour, a small bank having being formed parallel with the quay, & a hole beside it into which the vessel had pitched. This state of things had been caused by the paddles of steamers leaving the harbour at low tide, & its existence had not been found out previously to the accident:—*Held*: the taking of the ground by the vessel was in the circumstances of such an accidental & unforeseen character as not to be in the ordinary course of navigation & to amount to a "stranding."—*LETCHFORD v. OLDHAM* (1880), 5 Q. B. D. 538; 49 L. J. Q. B. 458; 28 W. R. 789, C. A.

1963. ———— *Fortuitous & accidental cause.*—*MAGNUS v. BUTTEMER*, No. 1600, *ante*.

1964. *Sinking in deep water.*—A policy insuring against the loss of a vessel by "grounding or stranding" does not cover a loss by the sinking of the vessel in deep water.—*BAKER-WHITELEY COAL CO. v. MARTEN* (1910), 26 T. L. R. 314.

#### (c) Collision.

1965. *Collision with ship.*—*RICHARDSON v. BURROWS* (1880), Lowndes on Marine Insurances, 2nd ed. 198, n.

1966. *Striking sunken wreck.*—*THE MUNROE*, No. 1703, *ante*.

1967. *Striking breakwater.*—*UNION MARINE INSURANCE CO. v. BORWICK*, No. 1705, *ante*.

1968. *Collision distinguished from "stranding."*—*UNION MARINE INSURANCE CO. v. BORWICK*, No. 1705, *ante*.

1969. *"Contact between two navigable things"*—*Collision with sunken barge—Barge subsequently refloated.*—*CHANDLER v. BLOGG*, No. 1706, *ante*.

#### (d) Other Cases.

1970. *Ship "burnt."*—A ship is not "burnt" within the meaning of the memorandum in a Lloyd's policy of insurance—"warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk or burnt"—unless the injury by fire is such as to constitute a substantial burning of the ship as a whole.

It seems to me impossible to lay down absolutely in the affirmative or the negative, as to whether a partial burning does constitute a "burnt" ship or not within this policy; it may or may not, according to the actual facts appertaining to the partial burning (A. L. SMITH, L.J.).—*THE GLENLIVET*, [1894] P. 48; 63 L. J. P. 45; 69 L. T. 706; 42 W. R. 97; 10 T. L. R. 97; 38 Sol. Jo. 78; 7 Asp. M. L. C. 395, C. A.; *affg.*, [1893] P. 164.

*Annotation*:—*Reid. The Alsace Lorraine*, [1893] P. 209.

#### C. Calculation of

##### (a) In General.

See Marine Insurance Act, 1906 (c. 41), s. 76.

1971. *Calculation of percentage—Proportion to*

#### PART II. SECT. 22, SUB-SECT. 4.—B. (d).

*Free from partial loss.*—*MOWAT v. BOSTON MARINE INSURANCE CO.* (1896), 26 S. C. R. 41.—CAN.



*Sect. 22.—Measure of loss for which insurers liable: Sub-sect. 4, C. (a) & (b), & D.]*

**value of cargo at time of loss—Average loss on cargo.]—**(1) Where a ship's bottom has during the voyage insured, been taken by the worm, in consequence of which she is incapable of proceeding on her voyage, & is condemned, this is not a loss by perils of the sea, within the meaning of the policy.

(2) In the case of an insurance upon slaves, free from an average loss under five per cent. for loss from insurrection, & a loss takes place from insurrection, the loss must be calculated in its proportion to the cargo, when it happened, & not when the whole cargo was sold.—*ROHL v. PARR* (1796), 1 Esp. 445, N. P.

*Annotations:—As to (1) Apld. Pandorf v. Hamilton* (1886), 17 Q. B. D. 670. *Refd. Butler v. Wildman* (1820), 3 B. & Ald. 398; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41.

**1972. — Proportion to value of ship—Average loss on ship.]—**A declaration stated, that pltf. made a policy of insurance with an assurance co., upon the goods, body, tackle, apparel, etc., of a ship valued at £5,000; that the ship & freight were warranted free from average under £3 per cent.; unless general, or the ship were stranded; that the capital stock & funds of the co. should alone be liable to make good all claims & demands under that policy; & that no proprietor of the co. should be charged, by reason of that policy, beyond the amount of his share in the stock of the co.; that the co. became insurers to pltf. for £1,500, & the policy was signed by defts., as directors of the co.; & in consideration of the payment of the premium at their request, defts. undertook that the co. should perform all things contained in the policy to be performed by them. The declaration then alleged, that the ship ran aground; that it was necessary for her safety to let go the larboard bower anchor & kedge anchor, & to cut away the cables from the anchors; that the anchors & cables were left in the sea, & lost to pltf.; that afterwards the ship was further strained, damaged & broken, whereby pltf. sustained a general average loss. Second breach, that, the ship being strained & damaged, pltf. sustained an average loss on the ship, her masts, ropes, & cables, to a larger amount than £3 per cent.; on all the moneys insured thereon, to wit, to the amount of £50, by the hundred for each & every hundred insured thereon, whereby the co. became liable to pay to pltf. a certain sum of money, to wit £200, being their proportion of the average loss in respect of the said sum of £1,500; & that, though the funds of the co. were sufficient, defts. had not paid the said losses. Defts. pleaded, that the anchors & cables were not left in the sea & lost; also, that the pltf. had not suffered an average loss on the ship or vessel, her masts, ropes, & cables, to the amount of £3 per cent. on all the moneys insured thereon. On special demurrer to the pleas:—*Held*: (1) the pleas were bad, the traverses being too large; (2) defts. were personally responsible, it being averred that the funds were sufficient, & it was not necessary to allege notice to them of the loss; (3) the stipulation, that the ship & freight should be free from average under £3 per cent. was not a proviso which required to be pleaded; & the second breach was bad, as it did not distinctly aver that the loss was more than £3 per cent. on the value of the ship; (4) defts. were entitled to judgment on the second breach, notwithstanding the plea was bad.—*DAWSON v. WRENCH* (1849),

3 Exch. 359; 18 L. J. Ex. 229; 12 L. T. O. S. 405; 154 E. R. 883.

*Annotations:—As to (2) Foll. Hallett v. Dowdall* (1852), 18 Q. B. 2. *Refd. Reid v. Allan, Cross v. Allan* (1849), 4 Exch. 326; *Sunderland Marine Insce. v. Kearney* (1851), 15 Jur. 1006; *Churchward v. R.* (1865), L. R. 1 Q. B. 173. *As to (3) Refd. Hurst v. Evans*, [1917] 1 K. B. 352; *Munro, Brice v. War Risks Assocn.*, [1918] 2 K. B. 78. *Generally, Refd. Compania Maritima of Barcelona v. Wishart* (1918), 87 L. J. K. B. 1027. *Mentd. Hill v. Nuttall* (1864), 17 C. B. N. S. 262; *S. E. Ry. v. Railway Comrs.* (1881), 6 Q. B. D. 586.

**1973. Average payable separately—Stipulation providing for—Option of assured to claim average on whole—Only part of goods lost.]—**A merchant ship, under a mistake, is taken in tow by a British ship of war, & is thereby exposed to a tempestuous sea, which injures goods on board of her, this is a loss from the perils of the sea; but *semble*, since the loss resulted from restraint by a ship of war, it might have been alleged to have been occasioned by capture & detention.

By the terms of the policy the underwriter binds himself to pay average separately, on each particular package of the goods insured, this stipulation does not preclude the assured from recovering an average loss upon the whole exceeding three per cent. under the usual clause in the policy, & in such case although several packages remain uninjured they are to be included in the average.

An insurer who desires the assured to do what he conceives to be the best in the circumstances, is bound by what the latter does in the exercise of a sound discretion.—*HAGEDORN v. WHITMORE* (1816), 1 Stark. 157, N. P.

**1974. — Must be expressly stated.]—**Two policies of insurance were made generally upon goods from Calcutta to London, with a memorandum "that the goods were warranted free from average, unless general, or the ship be stranded"; & the policies were afterwards respectively indorsed, with a declaration of interest, "Per *Waban*, 2,688 bags linseed, £1,600," & "Per *Waban*, linseed, £1,600." 2,000 bags of linseed were shipped on board the *Waban*, & during the voyage, by perils of the sea, 1,023 bags were so damaged that a large portion of the linseed in them was thrown into the sea as rotten & worthless, & the rest was sold, & only realised a few shillings, & would have lost the character of linseed if sent on to London. The remaining bags were uninjured, brought safe to London, & delivered to the insured:—*Held*: (1) in the absence of any separate valuation, or any other stipulation in the policy showing that it was intended to distinguish one portion of the seed from another, & to make a separate insurance upon each portion, as well as a joint one upon all, the policy was upon the whole of the seed; (2) although the seed was packed in packages, each capable of a distinct valuation, & some of the packages were totally lost, yet as the rest of the packages arrived safe, the loss was a partial loss only of the subject-matter insured, & the underwriters were protected by the ordinary memorandum, there being no general average or stranding, & were not liable as upon a total loss of some of the packages.—*RALLI v. JANSON* (1856), 6 E. & B. 422; 119 E. R. 922; *sub nom. JANSON v. RALLI*, 25 L. J. Q. B. 300; 27 L. T. O. S. 139; 4 W. R. 568; *sub nom. JAMSON v. RALLI*, 2 Jur. N. S. 566, Ex. Ch.

*Annotations:—As to (2) Distd. Duff v. Mackenzie* (1857), 3 C. B. N. S. 16. *Foll. Entwistle v. Ellis* (1857), 2 H. & N. 549. *Consd. Wilkinson v. Hyde* (1858), 3 C. B. N. S. 30. *Distd. Cator v. Great Western Insce. of New York* (1873), L. R. 8 C. P. 552. *Refd. Great Indian Peninsular Ry. v. Saunders* (1862), 6 L. T. 297.

*(b) Successive Losses.*

See Marine Insurance Act, 1906 (c. 41), ss. 76, 77.

**1975. Particular average losses—When added together—Voyage policy—Losses occurring in one voyage.]—**LE CHEMINANT *v.* PEARSON, LE CHEMINANT *v.* ALLNUTT, No. 1398, *ante*.

**1976. ——— ——— ———.]—**BLACKETT *v.* ROYAL EXCHANGE ASSURANCE CO., No. 23, *ante*.

**1977. ——— ——— ———.]—**(1) A time policy upon ship & freight contained the warranty "free from average under 3 per cent. unless general, or the ship be stranded, sunk or burnt":—*Held*: distinct & separate average losses occurring during the same voyage could be added together so as to ascertain whether the aggregate loss exceeded the limit of 3 per cent., but not such losses occurring in more than one voyage.

(2) I protest against the attempt to construe these policies by the rules of construction applicable to other instruments, & where they are construed without the assistance of a jury I think the proper way is to consider them with the aid of our knowledge of business, & to take it for granted that merchants & insurers have acted in a businesslike way (LORD ESHER, M.R.)—STEWART *v.* MERCHANTS MARINE INSURANCE CO. (1885), 16 Q. B. D. 619; 55 L. J. Q. B. 81; 53 L. T. 892; 31 W. R. 208; 2 T. L. R. 156; 5 Asp. M. L. C. 506, C. A.

*Annotations:—As to (1) Distd. Price v. Al Ships' Small Damage Insce. Asscn. (1889), 22 Q. B. D. 580. Generally, Refd. Wilson Shipping Co. v. British & Foreign Insce., [1920] 2 K. B. 25.*

**1978. ——— ——— Time policy—Losses occurring in separate voyages.]—**STEWART *v.* MERCHANTS MARINE INSURANCE CO., No. 1977, *ante*.

**1979. Particular average & general average—Cannot be added together—To make up percentage.]—**Under the memorandum in a marine policy by which the subject-matter of insurance is warranted free from average under a certain amount per cent., unless general, or the ship be stranded, sunk, or burnt, a general average loss cannot be added to a particular average loss to make up a loss amounting to the specified percentage.

A ship was insured by a policy expressed to be against all losses which could not be recovered under an ordinary Lloyd's policy by reason of the insertion therein of the memorandum against average under 3 per cent., unless general, or the ship be stranded, sunk, or burnt. The ship while covered by the policy, through stress of weather, incurred a particular average loss; & further damage to her was incurred under such circumstances as to constitute a general average loss. The particular average loss did not amount to 3 per cent. of her value, but the general & particular average losses taken together did amount to such percentage:—*Held*: the assured were entitled to recover the particular average loss under the policy.

We come to the portion of the clause which warrants other goods & also the ship & freight free from average under 3 per cent. unless general, or the ship be stranded. That must . . . be read as equivalent to "warranted free from partial loss under 3 per cent. unless it be a general average loss" (LORD ESHER, M.R.)—PRICE & CO. *v.* AL SHIPS' SMALL DAMAGE INSURANCE ASSOCN. (1889), 22 Q. B. D. 580; 58 L. J. Q. B. 269; 61 L. T. 278; 37 W. R. 566; 5 T. L. R. 356; 6 Asp. M. L. C. 435, C. A.

—*Refd.* The Knight of St. Michael, [1898]

P. 30.

**Partial loss of ship—Subsequent total loss.]—**See Sub-sect. 5, C. (c), *post*.

*D. Apportionment of Dock Dues.*

**1980. Proportional liability of insurers—Where liable for part of repairs.]—**A time policy on ship contained the warranty "free from average under 3 per cent." During a voyage covered by the policy the ship sustained, without its being discovered, a fracture of her stern-post owing to perils of the sea, being a particular average loss within the policy. The voyage having been completed & the cargo delivered the ship was put into dry dock for the purpose only of being cleaned, scraped, & painted, being in such a state that no prudent owner would have put to sea again without having her cleaned & scraped. When the ship was put into dry dock the injury was for the first time discovered, & the necessary repairs were then effected, & the ship was discharged from dry dock on the eighth day, repaired, cleaned, scraped, & painted. Had she required nothing but cleaning, scraping, & painting, she might have been discharged on the evening of the third day. The repairs alone, without cleaning, etc., would have taken the whole eight days. If the whole or half of the dock dues for the first three days ought to be charged against the underwriters in account there was a particular average loss exceeding 3 per cent. If the cost of the repairs plus the dock charges for the last five days were alone to be charged against the underwriters, there was not a particular average loss of 3 per cent. If the dock charges for the first three days ought to be attributed partly to the repairs & partly to the cleaning, etc., then, so far as the apportionment was a question of fact, it was to be taken that one half of those charges should be attributed to each purpose:—*Held*: although a contract of marine insurance is a contract of indemnity, & though the result would be that the shipowners would be relieved of part of the dock charges which they would otherwise have had to pay themselves, they were entitled to have the dock charges for the first three days apportioned between the repairs on the one hand & the cleaning, etc., on the other; the apportionment should be one half to each purpose, & there had therefore been a particular average loss exceeding 3 per cent.—MARINE INSURANCE CO. *v.* CHINA TRANSPACIFIC S.S. CO. (1886), 11 App. Cas. 573; 56 L. J. Q. B. 100; 55 L. T. 491; 35 W. R. 169; 2 T. L. R. 857; 6 Asp. M. L. C. 68, H. L.

*Annotations:—Distd. Ruabon S.S. Co. v. London Assce., [1900] A. C. 6; The Acanthus, [1902] P. 17. Consd. The Haversham Grange, [1905] P. 307. Refd. The Chekiang, [1925] P. 80.*

**1981. ——— ———.]—**There is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it.

During a voyage covered by a policy of marine insurance a vessel was damaged by a peril insured against & was therefore put into dry dock for the necessary repairs. The survey of the vessel for renewing her classification was not due, but the owners, without causing delay or increase of dock expenses, took advantage of her being in dry dock to have the survey made, & her classification was renewed:—*Held*: the expenses of getting the vessel into & out of the dock, as well as those incurred in the use of the dock, fell upon the underwriters alone, & could not be apportioned between them & the owners.—RUABON S.S. CO. *v.* LONDON ASSURANCE, [1900] A. C. 6; 69 L. J. Q. B. 86; 81 L. T. 585; 48 W. R. 225; 16 T. L. R. 90; 44 Sol. Jo. 116; 9 Asp. M. L. C. 2; 5 Com. Cas. 71, H. L.

*Annotations:—Appld. The Acanthus, [1902] P. 17. Refd. The Haversham Grange, [1905] P. 307; Pyman S.S. Co.*



**Sect. 22.—Measure of loss for which insurers liable:**  
**Sub-sect. 4, D.: sub-sect. 5, A. & B.]**

*v. Admiralty Comrs.*, [1918] 1 K. B. 480; *The Chekiang*, [1925] P. 80.

**1982.** — — —.]—In order to effect repairs necessitated by two collisions for which the owners of two wrongdoing vessels were liable, *pltf's.*, the owners of the damaged vessel, put her into dry dock, & proceeded to repair at the same time the separate damage sustained in each collision; but *defts.*, the owners of the wrongdoing vessel in the second collision, objected to pay any portion of the dock dues on the ground that the repair of the damage caused by their vessel occupied a shorter time than that required for the repair of the damage sustained in the first collision, so that *pltf's.* had not been put to any additional expense:—*Held*: the principle as to apportionment of expenses between owner & underwriter in respect of dry docking for simultaneous work on the vessel, laid down in *Marine Insurance Co. v. China Transpacific S.S. Co.*, No. 1980, *ante*, & explained in *Ruabon S.S. Co. v. London Assurance*, No. 1981, *ante*, applied, & therefore, *defts.* were liable for a proportion of the dry docking & incidental expenses, excluding demurrage.—*THE HAVERSHAM GRANGE*, [1905] P. 307; 74 L. J. P. 115; 93 L. T. 733; 53 W. R. 675; 21 T. L. R. 628; 10 Asp. M. L. C. 156, C. A.  
*Annotation*:—*Refd.* *The Chekiang*, [1925] P. 80.

**SUB-SECT. 5.—MEASURE OF INDEMNITY.**

**A. In General.**

See *Marine Insurance Act*, 1906 (c. 41), ss. 67, 73, 75, 81.

**1983. One policy on different subjects—One subject not at risk—Ship & cargo—Loss of ship.]—***AMERY v. ROGERS* (1791), 1 Esp. 207, N. P.

**1984. Valued policy—Total loss—Sum fixed by policy.]—**The value of the ship insured, stated in a valued time policy, is, in the absence of fraud, conclusive between the parties, however largely in excess of the true value. A ship was insured by a valued time policy, & its value stated in the policy was £8,000. At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the repairs would have exceeded its value when repaired. During the continuance of the risk the ship was totally lost. In an action against the underwriters:—*Held*: the policy attached, notwithstanding the previous injury to the ship, & there being no fraud, the value of the ship as stated in the policy was conclusive between the parties.

If a ship is so injured that it cannot sail without repairs & cannot be taken to a port at which the necessary repairs can be executed there is an actual total loss for that has ceased to be a ship which can never be used for the purposes of a ship (*WILLES, J.*).

An exorbitant valuation may be evidence of fraud, but when the transaction is *bonâ fide*, the valuation agreed upon is binding (*BOVILL, C.J.*).—*BARKER v. JANSON* (1868), L. R. 3 C. P. 303; 37 L. J. C. P. 105; 17 L. T. 473; 16 W. R. 399; 3 Mar. L. C. 28.

*Annotations*:—*Consd.* *Lidgett v. Secretan* (1871), L. R. 6 C. P. 616. *Expld.* *The Main*, [1894] P. 320. *Refd.* *Woodside v. Globe Marine Insce.*, [1896] 1 Q. B. 105; *Wilson Shipping Co. v. British & Foreign Insce.*, [1920] 2 K. B. 25.

**1985.** — — — — — **Previous constructive total loss.]—***Pltf's* vessel was insured by *defts.* by a valued time policy against loss or damage by fire. While so insured she stranded, & sustained such injuries that the cost of repairing her would have been greater than her value when repaired. Thirty-six hours afterwards she was completely destroyed by fire. In an action by *pltf's.* on the policy:—*Held*: *defts.* were liable for the full amount for which they had insured the vessel.—*WOODSIDE v. GLOBE MARINE INSURANCE CO.*, [1896] 1 Q. B. 105; 65 L. J. Q. B. 117; 73 L. T. 626; 44 W. R. 187; 12 T. L. R. 97; 40 Sol. Jo. 115; 8 Asp. M. L. C. 118; 1 Com. Cas. 237.

*Annotations*:—*Consd.* *Wilson Shipping Co. v. British & Foreign Insce.*, [1920] 2 K. B. 25. *Refd.* *Russian Bank for Foreign Trade v. Excess Insce.*, [1918] 2 K. B. 123. *Mentd.* *Re United London & Scottish Insce.*, *Newport Navigation Co.'s Claim* (1915), 84 L. J. Ch. 544.

**1986. Insurance of fluctuating subject-matter—Captain's effects—Partial loss—Amount at risk at time of loss.]—**The measure of insurable interest in a marine policy of insurance covering a fluctuating subject-matter is the amount at risk at the time of loss & not necessarily the amount of loss.

The captain of a ship insured his effects against total loss of the vessel, including perils of the sea, fire, etc. Whilst he was on shore with certain clothing, his watch, etc., the vessel was totally lost through an explosion of dynamite, with the result that his effects on board were destroyed:—*Held*: the policy covered the whole of his effects at the time of the loss & not merely the effects which were destroyed, & that the insurers were therefore only liable for such a proportionate sum of money as the value of the lost effects bore to the whole.—*ANSTEY v. OCEAN MARINE INSURANCE CO.* (1913), 83 L. J. K. B. 218; 109 L. T. 854; 30 T. L. R. 5; 58 Sol. Jo. 49; 12 Asp. M. L. C. 409; 19 Com. Cas. 8.

**1987. Assured as own insurer—Insurance for less than policy valuation—Right to proportion of sum recovered from third party.]—**A ship was insured for £1,000, her value being stated in the policy as £1,350. During the currency of the policy the ship was sunk by the fault of another ship, & the insurers paid the assured £1,000. Subsequently the insurers brought an action against the ship in default, & liability being admitted, the claim was referred to the registrar, who assessed the value of the insured ship at £1,000. This sum was paid into ct. The owners of the insured ship contended that, as they were their own insurers for £350, they were entitled to 350-1,350 of the £1,000:—*Held*: this contention was correct.—*THE COMMONWEALTH*, [1907] P. 216; 76 L. J. P. 106; 97 L. T. 625; 23 T. L. R. 420; 51 Sol. Jo. 386; 10 Asp. M. L. C. 538, C. A.; *affg.* *S. C. sub nom. THE WELSH GIRL* (1906), 22 T. L. R. 475.

*Annotation*:—*Consd.* *Thames & Mersey Marine Insce. v. British & Chilian S.S. Co.*, [1915] 2 K. B. 214.

**B. Partial Loss of Goods.**

See *Marine Insurance Act*, 1906 (c. 41), ss. 71, 72.

**1988. General rule.]—***TOBIN v. HARFORD*, No. 826, *ante*.

**1989. Difference between sound & damaged value—Irrrespective of market fluctuation.]—***LEWIS v. RUCKER*, No. 760, *ante*.

**1990.** — — — — — **Port duties or charges.]—**The rule by which to calculate a partial loss on a policy on goods by reason of sea damage is the difference

**PART II. SECT. 22, SUB-SECT. 5.—B.**

**a. Goods insured in bulk—Part**

**totally lost.]—**A total destruction of a part of goods, insured in bulk, is only a partial loss, & not a total loss of a

part.—*MOWAT v. BOSTON MARINE INSURANCE CO.* (1895), 33 N. B. R. 109; *on appeal*, 26 S. C. R. 47.—*CAN.*



between the respective gross proceeds of the same goods when sound & when damaged, & not the net proceeds; it being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination.—*JOHNSON v. SHEDDON* (1802), 2 East, 581; 102 E. R. 492.

*Annotations*:—*Folld. Hurry v. Royal Exchange Assce.* (1802), 3 Bos. & P. 308. *Appld. Francis v. Boulton* (1895), 65 L. J. Q. B. 153. *Refd. Usher v. Noble* (1810), 12 East, 639.

**1991. — Gross proceeds.**—*JOHNSON v. SHEDDON*, No. 1990, *ante*.

**1992. — — —**—A partial loss on a policy on goods by reason of sea damage, is to be calculated by ascertaining the difference between the respective gross proceeds of the same goods when sound & when damaged, & not the net proceeds.—*HURRY v. ROYAL EXCHANGE ASSURANCE CO.* (1802), 3 Bos. & P. 308; 127 E. R. 170.

**1993. — Damaged value to include conditioning—If goods so treated.**—When an insured cargo arrives damaged & is subsequently conditioned & sold, in estimating the amount of the average loss the value of the goods when sound should be compared with the sum for which they would sell conditioned, & the comparison of values should be made as at the date of the loss.

A ship containing rice, which was insured, collided with another vessel & partially sank. The rice remained under water for two tides & eventually having been kiln-dried was sold at a loss as “river-damaged kiln-dried broken rice”:—*Held*: the loss was a partial & not a total loss.—*FRANCIS v. BOULTON* (1895), 65 L. J. Q. B. 153; 73 L. T. 578; 44 W. R. 222; 12 T. L. R. 75; 40 Sol. Jo. 145; 8 Asp. M. L. C. 79; 1 Com. Cas. 217.

**1994. — — —**—The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the loading port, together with the premium of insurance & commission, as the basis of the calculation of the value of the goods; & the rule for estimating a partial loss in the like case is (the same as upon a valued policy) by taking the proportional difference between the selling price of the sound, & that of the damaged part of the goods at the port of delivery, & applying that proportion, be it a half, a quarter, an eighth, etc., with reference to such estimated value at the loading port, to the damaged portion of the goods.—*USHER v. NOBLE* (1810), 12 East, 639; 104 E. R. 249.

**1995. Sound value—Based on invoiced price.**—*DICK v. ALLEN* (1785), 1 Park on Marine Insurances, 8th ed. p. 226.

**1996. — — — Not market price at port of delivery.**—Where goods are shipped on an invoice, an average loss upon a policy must be calculated upon the invoice price, & not upon the price of the market at which the damaged goods are arrived.—*WALDRON v. COOMBE* (1810), 3 Taunt. 162; 128 E. R. 65.

**1997. — — — Plus premium & commission.**—*USHER v. NOBLE*, No. 1994, *ante*.

**1998. Where total loss becomes partial.**—A cargo insured by a valued policy was confiscated & sold; but the enemy permitted the foreign consignee to retain from the proceeds the amount of his acceptances; the assured not having abandoned, the loss became partial only, & the assured was entitled to recover from the underwriter a sum bearing the same proportion to his subscription as the loss ultimately sustained

bore to the whole value in the policy.—*GOLDSMID v. GILLIES* (1813), 4 Taunt. 803; 128 E. R. 547.

*Annotation*:—*Refd. Stringer v. English & Scottish Marine Insce.* (1870), 10 B. & S. 770.

**1999. Part of goods undamaged—Part totally lost—Full value of lost goods recoverable—Irrespective of sale price of remainder.**—*LEWIS v. RUCKER*, No. 760, *ante*.

**2000. — Sale of damaged goods—Undamaged valued by broker.**—Insurance on some hogsheads of tobacco, from Greenock to Bremen. Vessel deviates from stress of weather, & puts into Korshaven, on the coast of Norway, Nov. 30, 1798; where she remains till Apr. 24, 1799; then sails, & in three days arrives at Bremen, & delivers the tobacco, which was not examined till May 25; when it was found that 40 hogsheads were damaged & 7 sound. The 40 hogsheads sold at 10½ grots per lb.; the sound hogsheads, though instructions to sell had been sent, retained unsold in expectation of a better price; but valued by a broker at 17½ grots per lb. The only evidence of the deviation being occasioned by stress of weather consisted of letters from the consignees, stating that the master had written to a house at Bremen, that such was the fact; & a copy of a judicial examination of the master at Bremen; but no protest produced, no letter from the master:—*Held*: the underwriters were liable for the partial loss, though on evidence which would not be admitted in England.

Though the sale of both the sound & damaged hogsheads might be the most certain way of ascertaining the difference, & calculating the amount of the loss; the valuing of the sound hogsheads by a regular broker, the parties acting *bonâ fide*, was sufficient.—*SMITH v. MACNEIL* (1814), 2 Dow, 538; 3 E. R. 959, H. L.

**2001. — Sale of damaged & undamaged together—Diminished value.**—A policy of marine insurance was expressed to be “on one thousand seven hundred & eleven packages teas, valued at the sum insured, viz., \$31,000,” & contained a special warranty in the following terms, viz., “warranted by the assured free from damage or injury from dampness, change of flavour, or being spotted, discoloured, musty or mouldy, except caused by actual contact of sea water with the articles damaged occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation & sale of the portion only of the contents of the packages so damaged, & not otherwise, & the same practice shall obtain as to all other merchandises so far as practicable.” The ship met with bad weather & shipped large quantities of sea water, by contact with which four hundred & forty-nine packages of the tea insured were greatly injured. When teas are sold they are usually sold in the order of the consecutive numbers marked on the packages, & if the numbers be broken by some being omitted, or if some of the chests be marked as damaged, a suspicion is created that the other packages may be damaged, & they do not command such high prices as if none of the shipment had been damaged. In consequence of this the remaining one thousand two hundred & sixty-two packages, which had not been in contact with sea water, sold for less than they would otherwise have fetched:—*Held*: the assured could only recover in respect of the damage occasioned to the packages which had been actually in contact with sea water, & not in respect of the loss occasioned by injury to the reputation of the remainder. *Semble*: the effect would have been

**Sect. 22.—Measure of loss for which insurers liable:**  
**Sub-sect. 5, B. & C. (a) & (b).]**

the same even in the absence of the special warranty.—*CATOR v. GREAT WESTERN INSURANCE CO. OF NEW YORK* (1873), L. R. 8 C. P. 552; 29 L. T. 136; 21 W. R. 850; 2 Asp. M. L. C. 90; *sub nom. CATER v. GREAT WESTERN INSURANCE CO. OF NEW YORK*, 42 L. J. C. P. 266.

*Annotations*:—*Apld.* *Lysaght v. Coleman* (1894), 10 T. L. R. 356. *Distd.* *Brown v. Fleming* (1902), 7 Com. Cas. 245.

**2002.** ————*Pltfs. insured cases of whisky for a voyage from Glasgow to Singapore. Owing to a sea peril the straw in which the bottles were packed became wet & discoloured, & some of the labels were damaged by contact with the straw. The cases of whisky were sold in their damaged condition at Singapore:—Held: pltfs. were entitled to recover from the underwriters the amount of the loss upon the sale, & were under no obligation to repack or relabel the bottles before selling.*—*BROWN BROTHERS v. FLEMING* (1902), 7 Com. Cas. 245.

**2003.** ———— **Cost of examining undamaged part.]**  
 —L. insured goods in cases free from average under 3 per cent., average to be recoverable on each package separately or on the whole. Part of the goods were damaged, & the whole was unpacked & examined, & the damaged part sold:—*Held: the underwriters were not liable for any expenses incurred in relation to any part of the cargo other than those cases which contained goods that had been damaged.*—*LYSAGHT (J.), LTD. v. COLEMAN*, [1895] 1 Q. B. 49; 64 L. J. Q. B. 175; 71 L. T. 830; 11 T. L. R. 10; 7 Asp. M. L. C. 552; 14 R. 22, C. A.

**2004. Several different articles under one policy—Some totally lost—Apportionment of liability.]**  
 By a Lloyd's policy of marine insurance three distinct parcels of perishable goods, namely, two parcels of vanillin & one parcel of caffeine, all separately valued, were insured against certain perils in a lump sum made up of the separate values of the parcels, the policy containing a clause by which it was warranted free from particular average. The two parcels of vanillin were lost by one of the perils insured against:—*Held: the contract of insurance was apportionable as between the several parcels of goods, the loss was a total loss of a severable part of the goods insured & not a particular average loss of the whole, & consequently, the insurers were not exempted from liability by the said clause.*—*FABRIQUE DE PRODUITS CHIMIQUES v. LARGE*, [1923] 1 K. B. 203; 92 L. J. K. B. 370; 128 L. T. 636; 39 T. L. R. 76; 16 Asp. M. L. C. 110; 28 Com. Cas. 248.

**C. Partial Loss of Ship.**

**(a) In General**

*See* Marine Insurance Act, 1906 (c. 41), s. 69.

**2005. Where ship repaired—Assured's right to recover cost of repair—Less deductions.]**—*AITCHISON v. LOHRE*, No. 1899, *ante*.

**2006.** ———— **What costs recoverable—Bonâ fide & reasonable costs.]**—*STEWART v. STEELE*, No. 2011, *post*.

**2007.** ———— **Costs unrelated to portion repaired.]**—In a policy of insurance upon a

steamer, in the ordinary form, the hull & the machinery were separately valued, with a clause, "average on the whole or on each as if separately insured." The steamer had discharged her cargo at C., & while she lay there without any cargo on board, her hull was damaged by fire. The costs of repairs to the hull amounted, after a deduction of the usual one-third, to £386 12s. 6d., including the sum of £91 0s. 1d. for Lloyd's surveyors' fees. An additional sum of £55 5s. 10d. was expended in extinguishing the fire. It was proposed to add this to the other sum, so as to take the case out of the common 3 per cent. memorandum. In an action for particular average on the hull:—*Held: these expenses must be apportioned to the hull & machinery according to their respective values, & only the sum due for the hull could be added to the direct loss on the hull.*—*OPPENHEIM v. FRY* (1864), 5 B. & S. 348; 4 New Rep. 176; 33 L. J. Q. B. 267; 10 L. T. 539; 12 W. R. 831; 2 Mar. L. C. 17; 122 E. R. 860, Ex. Ch.

*Annotations*:—*Expld.* *The Brigella*, [1893] P. 189. *Mentd.* *Roddick v. Indemnity Mutual Marine Insee.* (1895), 44 W. R. 27; *Montgomery v. Indemnity Mutual Marine Insee.*, [1902] 1 K. B. 734.

**2008.** ———— **Costs of surveyor—Sent from England.]**—A British steamship, having been damaged in New Zealand, was repaired at Melbourne at a cost of £4,000. The owners claimed as part of the particular average loss from the underwriters the cost, about £750, of sending out a surveyor to represent their interests from the United Kingdom, the underwriters having refused in the first instance to agree to such a course. The shipowners further claimed to recover their bankers' charges for an overdraft which they had to obtain to send money to Melbourne to pay the repairs bill; & they also claimed the cost of reinstating certain damaged parts of the vessel, instead of repairing in a less expensive but more unsightly form:—*Held: (1) though the shipowner is entitled to have at the expense of the underwriters a surveyor to represent him in carrying out repairs, the question whether a surveyor can be sent from the United Kingdom to a foreign port by the shipowner for the purpose must depend on the extent & nature of the repairs & the possibility of getting competent surveyors at or near the foreign port; (2) in the circumstances, the shipowner was entitled to the bankers' charges for the overdraft; (3) he was entitled to have his ship repaired with materials & workmanship corresponding to the original work.*

The shipowner is entitled to object to a method of repairing an injured part of the ship which, though adequate to restore the part to its original strength, is so unsightly as to depreciate the vessel for purposes of sale, & the underwriter is responsible for the repair of the injured part with materials & workmanship corresponding to its original character.—*AGENORIA S.S. CO., LTD. v. MERCHANTS MARINE INSURANCE CO., LTD.* (1903), 19 T. L. R. 442; 8 Com. Cas. 212.

*Annotation*:—*As to (2) Refd.* *Adelaide S.S. Co. v. R.* (1924), 93 L. J. K. B. 871.

**2009.** ———— **Bankers charged for overdraft.]**—*AGENORIA S.S. CO., LTD. v. MERCHANTS MARINE INSURANCE CO., LTD.*, No. 2008, *ante*.

**2010.** ———— **Requisite standard of repair—Consistent with original work.]**—*AGENORIA S.S. CO., LTD. v. MERCHANTS MARINE INSURANCE CO., LTD.*, No. 2008, *ante*.

**PART II. SECT. 22, SUB-SECT. 5.—**  
**C. (a).**

**1. Where ship repaired—No evidence of amount of repairs—Nominal**

*sum.*—Pltf. claimed for a constructive total loss, but the evidence showed a partial loss only, the vessel having been repaired & sailed again. No evidence was given as to the amount of

repairs, & pltf. was nonsuited:—*Held: pltf. was entitled to nominal damages at all events.*—*MILLIDGE v. STYNKST* (1866), N. B. Dig. 737.—*CAN.*



**2011. Ship sold without repair—What recoverable by assured—Estimated costs of repair.]—**

(1) In order to entitle the owner of a ship insured to recover from the underwriters the expenses of repairing the ship, those expenses must have been actually, *bonâ fide*, & prudently incurred to remedy the loss within the policy.

The estimated expense of repairing the damage done to a ship, by a peril insured against, which expense was not in fact incurred, because the owner thought it better to sell the ship as a wreck :—*Held* : not the proper measure of damages recoverable as an average loss from the underwriters.

(2) When the assured has been put to no expense, the proper time to estimate an average is at the expiration of the risk.

(3) An underwriter is not liable for the unskilful or negligent conduct of the shipbuilders employed to repair a ship injured by one of the perils insured against.—*STEWART v. STEELE* (1842), 5 Scott, N. R. 927 ; 11 L. J. C. P. 155.

*Annotations* :—*As to* (1) *Consd.* Paterson v. Harris (1862), 2 B. & S. 814 ; Pitman v. Universal Marine Insce. (1882), 9 Q. B. D. 192. *Refd.* Kemp v. Halliday (1866), 6 B. & S. 723 ; Marine Insce. v. China Transpacific Co. (1886), 56 L. J. Q. B. 100 ; Field S.S. Co. v. Burr, [1899] 1 Q. B. 579. *As to* (2) *Consd.* British & Foreign Insce. v. Wilson Shipping Co., [1921] 1 A. C. 188. *Refd.* Naylor v. Palmer (1853), 1 C. L. R. 356 ; Lidgett v. Secretan (1871), L. R. 6 C. P. 616 ; Pitman v. Universal Marine Insce. (1882), 9 Q. B. D. 192.

**2012. ——— Depreciation in value.]—**

*AITCHISON v. LOHRE*, No. 1899, *ante*.

**2013. ——— Calculation of depreciation.]—**An insured ship was damaged during the continuance of the risk by perils insured against, & was sold by the owners without being repaired. The amount required to restore her to the same condition as she was in at the commencement of the risk would have exceeded her value when repaired so that no reasonable uninsured owner would have repaired her. The owners, having done some slight repairs for the purposes of sale, sold the ship, & then claimed to recover from the underwriters two-thirds of the cost of the repairs estimated as necessary to put the ship in the same condition as she was before the injury :—*Held* : *plffs.* were not entitled to recover the amount claimed, & the underwriters were only liable to pay the amount of the difference between the value of the ship at the port of departure & the amount of the net proceeds of the sale after deducting the sum spent on repairs.—*PITMAN v. UNIVERSAL MARINE INSURANCE CO.* (1882), 9 Q. B. D. 192 ; 51 L. J. Q. B. 561 ; 46 L. T. 863 ; 30 W. R. 906 ; 4 Asp. M. L. C. 544, C. A.

*Annotations* :—*Consd.* Marine Insce. v. China Transpacific S.S. Co. (1886), 11 App. Cas. 573. *Appld.* Bristol Steam Navigation Co. v. Indemnity Mutual Marine Insce. (1887), 57 L. T. 101. *Consd.* Ruabon S.S. Co. v. London Assee., [1900] A. C. 6 ; The Haversham Grange (1905), 74 L. J. P. 115 ; British & Foreign Insce. v. Wilson Shipping Co., [1921] 1 A. C. 188. *Refd.* Field S.S. Co. v. Burr, [1899] 1 Q. B. 579 ; Balmoral S.S. Co. v. Marten, [1902] A. C. 511.

**2014. Ship converted not reinstated.]—**A ship, insured on a time policy, had, above her main deck, a saloon deck for passengers. During the time covered by the policy the saloon deck was destroyed by fire. At the time of the fire the ship was engaged in carrying cargo, being obsolete as a passenger ship & useless for passenger traffic. After the expiration of the policy the ship was converted into a cargo-carrying ship, & the saloon deck for passengers was not reinstated. The cost of converting the ship was less than the cost of the reinstatement of the saloon deck would have been. The ship, after the alteration, was as valuable for sale or use as she was before the accident. In an

action by the shipowners against the underwriters to recover the cost of reinstatement of the saloon deck :—*Held* : on the authority of *Pitman v. Universal Marine Insurance Co.*, No. 2013, *ante*, as the shipowners were not entitled to recover more than they had lost, they were not entitled to recover the cost of reinstatement, but only the actual cost of converting the ship.—*BRISTOL STEAM NAVIGATION CO., LTD. v. INDEMNITY MUTUAL MARINE INSURANCE CO.* (1887), 57 L. T. 101 ; 3 T. L. R. 711 ; 6 Asp. M. L. C. 173, D. C.

**Deductions.]—***See* Sub-sect. 5, C. (b), *post*.

**Simultaneous repair & general overhauling—Apportionment of expenses.]—***See* Sub-sect. 4, D., *ante*.

**(b) Deductions from Cost of Repairs.**

*See* Marine Insurance Act, 1906 (c. 41), s. 69 (1).

**2015. One-third new for old—General rule.]—**Where a ship partially damaged, has been repaired by the owners, the insurers are only liable to the amount of two-thirds of the cost of repair, unless circumstances be shown to take the case out of the ordinary rule of deduction of one-third for the benefit to the owners from the repairs.—*POINGDESTRE v. ROYAL EXCHANGE CORPN.* (1826), Ry. & M. 378, N. P.

*Annotation* :—*Refd.* Lohre v. Aitchison (1877), 2 Q. B. D. 501.

**2016. ———.]—***THE EXCHANGE, TAYLOR v. LODGE* (1839), 6 L. T. 108.

**2017. ———.]—***AITCHISON v. LOHRE*, No. 1899, *ante*.

**2018. ——— Ship must be in free possession of owner.]—**Where a ship has been repaired, the underwriters are not entitled to the deduction of one-third, new for old, unless the ship has been put into the free possession of the owner again.—*DA COSTA v. NEWNHAM* (1788), 2 Term Rep. 407 ; 100 E. R. 219.

*Annotations* :—*Refd.* Lohre v. Aitchison (1877), 2 Q. B. D. 501. *Mentd.* Williams v. London Assee. (1813), 1 M. & S. 318 ; Hallett v. Wigram (1850), 9 C. B. 580 ; Svensden v. Wallace (1884), 13 Q. B. D. 69.

**2019. ——— Not applicable to new ship—What is first voyage.]—**If a new ship is insured, “on a voyage from Bristol to New York, during her stay there, & back to her port of discharge,” & on her passage back from New York to England, sustains an injury, which requires her to be repaired, the underwriter is not entitled to deduct one-third new for old, as the whole is to be considered only one voyage.—*FENWICK v. ROBINSON* (1828), 3 C. & P. 323 ; Dan. & Ll. 8, N. P.

*Annotation* :—*Refd.* Lohre v. Aitchison (1877), 2 Q. B. D. 501.

**2020. ———.]—**The great object of a policy of insurance on a ship is to indemnify the assured, & the supposed rule of deducting one-third new for old, after the first voyage, has grown up to prevent controversy. The question, whether a ship is on her first voyage, is not determined by the policy. It seems that it would be better that a time, depending on the age of the ship, should be specified in the policy as the time from which the deduction of one-third new for old should take place, instead of its depending on the first voyage.—*PIRIE v. STEELE* (1837), 8 C. & P. 200 ; 2 Mood. & R. 49 ; 3 L. T. 382, N. P.

**2021. ——— Effect of special clause in policy.]—***BYRNE v. MERCANTILE INSURANCE CO.* (1866), 4 H. & C. 506.

**2022. ——— Whether applicable to iron ship.]—***LIDGETT v. SECRETAN*, No. 2033, *post*.



**Sect. 22.—Measure of loss for which insurers liable:**  
**Sub-sect. 5, C. (b) & (c), & D.]**

**2023. — Where ship constructive total loss.]**  
**—HENDERSON BROTHERS v. SHANKLAND & CO.,**  
**No. 2192, post.**

(c) *Subsequent Total Loss.*

See Marine Insurance Act, 1906 (c. 41), s. 77.

**2024. Losses under one policy—Total loss before partial loss repaired—Partial loss not recoverable—Total loss by peril not insured against.]**—An American ship insured from New York to London, warranted free from American condemnation, having, for the purpose of eluding her national embargo, slipped away in the night, was by force of the ice, wind, & tide, driven on shore, where she sustained only partial damage, but was seized the next day, & afterwards, with great difficulty & expense, got off & finally condemned by the American govt. for breach of the embargo:—*Held*: as there was ultimately a total loss by a peril excepted out of the policy, the assured could neither recover for a total loss, nor for any previous partial loss arising from the stranding, etc., which in the event became wholly immaterial to the assured; *aliter* in case of actual disbursements made for repair of damage occasioned by sea perils before the total loss; which appear to be covered by the general authority given to the assured to "labour & travail, etc., for the defence, safeguard, & recovery of the property insured."

If a ship meet with sea damage, which checks her rate of sailing, so that she is taken by an enemy from whom she would otherwise have escaped . . . the loss is to be ascribed to the capture, not to the sea damage; & this upon the principle that *causa proxima, non remota, spectatur* (LORD ELLENBOROUGH, C.J.).—*LIVIE v. JANSON* (1810), 12 East, 648; 104 E. R. 253.

**Annotations:—***Apld.* Hahn v. Corbett (1824), 2 Bing. 205. *Distd.* Knight v. Faith (1850), 15 Q. B. 649. *Consd.* Ionides v. Universal Marine Insce. (1863), 14 C. B. N. S. 259; Cory v. Burr (1881), 8 Q. B. D. 313. *Foldd.* British & Foreign Insce. v. Wilson Shipping Co., [1921] 1 A. C. 188. *Refd.* Stewart v. Steele (1842), 5 Scott, N. R. 927; Thompson v. Hopper (1856), 6 E. & B. 937; Paterson v. Harris (1862), 2 B. & S. 814; Taylor v. Dewar (1864), 5 B. & S. 58; Kemp v. Halliday (1866), 6 B. & S. 723; Lidgett v. Secretan (1871), L. R. 6 C. P. 616; Pitman v. Universal Marine Insce. (1882), 9 Q. B. D. 192; Marine Insce. v. China Transpacific Co. (1886), 56 L. J. Q. B. 100; Leyland Shipping Co. v. Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873.

**2025. — — — — —.]—KNIGHT v. FAITH,**  
**No. 790, ante.**

**2026. — — — — —.]—When a vessel,**  
insured against perils of the sea, is damaged by one of the risks covered by the policy, & before that damage is repaired she is lost, during the currency of the policy, by a risk which is not covered by the policy, the insurer is not liable for the unrepaired damage.

By a time policy a vessel was insured against marine risks only, but including particular average. The vessel was under charter to the Admty. on the T. 99 form, under which the Admty. contracted to pay for loss by war risks, the value to be ascertained at the date of the loss. During the

currency of the policy the vessel sustained damage by marine risks, but, to the extent of £1,770, this damage was not repaired. On a subsequent voyage, but during the currency of the policy, the vessel became a total loss by war perils, & the Admty. in consequence of the unrepaired damage paid the owners £1,770 less than they would otherwise have done. The owners claimed to recover from some of the underwriters their proportion of the £1,770:—*Held*: as the unrepaired damage was followed by a total loss during the currency of the same policy the smaller loss merged in the larger, & therefore the underwriters were not liable for the unrepaired damage, notwithstanding the fact that the liability for the total loss did not fall upon them.—*BRITISH & FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.*, [1921] 1 A. C. 188; 89 L. J. K. B. 981; 123 L. T. 756; 36 T. L. R. 890; 65 Sol. Jo. 25; 15 Asp. M. L. C. 114; 20 Com. Cas. 13, H. L.; *reversg.* S. C. *sub nom.* WILSON SHIPPING CO. v. BRITISH & FOREIGN INSURANCE CO., [1920] 2 K. B. 25, C. A.

**2027. — — — — —.]—BARKER v. JANSON,**  
**No. 1984, ante.**

**2028. — — — — — Total loss recoverable.]—WOOD-**  
**SIDE v. GLOBE MARINE INSURANCE CO., No. 1985,**  
**ante.**

**2029. — — — — — Total loss after partial loss repaired—**  
**Whether partial loss recoverable.]—LIVIE v. JAN-**  
**SON, No. 2024, ante.**

**2030. — — — — —.]—LE CHEMINANT v.**  
**PEARSON, LE CHEMINANT v. ALLNUTT, No. 1398,**  
**ante.**

**2031. — — — — — Shipowner not liable for**  
**cost of repairs.]—A vessel, under a charter to load**  
home, sustained damage on the outward voyage which was repaired on arrival at the port of loading, & a payment on account of the particular average loss was made to the shipowners by the underwriters on a time policy on hull & machinery. The repairs were paid for at the port of loading by the charterers as disbursements secured by a draft in their favour, including commission & insurance, signed by the master, pledging the ship for repayment on safe arrival at the port of discharge. This draft was insured by the charterers. The vessel was totally lost on the homeward voyage; & the underwriters on the time policy paid for a total loss, but the shipowners brought an action against them to recover the balance of the particular average loss. The underwriters counter-claimed for a return of the payment on account:—*Held*: (1) the shipowners could not recover as they were never personally liable for the cost of the repairs, & had sustained no loss, the amount of the draft, on the loss of the ship, having been paid to the charterers by their insurers; (2) the underwriters were entitled to a return of the amount paid on account, as a payment made without prejudice & under a mistake of fact.—*THE DORA FORSTER*, [1900] P. 241; 69 L. J. P. 85; 49 W. R. 271; 16 T. L. R. 380.

**Annotation:—***As to* (1) *Refd.* Wilson Shipping Co. v. British & Foreign Insce., [1920] 2 K. B. 25.

**2032. Total loss after expiry of policy.]—KNIGHT**  
**v. FAITH, No. 790, ante.**

**PART II. SECT. 22, SUB-SECT. 5.—**  
**C. (b).**

**2023 i. One-third new for old—Where**  
**ship constructive total loss.]—GEROW**  
**v. ROYAL CANADIAN ASSURANCE CO.**  
**(1888), 27 N. B. R. 513; affd. on appeal,**  
**16 S. C. R. 524.—CAN.**

**2023 ii. — — — — —.]—APCAR v. HO-**  
**WAH BYE (1865), 1 Ind. Jur. N. S. 237.**  
**—IND.**

*Ship must be enhanced by*

*repairs.]—If after the repairs to a ship,*  
whether they belong to general or particular average, the ship be lost in the continuation of the voyage, the rule for deducting the one-third does not apply. It is only by reason of the ship coming to the owner enhanced by the repairs that the one-third of the value of the repairs is brought to his charge.—*GERAN & JACKMAN v. NEWFOUNDLAND MARINE INSURANCE CO.* (1857), 4 Nfld. L. R.

141.—**NFLD.**

**h. — — — — —.]—A ship was not**  
by the repairs done to her put in a better condition than she had been in before sustaining the damage which constituted the partial loss:—*Held*: the rule, by which a deduction of one third new for old is calculated in favour of the insurers who pay for the repairs, did not apply.—*SEEDICK GROSUL v. APCAR* (1865), Bourke 418.—**IND.**

**2033. Losses under consecutive policies—Partial & total loss recoverable—Under respective policies.]**

—Pltfs. insured their iron ship *Charlemagne*, valued at £20,000, in a policy for £18,000, "at & from London to Calcutta, & for thirty days after arrival," & in another policy for £10,000 "at & from Calcutta to London." Deft. underwrote the first policy for £150, & the second for £100. On her outward voyage, the *Charlemagne* struck upon a reef or bank, & sustained damage, & in order to get her off part of her cargo was jettisoned. She reached Calcutta on Oct. 28, & the unloading of her outward cargo was completed by Nov. 8. She was then taken into a dry-dock for survey & repair. Whilst the repairs were in progress the outward policy expired; & on Dec. 5 the ship was totally destroyed by fire. Pltfs. claimed under the outward policy the whole amount of the loss resulting from the ship's striking on the reef, without regard to the extent to which the damage had been made good at the time of the fire; & that, in estimating that amount, they were entitled to include what they would have had to pay for dock dues & other charges of a like nature for the time the vessel would but for the fire have remained in dock for the purpose of being repaired. Deft. admitted his liability for an average loss under the outward policy, & for a total loss with benefit of salvage under the homeward policy, & also for the dock dues & other charges actually incurred at the time of the fire; & he had paid into ct. sufficient to cover pltfs.' claim so estimated. At the suggestion of the ct. pltfs.' claim in respect of dock dues incurred since the fire was abandoned. Upon a case stated by an arbitrator for the purpose of ascertaining upon what principle the losses upon the two policies were to be assessed:—*Held*: (1) under the first policy, the assured were entitled to recover the amount of the vessel's depreciation at the expiration of the risk in consequence of the damage she had sustained on the outward voyage, without reference to the sum actually expended on her repairs; & under the second policy, they were entitled to recover as for a total loss, without reference to their claim under the first policy.

(2) *Qu.*: whether, in estimating the particular average under the first policy the customary deduction of "one-third new for old" is applicable to iron vessels.

(3) Nobody has been able to improve upon the practice as to valued policies which has been recognised & adopted by shipowners & underwriters. . . . It saves them both the necessity of going into an expensive & intricate question as to the value in each particular case; & its abandonment would in the end, as it seems to me, prove highly detrimental to the interests of the underwriters. . . . In the absence of fraud or wagering, it seems to me that the value is to be taken to be the conventional sum to be paid in the event of a loss, whatever the actual value of the vessel might be at the time (WILLES, J.).—*LIDGETT v. SECRETAN* (1871), L. R. 6 C. P. 616; 40 L. J. C. P. 257; 24 L. T. 942; 19 W. R. 1088; 1 Asp. M. L. C. 95.

*Annotations*:—As to (1) *Consd.* *Pitman v. Universal Marine Insee.* (1882), 9 Q. B. D. 192; *British & Foreign Insee. v. Wilson Shipping Co.*, [1921] 1 A. C. 188. *Reid. Francis v. Boulton* (1895), 65 L. J. Q. B. 153; *Woodside v. Globe Marine Insee.*, [1896] 1 Q. B. 105; *The Dora Forster*, [1900] P. 241. As to (3) *Fold. The Main*, [1894] P. 320.

**D. Partial Loss of Freight.**

See Marine Insurance Act, 1906 (c. 41), s. 70.

**2034. Unvalued policy—Only freight on portion lost.]—FORBES v. COWIE, No. 939, ante.**

**2035. — Plus premium.]**—The valuation upon a freight policy of insurance is calculated upon all the goods the ship is intended to carry upon the voyage insured; & if by a peril insured against the ship be lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be opened, & the assured can only recover as for that proportional share; as where freight valued at £6,500 was insured on a ship from any port or ports in Hayti to Liverpool; & the ship, which had sailed with goods from Liverpool to Hayti on a voyage of barter, after exchanging a part of her outward cargo for fifty-five bales of cotton at one port of Hayti, proceeded with the same to another port, for the purpose of making a similar barter of the rest of the outward cargo, but was lost by a peril of the sea before it was effected; the assured was only entitled to recover for the freight of the fifty-five bales of the return cargo on board; though there was a moral certainty at the time, that the remaining part of her outward cargo would, except for the loss, have been exchanged for a full return cargo; for shortly after the loss of the ship, the goods saved from the wreck were in fact exchanged for more produce than was sufficient to have covered the freight insured. But if there be a loss by a peril insured against of the whole subject-matter of the insurance to which the valuation applied, as of all the intended freight, where the insurance is on freight, the valuation in the policy will not be opened. And in an action on a freight policy it seems sufficient to prove a contract under which the shipowner would have been entitled to demand freight if the voyage were not stopped by a peril insured against.

Freight is the profit earned by the shipowner in the carriage of goods on board his ship; & an insurance upon freight is an insurance made in order to secure that profit to the shipowner, in case he is prevented by any of the perils insured against from actually earning such profit. An insurance upon freight has no reference to the hull of the ship, or its outfit for the voyage; both of which are protected by insurance upon the ship; but its sole object is to protect the assured from being deprived, by any of the perils insured against, of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy on freight, it is incumbent on the assured to prove that, unless some of the perils insured against had intervened to prevent it, some freight would have been earned; & where the policy is open, the actual amount of the freight, which would have been so earned, limits the extent of the underwriter's liability. In every action upon such a policy evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract, under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight; & in either case, if the policy be open, the sum payable to the shipowner for freight, together with the premiums of insurance & commission thereupon, is the extent to which the underwriters are chargeable. . . . The question then is, whether it makes any essential difference that this is the case of a valued policy, & we are of opinion, upon full consideration, that it does not. The object of valuation in a policy is to fix by agreement between the parties an estimate upon the subject insured, & to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of that



**Sect. 22.—Measure of loss for which insurers liable:**  
**Sub-sect. 5, D. & E. Sect. 23: Sub-sects. 1 & 2, A.]**

value (LORD ELLENBOROUGH, C.J.).—**FORBES v. ASPINALL** (1811), 13 East, 323; 104 E. R. 394.

**Annotations:—Distd.** Davidson v. Willasey (1813), 1 M. & S. 313; Devaux v. J'Anson (1839), 5 Bing. N. C. 519. **Folld.** Denoon v. Home & Colonial Assce. (1872), L. R. 7 C. P. 341. **Distd.** The Main, [1894] P. 320. **Refd.** Truscott v. Christie (1820), 2 Brod. & Bing. 320; Warre v. Miller (1825), 4 B. & C. 538; Rickman v. Carstairs (1833), 5 B. & Ad. 651; Tobin v. Harford (1864), 17 C. B. N. S. 528; Rankin v. Potter (1873), L. R. 6 H. L. 83; Roddick v. Indemnity Mutual Marine Insee. (1895), 72 L. T. 860; United States Shipping Co. v. Empress Assce. Corp., [1907] 1 K. B. 259; Scottish Shire Line v. London & Provincial Marine & General Insee., [1912] 3 K. B. 51; Reliance Marine Insee. v. Duder, [1913] 1 K. B. 265.

**2036. Valued policy—Proportion of part lost to full cargo.]—FORBES v. ASPINALL**, No. 2035, ante.

**2037. ———.]—Defts.** underwrote for £1,000 a policy of marine insurance expressed to be "upon chartered freight valued at £7,000 at & from Sydney to Calcutta & London." The risk was by the terms of the policy to commence from the loading of the said goods & merchandise, & to continue until they were safely landed. Upon the arrival of the ship at Calcutta the voyage to England was abandoned in consequence of the failure of the charterers, & the ship was employed for the conveyance of 360 coolies & 1,200 bags of rice to the Mauritius. Upon learning this pltf., the assured, procured an alteration of the policy, by the insertion of a memorandum in the margin, altering the voyage & declaring the interest to be on freight valued at £2,000. The intention of pltf. in effecting this insurance was to insure the freight of the rice only, but this intention was not communicated to defts. No binding custom of trade limiting the meaning of the term freight was proved; but the most frequent course in insurance business, where freight of coolies is intended, is to describe it as freight of coolies, or passage money of coolies, or by some other term distinguishing it from freight of merchandise. The rate of premium differs for the insurance of passage money of coolies & freight of goods. The ship was wrecked, & there was a total loss of the rice, & consequently of the freight of the rice, but the coolies, with the exception of twelve, were saved, & their passage money, which was payable on arrival, paid. Pltf. sued defts. to recover, as on a total loss, the amount underwritten, being the half of the total value declared in the policy. Defts. contended that there was only a partial loss, as the freight or passage money of coolies must be taken to be included in the term "freight" used in the policy:—**Held:** the question, whether the term "freight" in a marine policy includes passage money, must depend upon the circumstances of each particular case, & the context of the particular policy; in the present case, the term "freight" did not include such passage money, & consequently there was a total loss of the freight insured by the policy; but inasmuch as the valuation of freight in a valued policy *prima facie* refers to a full cargo, or the charter of the entire ship, & there was in this case nothing to show the underwriter that the valuation was less than such full freight, the valued policy as applicable to a partial cargo must be treated as an open policy for half the loss of freight, not exceeding in any case £1,000.—**DENOON v. HOME & COLONIAL ASSURANCE CO.** (1872), L. R.

7 C. P. 341; 26 L. T. 628; 1 Asp. M. L. C. 309; *sub nom.* **DINOON v. HOME & COLONIAL ASSURANCE CO.**, 41 L. J. C. P. 162; *sub nom.* **DEWSON v. HOME & COLONIAL ASSURANCE CO.**, 20 W. R. 970.

**Annotation:—Refd.** Reliance Marine Insee. v. Duder, [1913] 1 K. B. 265.

**2038. ——— Effect of special memorandum.]—**Insurance on freight on a voyage from A. to B.; a second insurance on freight valued at £10,000 on a voyage from A. to B. & thence to C., with a memorandum that, if the ship should be lost at B., a settlement should be made as if she had had on board an entire freight to C. The ship earned freight to the amount of £2,500 on her voyage from A. to B. & was lost at B.:—**Held:** the assured could not recover for a greater loss than £7,500.—**ROBERTSON v. MARJORIBANKS** (1819), 2 Stark. 573, N. P.

**2039. ——— Part of freight not at risk—Paid in advance.]—Pltfs.**, whilst their vessel was on her way to New Orleans, & in anticipation of a full homeward cargo, effected a policy of insurance with defts. for £1,500 upon "freight valued at £5,500" "at & from New Orleans to Liverpool" the insurance to commence from the loading of the cargo. At the date of the policy this valuation was reasonable & proper upon a full cargo, having regard to the rates of freight then current at New Orleans & to the engagements of cargo for the vessel; but on her way out she met with an accident, & during the time occupied in repairs the rates of freight at New Orleans declined considerably, & the greater part of the engagements of cargo had to be cancelled. After some months delay the vessel sailed for Liverpool with a full cargo, the total freight on which amounted to £3,250 of which £952 was paid in advance. In the course of the voyage the vessel was lost by a peril insured against, & the total freight at risk, £2,298, also lost. Pltfs. collected under other policies the sum of £3,250 & in an action against defts. claimed £1,500 from them. Defts. contended that the valuation must be opened, & that, on the actual amount of freight at risk, pltfs. had been fully indemnified under other policies:—**Held:** the valuation was binding; but as freight to the amount of £952 had been paid in advance, & was, therefore, not at risk, the valuation of £5,500 must be reduced by £1,611 being the proportion of the prepaid freight to the gross freight, leaving £3,889 as the value at risk, & as, of this sum, pltfs. had received £3,250 the amount recoverable from defts. was £639 with a small proportionate return of premium.

Though the assured may value that which he intended should be at risk upon the basis of a value which ultimately turns out to be erroneous, because of facts of which he had no knowledge at the time when he took out the policy, yet still, if the policy attaches, the amount which he has valued as that which is to be at risk is to be taken as conclusive & binding, although the amount which actually is at risk turns out to be very much less than was actually intended at the time of making the policy (**GORELL BARNES, J.**).—**THE MAIN**, [1894] P. 320; 63 L. J. P. 69; 70 L. T. 247; 10 T. L. R. 242; 7 Asp. M. L. C. 424; 6 R. 775.

**Annotation:—Refd.** Balmoral S.S. Co. v. Marten, [1902] A. C. 511.

*E. In respect of Liability to Third Party.*

See Marine Insurance Act, 1906 (c. 41), s. 74.

**2040. Insurance by carrier—Proportion of sum**

**PART II. SECT. 22, SUB-SECT. 5.—E.**

**k. Agent of captain of ship.]—An** agent employed by the captain of

a ship which had put into port for repairs, made disbursements on account of said ship & cargo. The master having terminated the charter gave

a draft to the agent on his owners for amount of disbursements. The owners repudiated any liability for contribution for cargo but accepted for



insured to value of goods carried—At time of loss.]—CROWLEY v. COHEN, No. 609, *ante*.

**2041. — Sum paid to third party.]—**Pltfs., J. & Son, were lightermen, & effected an insurance in the form of an ordinary Lloyd's policy, at & from all wharves on the Thames from Wandsworth to the Victoria Docks, which contained the following clause: "To cover & include all losses, damages and accidents amounting to £20 or upwards in each craft, to goods carried by J. & Son as lightermen, or delivered to them to be waterborne, either in their own or other craft, & for which losses, damages & accidents J. & Son may be liable or responsible to the owners thereof, or others interested." The policy was subscribed by different underwriters for different sums amounting to £2,000, & defts. underwrote the policy for £100. A loss happened to goods carried by pltfs. in a barge, for which pltfs. became liable to those interested in the goods to the amount of £1,100. The total value of the risks of pltfs. in this & other barges at the time of the loss & covered by the policy amounted to £20,000:—*Held*: on the construction of the policy, pltfs. were entitled to be indemnified for the loss actually sustained, viz., £1,100, & to recover from deft. £55, his proportion; & the sum to be recovered was not merely such a proportion of pltfs.' loss as the sum for which deft. subscribed the policy, viz., £100, bore to the value of all the goods afloat & covered by the policy at the time of the loss, viz., £20,000.

The subject-matter insured against is the liability which pltfs. would sustain in respect of the goods by reason of their accepting them as carriers. It is not an ordinary marine policy, but a policy of a mixed nature, the object of which was to secure to pltfs. an indemnity to the extent of the sum subscribed for, for any loss during the year which they might sustain by reason of their being responsible as carriers for the loss of the goods (LUSH, J.).—JOYCE v. KENNARD (1871), L. R. 7 Q. B. 78; 41 L. J. Q. B. 17; 25 L. T. 932; 20 W. R. 233; 1 Asp. M. L. C. 194.

*Annotations*:—**Distd.** Holman v. Merchants' Marine Insee., [1919] 1 K. B. 383. **Refd.** Manchester Liners v. British & Foreign Marine Insee. (1901), 7 Com. Cas. 26; Cunard S.S. Co. v. Marten, [1902] 2 K. B. 624.

—.]—See, generally, Part II., Sect. 8, sub-sect. 3, D., *ante*.

## SECT. 23.—TOTAL LOSS.

### SUB-SECT. 1.—PRESUMPTION OF TOTAL LOSS.

See, now, Marine Insurance Act, 1906 (c. 41), s. 58.

See Sect. 20, sub-sect. 1, J., *ante*.

### SUB-SECT. 2.—ACTUAL TOTAL LOSS.

#### A. Of Ship.

See Marine Insurance Act, 1906 (c. 41), s. 57 (1).

**Presumption of total loss.]—**See Sect. 20, sub-sect. 1, J., *ante*.

ship. In an action against the insurers of the cargo, for a contribution of the disbursements:—*Held*: there was no legal liability on the insurers to the agent as a third party.—BOWRING v. BOSTON INSURANCE CO. (1881), 6 Nfld. L. R. 265.—**NFLD.**

## PART II. SECT. 23, SUB-SECT. 2.—A.

**2043 i. Damaged ship—Subsistence in specie—Ship not worth repairing.]—**

Resp.'s vessel sustained damage & put into S. According to the report of competent persons the cost of putting her in good condition would exceed her value. The captain, under instructions from owners to proceed under best advice, advertised & sold vessel, & the purchaser had her repaired at a cost much less than the report, & sent her to sea:—*Held*: there was no evidence to justify the jury in finding that the vessel was a

**2042. Damaged ship—Subsistence in specie—Broken up for old timber.]—**A vessel was driven into a port, where there was no dock to receive her: it appeared that she had suffered so much by sea perils, that, upon examination & survey, it was judged expedient to break her up, & to sell her for old timber:—*Held*: in an action on the policy, the assured was bound to abandon before he could call upon the underwriters for a total loss; the ship not being a wreck, but, however maimed & damaged, existing in specie as a ship.—BELL v. NIXON (1816), Holt, N. P. 423, N. P.

**2043. — Ship not worth repairing.]—**Where a ship is so much injured by perils of the sea as not to be repairable at all, or not repairable without an expense exceeding her value when repaired, the assured may recover for a total loss without giving notice of abandonment.—CAMBRIDGE v. ANDERTON (1824), 2 B. & C. 691; 1 C. & P. 213; 4 Dow. & Ry. K. B. 203; Ry. & M. 60; 2 L. J. O. S. K. B. 141; 107 E. R. 540.

*Annotations*:—**Folld.** Roux v. Salvador (1836), 3 Bing. N. C. 266. **Consd.** Knight v. Faith (1850), 15 Q. B. 649. **Folld.** Levy v. Merchant Marine Insee. (1885), Cab. & El. 474. **Refd.** Manning v. Irving (1845), 1 C. B. 168; Fleming v. Smith (1848), 1 H. L. Cas. 513; Fawcus v. Sarsfield (1856), 6 E. & B. 192; King v. Walker (1864), 3 H. & C. 209; Farnworth v. Hyde (1866), L. R. 2 C. P. 204; Kemp v. Halliday (1866), 6 B. & S. 723; Rankin v. Potter (1873), L. R. 6 H. L. 83; Cossman v. West, Cossman v. British America Assee. (1887), 13 App. Cas. 160.

**2044. — — — — —.]—**ALLEN v. SUGRUE, No. 2153, *post*.

**2045. — — — — —.]—**STEWART v. GREENOCK MARINE INSURANCE CO., No. 2347, *post*.

**2046. — — — — —.]—**HANSON v. PORT OF LONDON SHIP LOAN & INSURANCE CO. (1849), 10 L. T. 353.

**2047. — — — — — Repair impossible.]—**CAMBRIDGE v. ANDERTON, No. 2043, *ante*.

**2048. — — — — —.]—**Where by means within the reach of the master a ship can be so treated as to retain the character of a ship, he cannot by selling her, even *bonâ fide*, convert the average into a total loss, but the underwriters are entitled to have those means used on their account.

If the situation of the ship be such, that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it with a fair hope of restoring it to the character of a ship, he cannot by selling it turn it into a total loss. If she be in a situation such that by means which the captain could reasonably use she could not be brought to retain the character of a ship, it is a total loss. *Bona fides* in the captain will not decide the question; for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do (BAYLEY, B.).—GARDNER v. SALVADOR (1831), 1 Mood. & R. 116, N. P.

*Annotations*:—**Refd.** Kemp v. Halliday (1866), 6 B. & S. 723; Macbeth v. Maritime Insee., [1908] A. C. 144.

**2049. — — — — —.]—**IRVING v. MANNING, No. 2176, *post*.

**2050. — — — — —.]—**MOSS v. SMITH, No. 2096, *post*.

total loss.—MILLVILLE MUTUAL MARINE & FIRE INSURANCE CO. v. DRISCOLL (1884), 11 S. C. R. 183.—**CAN.**

**2047 i. — — — — — Repair impossible.]—**ANCHOR MARINE INSURANCE CO. v. KEITH (1884), 9 S. C. R. 483.—**CAN.**

1. — — — — — *Special terms in policy.]—*SLAUGHENWHITE v. WESTERN ASSURANCE CO. (1911), 11 E. L. R. 310.—**CAN.**

**Sect. 23.—Total loss: Sub-sect. 2, A. & B. (a), (b)**

**2051.** ————.]—**BARKER v. JANSON**, No. 1984, *ante*.

**2052. Stranded ship—Impossible to refloat—Sale.**]—**FLEMING v. SMITH**, No. 2322, *post*.

**2053.** ————.]—**LEVY & Co. v. MERCHANTS MARINE INSURANCE CO.**, No. 663, *ante*.

**Constructive total loss followed by sale.**]—*See* Sub-sect. 2, E., *post*.

**2054. Sale under decree of Admiralty Court.**]—To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated. If it is lost to the owner by an adverse valid & legal transfer of his right of property & possession to a purchaser by a sale under a decree of a Ct. of competent jurisdiction in consequence of a peril insured against it is as much a total loss as if it had been annihilated. In such a case no distinction can be drawn between a sale upon capture & a sale under the decree of a Ct. of Admlty. for the expenses of salvage services.

A ship & her freight having been insured (*inter alia*) against barratry of the master, was wrongfully abandoned by him. Salvors took possession of her & having towed her into port instituted salvage proceedings against her. These proceedings were known to the owners, but they did not appear. The ship & cargo were sold by decree of the Ct. of Admlty., & realised less than the salvage award. In an action on the policies:—*Held*: the assured were entitled to recover, as the sale under the decree of the Admlty. Ct. constituted an actual total loss, & no notice of abandonment was necessary.—**COSSMAN v. WEST**, **COSSMAN v. BRITISH AMERICA ASSURANCE CO.** (1887), 13 App. Cas. 160; 57 L. J. P. C. 17; 58 L. T. 122; 4 T. L. R. 65; 6 Asp. M. L. C. 233, P. C.

*Annotations*:—**Consd.** **Fooks v. Smith**, [1924] 2 K. B. 508. **Refd.** **Sailing Ship Blairmore Co. v. Macredie**, [1898] A. C. 593; **Polarian S.S. Co. v. Young**, [1915] 1 K. B. 922. **Mentd.** **Bradley v. Newsom**, [1919] A. C. 16; **The Tubantia**, [1924] P. 78.

**2055. Sunken ship—Subsequent raising by underwriters.**]—**SAILING SHIP BLAIRMORE CO. v. MACREDIE**, No. 2145, *post*.

**2056. Derelict vessel drifting ashore—Cost of removal exceeding insured value.**]—**COHEN (G.) SONS & CO. v. STANDARD MARINE INSURANCE CO., LTD.**, No. 1457, *ante*.

### B. Of Cargo.

#### (a) Total Destruction in Specie.

*See, now*, Marine Insurance Act, 1906 (c. 41), s. 57 (1).

**2057. Damage amounting to loss of character of goods.**]—Insurance on goods with the usual memorandum, "Corn, fish, etc. warranted free from average, unless general, or the ship should be stranded." A quantity of fish, part of the goods insured, was so much damaged by the perils of the

seas, that on putting into the port of Lisbon, on a survey by the Board of Health at that place, the fish was declared to be, & in fact was, of no value:—*Held*: this was not a total loss of the fish.

**COCKING v. FRASER** (1785), 4 Doug. K. B. 295; 99 E. R. 889.

*Annotations*:—**Distd.** **Hadkinson v. Robinson** (1803), 3 Bos. & P. 388. **N.F. Asfar v. Blundell**, [1895] 2 Q. B. 196. **Refd.** **Burnett v. Kensington** (1797), 7 Term Rep. 210; **Dyson v. Rowcroft** (1803), 3 Bos. & P. 474; **Anderson v. Royal Exchange Assce.** (1805), 3 Smith, K. B. 48; **Cologan v. London Assce.** (1816), 5 M. & S. 447; **Navone v. Haddon** (1850), 9 C. B. 30.

**2058.** ————.]—Insurance at & from Quebec to Teneriffe on a cargo of wheat, fish, & staves, with the usual memorandum as to corn & fish free from average, unless general; & the ship was captured, & afterwards recaptured, & sent by the recaptors to Bermuda, where, a scarcity prevailing, an embargo was laid on the export of provisions, & the cargo being landed, it was found that five hundred & eighty-five bushels of wheat were so damaged by sea-water, that they were, by order of the magistrates, for the sake of the public health, thrown overboard; & other part of the wheat being damaged, the captain sold that part & the fish, which sold at a profit; & put up the ship to sale, which he purchased at not more than one-fourth of its value, for the benefit of the owners; & having repaired her, & being refused permission to ship the remaining wheat to Teneriffe, he directed it to be sold, & purchased it for the benefit of those concerned; & by leave of the governor, the embargo being then raised as to the West India Islands, shipped the same for Madeira, where he arrived, & delivered it: & took in a cargo of wine for London, with which he arrived:—*Held*: the assured, who had abandoned upon receiving intelligence of the circumstances which happened previously to the time of the ship's being permitted to proceed to Madeira, were entitled to recover as for a total loss on the whole of the goods insured.

Considering the contract of insurance as a contract of indemnity, it surely cannot be less a total loss because the commodity exists in specie, if it subsist only in the form of a nuisance. There is a total loss of the thing, if, by any of the perils insured against, it is rendered of no use whatever, although it may not be entirely annihilated (**LORD ELLENBOROUGH, C.J.**).—**COLOGAN v. LONDON ASSURANCE CO.** (1816), 5 M. & S. 447; 105 E. R. 1114.

*Annotations*:—**Consd.** **Ralli v. Janson** (1856), 6 E. & B. 422. **Refd.** **Holdsworth v. Wise** (1828), 7 B. & C. 794; **Dean v. Hornby** (1854), 3 E. & B. 180; **Lozano v. Janson** (1859), 2 E. & B. 160; **Rankin v. Potter** (1873), L. R. 6 H. L. 83; **Ruys v. Royal Exchange Assce. Corpn.**, [1897] 2 Q. B. 135.

**2059.** ————.]—**ROUX v. SALVADOR**, No. 2129, *post*.

**2060.** ————.]—**SAUNDERS v. BARING**, No. 2134, *post*.

**2061.** ————.]—**ASFAR & CO. v. BLUNDELL**, No. 2082, *post*.

**2062.** ————.]—A cargo of goods was insured, the insurance being expressed to be "against loss by

**2052 i. Stranded ship—Impossible to refloat—Sale.**]—**PHOENIX INSURANCE CO. v. MCGHEE** (1890), 18 S. C. R. 61.—**CAN.**

**m. Expense of removing wreck—Liability of owner.**]—Where a ship was sunk in a port, & the owner gave due notice of abandonment to the underwriters, & claimed under the policy of insurance for a total loss, & his claim was admitted & paid:—*Held*: he was liable for the excess of expenses of removing the wreck beyond the proceeds of the sale of it.—**SMITH & SONS v. WILSON** (1896), 75 L. T. 81.—**AUS.**

**n. Test of total loss.**]—Whether a loss is to be considered a total loss, depends on the fact whether the vessel, as injured, is useless to the owner unless it is repaired at an expense that no prudent man, if uninsured, would incur, an expense exceeding the value of the ship when repaired.—**HARKLEY v. PROVINCIAL INSURANCE CO.** (1868), 18 C. P. 335.—**CAN.**

#### PART II. SECT. 23, SUB-SECT. 2.—B. (a).

**2057 i. Damage amounting to loss of character of goods.**]—**ALMON v. BRITISH**

**AMERICA ASSURANCE CO.** (1882), 16 N. S. R. (4 R. & G.) 43.—**CAN.**

**2057 ii.** ————.]—A cargo of cement shipped by barge was insured against total loss "by total loss of the vessel." The barge struck against a snag, & part of her deck was submerged. The cement was completely destroyed as cement:—*Held*: there had been a total loss of the cargo insured, notwithstanding that the barge might be afterwards floated & repaired.—**MONTREAL LIGHT, HEAT & POWER CO. v. SEDGWICK** (1910), 30 C. L. T. 821.—**CAN.**



total loss of the vessel & general average only." The vessel was lost, but the insurers of the vessel did not accept the abandonment as a constructive total loss, & the vessel was raised & repaired at a loss. The cargo was totally lost:—*Held*: the insurers of the cargo were liable on the policy.—**MONTREAL LIGHT, HEAT & POWER CO. v. SEDGWICK**, [1910] A. C. 598; 80 L. J. P. C. 11; 103 L. T. 234; 26 T. L. R. 657; 11 Asp. M. L. C. 437, P. C.

**2063. Jettison.**—Policy on fruit from Cadiz to London, with the usual memorandum. In the course of the voyage the fruit was so much damaged by sea-water, that it became rotten, & stunk; & on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also being too much damaged to proceed on the voyage, was sold, & the cargo necessarily thrown overboard:—*Held*: the assured were entitled to recover for a total loss.—**DYSON v. ROWCROFT** (1803), 3 Bos. & P. 474; 127 E. R. 257.

*Annotations*:—**Apld.** Roux v. Salvador (1835), 1 Bing. N. C. 526. **Refd.** Cologan v. London Assee. (1816), 5 M. & S. 447; Ralli v. Janson (1856), 6 E. & B. 422.

**2064. Retardation of voyage.**—**NAYLOR v. TAYLOR**, No. 2151, *post*.

(b) *Capture by Belligerent.*

**2065. Condemnation as prize—Sale by captain.**—**MARSHALL v. PARKER**, No. 752, *ante*.

**2066. — Subsequent reversal of order—On payment of captain's costs.**—An American properly licensed to export saltpetre from Calcutta to America, having insured it for the voyage, the ship was seized by the captain of a British ship of war at the Cape of Good Hope, & the cargo condemned, unshipped, & sold by order of the Ct. of Admty. there, whose sentence was afterwards reversed on appeal here, & the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs:—*Held*: the assured might recover as for a total loss, without notice of abandonment; the thing insured being wholly lost to the owner by the unshipping & sale of the commodity at the Cape under the order of the ct. there: & such loss was recoverable against the underwriters on a count alleging it to have happened by the unlawful seizure & detention of a British ship of war: however questionable it might have been, if notice of abandonment had been necessary, whether such a notice, not given till after the receipt of a second letter from the Cape, announcing the condemnation, landing, & sale of the goods, were in time; when a prior letter of advice had stated the seizure & detention, on which no notice had been given, & the allowing the captor his costs, on the reversal of the sentence of condemnation, did not the less show the original seizure & detention to be unlawful, as alleged in the count.—**MULLETT v. SHEDDEN** (1811), 13 East, 304; 104 E. R. 387.

*Annotations*:—**Consd.** Roux v. Salvador (1836), 3 Bing. N. C. 266. **Distd.** Stringer v. English, etc. Insee. (1869), L. R. 4 Q. B. 676. **Apld.** Levy v. Merchants' Marine Insee. (1885), 52 L. T. 263. **Refd.** Read v. Bonham (1821), 6 Moore, C. P. 397; Cossman v. West, Cossman v. British America Assee. (1887), 13 App. Cas. 160.

**2067. —**—Pltfs. insured with defts. the cargo on board a ship bound from Liverpool to Matamoras against the usual perils, including "takings at sea, arrests, restraints, & detainments of all kings, princes, & people." The ship sailed & had nearly reached her destination when she was captured by a United States cruiser, & taken into New Orleans, where a suit was instituted in the Prize Ct. for her condemnation. Pltfs. contested

the suit, electing to treat the loss as a partial one. They obtained the judgment of the Ct., whereupon the captors appealed. Pltfs. gave a formal notice of abandonment, which the insurers refused to accept. Upon the application of the captors, the ship & cargo were ordered to be sold, unless bail were given by plts. Upon receiving intelligence that this order had been made, pltfs. applied to the insurers for assistance in giving bail to prevent the sale. The insurers refused to give any assistance, & in the end the ship & cargo were sold by order of the Prize Ct. Pltfs. brought an action to recover from defts., the insurers, as for a total loss:—*Held*: they were entitled to recover the whole amount at which they were insured under the policy, inasmuch as the decree of the Prize Ct., & the sale of the goods under it, was a deprivation of the ownership of the goods, & amounted to a total loss.—**STRINGER v. ENGLISH & SCOTTISH MARINE INSURANCE CO.** (1870), L. R. 5 Q. B. 599; 10 B. & S. 770; 39 L. J. Q. B. 214; 22 L. T. 802; 18 W. R. 1201; 3 Mar. L. C. 440, Ex. Ch.

*Annotations*:—**Distd.** De Mattos v. Saunders (1872), L. R. 7 C. P. 570. **Consd.** Rankin v. Potter (1873), L. R. 6 H. L. 85. **Apld.** Levy v. Merchant Marine Insee. (1885), Cab. & El. 474; Cossman v. West, Cossman v. British America Assee. (1887), 13 App. Cas. 160. **Consd.** Fooks v. Smith, [1924] 2 K. B. 508. **Refd.** Browning v. Provincial Insee. of Canada (1873), 28 L. T. 853; Saunders v. Baring (1876), 34 L. T. 419; The Blairmore (1898), 67 L. J. P. C. 96; Polurrian S.S. Co. v. Young (1915), 112 L. T. 1053. **Mentd.** Castrique v. Imrie (1870), L. R. 4 H. L. 414; Meyer v. Ralli (1876), 24 W. R. 963.

(c) *Part of Cargo Lost.*

See Marine Insurance Act, 1906 (c. 41), s. 56, 76 (1).

**2068. Insurance not severable—80 per cent. of cargo lost.**—**M'ANDREWS v. VAUGHAN** (1793), 1 Park on Marine Insurances, 8th ed. p. 252.

*Annotations*:—**Consd.** Hadkinson v. Robinson (1803), 3 Bos. & P. 388. **Refd.** Anderson v. Royal Exchange Assee. (1805), 3 Smith, K. B. 48.

**2069. — Fifteenth-sixteenths of cargo lost—One-sixteenth salvaged in specie but much damaged.**—Upon a policy of insurance on flax, valued at so much, & warranted free of particular average, if the vessel be wrecked, & the assured do not abandon but labours to save the cargo, & in fact saves a part, one-sixteenth, though much damaged, they are entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest which was saved to them in specie, though deteriorated.—**DAVY v. MILFORD** (1812), 15 East, 559; 104 E. R. 954.

*Annotations*:—**Distd.** Hedberg v. Pearson (1816), 2 Marsh. 432; Hills v. London Assee. Corp'n. (1839), 5 M. & W. 569. **Consd.** Navone v. Haddon (1850), 9 C. B. 30. **Dtd.** Ralli v. Janson (1856), 6 E. & B. 422. It appears that the judgment in *Davy v. Milford*, did not proceed upon the fact of the goods having been shipped in packages & indeed that it could not be sustained on that ground... & so far as the judgment was against the underwriters it must now be considered as overruled (JERVIS, C.J.). **Consd.** Wilkinson v. Hyde (1858), 3 C. B. N. S. 30. **Refd.** Glennie v. London Assee. (1814), 2 M. & S. 371.

**2070. — 97 per cent. of cargo lost.**—Upon a policy on hogsheads of sugar, warranted against particular average, some part of the sugar in every hogshead being preserved, though less than 3 per cent. on the cargo, it was held that this could not be a total loss.—**HEDBURG v. PEARSON** (1816), 7 Taunt. 154; 2 Marsh. 432; 129 E. R. 62.

*Annotations*:—**Consd.** Hills v. London Assee. Corp'n. (1839), 5 M. & W. 569; Ralli v. Janson (1856), 6 E. & B. 422.

**2071. — 5 per cent. of cargo lost.**—An insurance was effected on wheat shipped in bulk, & valued at £1,600, warranted free from average except general, or the ship were stranded. On the voyage the ship met with tempestuous



**Sect. 23.—Total loss: Sub-sect. 2, B. (c), & C.**

weather, & made considerable water; & in pumping it out, wheat to the value of about £75 was pumped out with the water & lost:—*Held*: pl'tfs. could not recover as for a total loss of the part so lost.—*HILLS v. LONDON ASSURANCE CORPN.* (1839), 5 M. & W. 569; 9 L. J. Ex. 25; 11 L. T. 159; 151 E. R. 241.

*Annotations*:—*Consd.* *Ralli v. Janson* (1856), 6 E. & B. 422; *Entwistle v. Ellis* (1857), 27 L. J. Ex. 105. *Refd.* *Rosetto v. Gurney* (1851), 11 C. B. 176; *Carr v. Royal Exchange Assee. Corpn.* (1864), 5 B. & S. 433.

**2072. — Cargo in packages—No express separate insurance.**—*RALLI v. JANSON*, No. 1974, *ante*.

**2073. — Cargo of rice—Separate valuation of each bag—By indorsement on declaration of interest.**—On an insurance of goods in "ship or ships" which were declared to be & to be valued "on rice, to be declared free from particular average," the insurer cannot by indorsing a declaration of interest with a separate valuation of each bag of rice, create a separate insurance on each bag.

A policy of insurance, having been effected on goods "in ship or ships," declared to be "on rice, to be declared free from particular average," the insured indorsed on the policy a declaration which was afterwards marked with the initials of the underwriters, as follows: (R.) five hundred bags rice, per *Laidmans*, at 8s. 3d. per bag, £206 5s. (R.) four thousand five hundred bags rice, per *Margaret Skelly*, at 8s. 3d. per bag, £1,856 5s. From each ship certain of the bags of rice were safely landed at their port of destination; others were jettisoned, being cast into the sea to save the ship; others, in the *Laidmans*, on arriving at their port of destination, were cast into the sea, being unfit for consumption; others, in the *Margaret Skelly*, were so much injured by sea damage as to be sold at the port of departure to which that ship was obliged to put back. The underwriters had paid the loss on the goods jettisoned:—*Held*: the assured were not entitled to recover the value of the bags of rice cast into the sea at the port of destination or sold at the port of departure.—*ENTWISLE v. ELLIS* (1857), 2 H. & N. 549; 27 L. J. Ex. 105; 3 L. T. 382; 6 W. R. 76; 157 E. R. 226.

**2074. — Identification impossible—Destruction of marks.**—Cotton belonging to different owners was shipped in bales specifically marked, at Mobile for Liverpool; forty-three bales belonged to pl'tfs., & were insured by defts. against the usual perils. In the course of her voyage the ship was wrecked near Key West; all the cotton was more or less damaged; some of it was lost, & some was so damaged that it had to be sold at Key West. The rest of the cotton was conveyed in another vessel to Liverpool. The marks on a very large number of the bales were so obliterated by sea water that none of the cotton lost or sold at Key West, & a portion only of that carried to Liverpool, could be identified as belonging to any particular consignee. Two only of pl'tfs.' forty-three bales were identified, & these were delivered to pl'tfs.:—*Held*: in respect of the cotton lost, & that sold at Key West, there was a total loss of a part of each owner's cotton, & all the owners became tenants in common of the cotton which arrived at Liverpool, & could not be identified; the share of each owner's loss in the cotton totally lost or sold at Key West, & his share in

the remainder which arrived at Liverpool being in the proportion which the quantity shipped by him bore to the whole quantity shipped according to the rule in cases of general average where it is not known whose goods are sacrificed: & consequently, there was no total loss, either actual or constructive, of pl'tf.'s forty-one bales.—*SPENCE v. UNION MARINE INSURANCE CO.* (1868), L. R. 3 C. P. 427; 37 L. J. C. P. 169; 18 L. T. 632; 16 W. R. 1010; 3 Mar. L. C. 82.

*Annotations*:—*Refd.* *Sandeman v. Tyzack & Branfoot S.S. Co.*, [1913] A. C. 680. *Mentd.* *Harris v. Truman* (1881), 7 Q. B. D. 340; *Rose v. Bank of Australasia* (1894), 6 R. 121; *Smurthwaite v. Hannay*, [1894] A. C. 494; *Sinclair v. Brougham*, [1914] A. C. 398.

*See, now*, Marine Insurance Act, 1906 (c. 41), s. 56 (5).

**2075. Insurance severable—No separate specification in policy—"Master's effects."**—An insurance was effected on "master's effects, valued at £100, free from all average." Some of the articles thus insured were totally lost by the perils insured against, but others were saved:—*Held*: the assured was entitled to recover in respect of the goods which had been so totally lost; the word "effects" being obviously employed to save the enumeration of the different articles of which the subject-matter of insurance consisted.

The word "effects" is obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, etc., at which they happened to consist; & although it is stipulated by the warranty that these effects shall be free of all average—or, in other words, that the insurer shall not be liable for any amount of sea-damage to them short of a total loss, we think, looking at the nature of the subject of insurance, & the terms of this exemption, it is doing no violence to the language used, to hold that he is not exempted from liability for a total loss of any of the articles of which the "effects" consist (*WILLIAMS, J.*).—*DUFF v. MACKENZIE* (1857), 3 C. B. N. S. 16; 26 L. J. C. P. 313; 30 L. T. O. S. 103; 3 Jur. N. S. 1025; 140 E. R. 643.

—*Apld.* *Wilkinson v. Hyde* (1858), 3 C. B. N. S. 30. *Consd.* *Cator v. Great Western Insce. of New York* (1873), L. R. 8 C. P. 552; *Fabrique de Produits Chimiques v. Large*, [1923] 1 K. B. 203. *Refd.* *Entwistle v. Ellis* (1857), 3 L. T. 382; *Great Indian Peninsular Ry. v. Saunders* (1862), 6 L. T. 297.

**2076. — Packages containing emigrant's equipment.**—Where pl'tf. insured £240 on any kind of goods abroad a ship against total loss, & afterwards put on board an emigrant's equipment, consisting of a variety of tools, materials, etc. in several separate packages, & all were lost, except three packages of small value:—*Held*: he might recover for the total loss of the packages which were totally lost.—*WILKINSON v. HYDE* (1858), 3 C. B. N. S. 30; 27 L. J. C. P. 116; 7 L. T. 442; 4 Jur. N. S. 482; 140 E. R. 649.

*Annotations*:—*Consd.* *Cator v. Great Western Insce. of New York* (1873), L. R. 8 C. P. 552; *Fabrique de Produits Chimiques v. Large*, [1923] 1 K. B. 203.

**2077. — Separate valuation in policy—Different species of goods.**—*FABRIQUE DE PRODUITS CHIMIQUES v. LARGE*, No. 2004, *ante*.

### C. Of Freight.

#### (a) In General.

*See, now*, Marine Insurance Act, 1906 (c. 41), s. 57.

**Notice of abandonment—Whether necessary.**—*See Sect. 24, post.*

### PART II. SECT. 23, SUB-SECT. 2.—C. (a).

#### a. Ship lost—Cargo forwarded by

another ship.]—Where a vessel, the freight of which was insured, was lost, & the master forwarded the cargo to its

destination by another ship, paying therefor the same freight which he was to receive:—*Held*: the ship-

**2078. Insurance against failure to load return cargo—Unloading forbidden.]—PULLER v. STANFORTH, No. 627, ante.**

**2079. ———.]—**Where a ship was chartered to take a cargo of lead from London to St. Petersburg, & there immediately receive a return cargo from the freighter's agent, & bring it to London; with a proviso, that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at St. P. 40 running days without the outward cargo being unloaded, & consequently without the return cargo being loaded, should be at liberty to return to London or any port in England: & the ship not having been permitted to unload at St. P. by the Russian Govt., the master, after waiting there the 40 running days, loaded a return cargo for his own benefit upon the outward cargo, both of which he brought home, & earned new freight on the homeward cargo; which freight was adjudged to him in an action between him & the freighters, over & above the dead freight stipulated to be paid by the charterparty:—*Held*: the freighters were entitled to recover the whole of such dead freight from the underwriters upon a policy of insurance, whereby they agreed to pay a loss in case the master should not be allowed by the Russian Govt. to unload the outward cargo at St. P.; the vessel having sailed chartered by the freighters on a voyage from London to St. P. & back.—**PULLER v. HALLIDAY (1810), 12 East, 494; 104 E. R. 193.**

**2080. Insurance for less than gross freight—Payment by charterer of wages & sailing charges—Part payment of freight.]—**Where the owner of a vessel has insured for freight to an amount not equal to the gross freight likely to be earned, & the freighter stipulates in the charterparty to pay all wages & sailing charges in the course of the voyage, as part payments of the freight, & also insurers for those wages & sailing charges, & such payments are accordingly made; the insurers, in the event of a total loss, will not be entitled to consider the insurance of the owner to have been effected upon gross freight.

S. let his ship to A., under a charterparty, stipulating that A. should pay "in full for the freight & hire of the same, at the rate of £100 per month; the sum of £50 to be paid immediately upon the sailing of the vessel, as much cash as might be from time to time required & sufficient to pay all wages & sailing charges, & the residue of such freight as might be due at the completion of each voyage," etc. The probable duration of the intended voyage was eight months, but S. effected an insurance of freight for £400 only, & A., at the same time, on money advanced for sailing charges, for £350. The vessel was lost at the end of six months:—*Held*: S. was entitled to recover the whole amount of the sum insured.—**ETCHES v. ALDAN (1827), 1 Man. & Ry. K. B. 157; 6 L. J. O. S. K. B. 65.**

*Annotation*:—**Reld. Dinon v. Home & Colonial Assce. (1872), 41 L. J. C. P. 162.**

**2081. Ship earning full freight on other cargo — Delay of ship.]—**On a policy on freight, the ship having actually earned full freight, though not that intended for her, the owners cannot recover for the delay & expense as a partial loss.—**BROCKLERANK (OR BROCKELBANK) v. SUGRUE (1831), as reported in 1 Mood. & R. 102, N. P.**

*Annotation*:—**Mentd. Blasco v. Fletcher (1863), 32 L. J. C. P. 284.**

**2082. Insurance of profit on charter—Part of**

**cargo damaged—Freight earned less than charter freight.]—**(1) A vessel, on board which dates had been shipped under bills of lading making the freight payable on right delivery, was sunk during the course of the voyage, & subsequently raised. On arrival at the port of discharge it was found that although the dates still retained the appearance of dates, & although they were of considerable value for the purpose of distillation into spirit, they were so impregnated with sewage & in such a condition of fermentation as to be no longer merchantable as dates:—*Held*: freight was not payable in respect of them.

A ship having been chartered for a lump sum the charterers put her up as a general ship, & goods were shipped on board under bills of lading at freights which in the aggregate exceeded the charter freight. The charterers insured their "profit on charter" by a policy which contained a warranty against average. On arrival of the ship part of the cargo was delivered & freight was payable under the bills of lading for that portion; but owing to sea damage the remainder of the cargo had lost its merchantable character, & freight was not payable in respect of it; the result being that the total amount of the freights payable under the bills of lading was less than the charter freight, & the charterers' profit was consequently lost:—*Held*: (2) there had been a total loss of the subject-matter of the insurance within the meaning of the warranty: (3) the fact that the shorter freight was a lump sum & not a tonnage rate, although material, had been sufficiently disclosed by a reference to the charterparty, a clause for payment of a lump sum for freight being a usual clause in charterparties, & the obligation to specifically disclose the contents of a charter extending only to usual clauses, the insertion of which the underwriters could not reasonably have anticipated.

There is a perfectly well known test which for many years has been applied to such cases as the present—that test is whether, as a matter of business, the nature of the thing has been altered. The nature of the thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the things dealt with as wheat or rice in business. But if the nature of the thing is altered, & it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce has become a total loss. If it is changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy & no honest seller would sell, then there is a total loss (**LORD ESHER, M.R.**).

The assured is bound to disclose every material fact within his knowledge, which is not fairly to be taken as being within the knowledge of the underwriter, & if he fails to do so—he is guilty of what is called in insurance law—concealment. . . . But it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it (**LORD ESHER, M.R.**).—**ASFAR & CO. v. BLUNDELL, [1896] 1 Q. B. 123; 65 L. J. Q. B. 138; 73 L. T.**

owner was entitled to recover for a total loss of freight.—**DRISCOLL v. MILLVILLE MARINE INSURANCE CO. (1883), 23 N. B. R. 160; on appeal, 2 S. C. R. 183.—CAN.**



**Sect. 23.—Total loss: Sub-sect. 2, C. (a), (b) & (c).]**

648; 44 W. R. 130; 12 T. L. R. 29; 40 Sol. Jo. 66; 8 Asp. M. L. C. 106; 1 Com. Cas. 185, C. A.; *affg.*, [1895] 2 Q. B. 196.

*Annotations*:—As to (2) *Distd.* Francis v. Boulton (1895), 65 L. J. Q. B. 153. *Reid.* Field S.S. Co. v. Burr, [1898] 1 Q. B. 821; Hansen v. Dunn (1906), 22 T. L. R. 458. As to (3) *Apld.* Mann Maoneal & Stoeves v. Capital & Counties Insce., Same v. General Marine Underwriters, [1921] 2 K. B. 300.

**(b) Frustration of Adventure.**

**2083. Seizure of ship by foreign government—Before cargo shipped.]—**HORNCastle v. SUART, No. 936, *ante*.

**2084. —.]—**MACKENZIE v. SHEDDEN, No. 937, *ante*.

**2085. Destruction of ship—On way to port of loading.]—**A cargo being purchased & ready to be shipped, & the vessel being ready to receive it, the vessel was broken to pieces through the accidental giving way of her tackle & shores in being moved out of an artificial dock at a place about seven miles distant from the intended loading port:—*Held*: there was a total loss of freight expected to be earned on shipowner's goods, & the peril was covered by the terms of an ordinary policy on freight.—DEVAUX v. J'ANSON (1839), 5 Bing. N. C. 519; 2 Arn. 82; 7 Scott, 507; 8 L. J. C. P. 284 6 L. T. 836; 3 Jur. 678; 132 E. R. 1200.

*Annotations*:—*Consd.* Thames & Mersey Marine Insce. v. Hamilton Fraser (1887), 12 App. Cas. 484. *Reid.* Magnus v. Buttimer (1852), 21 L. J. C. P. 119. *Mentd.* Hill v. Kitching (1846), 3 C. B. 299; Royal Exchange Assce. v. M'Swiney (1850), 14 Q. B. 646; West India & Panama Telegraph Co. v. Home & Colonial Marine Insce. (1880), 6 Q. B. D. 51.

**2086. Damage to ship—Amounting to constructive total loss.]—**Where a ship is by perils of the sea so much damaged as to be incapable of repair so as to prosecute the adventure, except at an expense exceeding her value together with the freight when repaired, the master is justified in abandoning the voyage, & is not bound as agent of his owner to send the goods on in another bottom.

In an action upon a policy on goods from Cadiz to Monte Video & Buenos Ayres, & also "on cash on account of freight, £216," the declaration alleged the shipment of the goods & the pre-payment of the £216 on account of freight, & then proceeded to aver that, whilst prosecuting the voyage, the vessel encountered a storm, & sustained so much damage that she became & was disabled from proceeding without being repaired, & could not be repaired so as to proceed on the voyage without incurring an expense greater than her value would have been when repaired, together with the freight which she would have earned on the voyage; that the ship being so disabled from continuing the voyage with the goods on board, the master was obliged to & did abandon the voyage & the earning of the residue of the freight; that the freighter procured two other vessels to carry the goods on, at a rate of freight exceeding the freight originally payable under the charterparty; & that the £216 so paid in cash on account of freight as aforesaid, by reason of the premises, became & was wholly lost to pltf. The declaration then went on to aver that one of the substituted vessels sustained so much damage that she was obliged to put back to Gibraltar, & there unload, & the goods were sent on to Monte Video by the other; & that, by reason of the premises, pltf.

sustained a total loss of £216 so paid in cash on account of freight as aforesaid, & was put to charges in transshipping the goods, etc.:—*Held*: the declaration disclosed a sufficient justification for the master's abandoning the voyage, & consequently pltf. was entitled to recover as for a total loss of the prepaid freight.—DE CUADRA v. SWANN (1864), 16 C. B. N. S. 772; 143 E. R. 1329.

*Annotations*:—*Reid.* The Bahia (1864), 11 Jur. N. S. 90; Notara v. Henderson (1872), L. R. 7 Q. B. 225; Atwood v. Sellar (1879), 4 Q. B. D. 342.

**2087. — Delay for repairs—Cancellation by charterers.]—**Pltf., a shipowner, in Nov. 1871, entered into a charterparty, by which the ship was to proceed with all possible dispatch, dangers & accidents of navigation excepted, from Liverpool to Newport, & there load a cargo of iron rails for San Francisco. Pltf. effected an insurance on the chartered freight for the voyage. The ship sailed from Liverpool on Jan. 2, 1872, & on Jan. 3 got aground in Carnarvon Bay. She was got off by Feb. 18 & repaired, the time necessary for the completion of such repairs extending to the end of Aug. In the meantime, on Feb. 15, the charterers had thrown up the charter & chartered another ship to carry the rails, which were wanted for the construction of a railway, to San Francisco. In an action by pltf. on the policy insurance on the chartered freight, the jury found that the time necessary for getting the ship off & repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner & the charterers:—*Held*: the charterers were, by reason of the delay, not bound to load the ship, & there was therefore a loss of the chartered freight by perils of the sea.—JACKSON v. UNION MARINE INSURANCE CO. (1874), L. R. 10 C. P. 125; 44 L. J. C. P. 27; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. L. C. 435, Ex. Ch.

*Annotations*:—*Consd.* Hudson v. Hill (1874), 43 L. J. C. P. 273. *Expld.* Dahl v. Nelson, Donkin (1880), 6 App. Cas. 38. *Consd.* Inman S.S. Co. v. Bischoff (1882), 7 App. Cas. 670; Bush v. Whitehaven Town & Harbour Trustees (1888), 52 J. P. 392. *Apld.* The Alps, [1893] P. 109. *Consd.* Bensaude v. Thames & Mersey Marine Insce. (1896), 75 L. T. 155. *Expld.* Krell v. Henry, [1903] 2 K. B. 740. *Consd.* Embiricos v. Reid, [1914] 3 K. B. 45. *Expld.* Millar v. Taylor, [1916] 1 K. B. 402. *Consd.* Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Scottish Navigation Co. v. Souter, Admiral Shipping Co. v. Weidner, Hopkins, [1917] 1 K. B. 222. *Expld.* Bank Line v. Capel, [1919] A. C. 435. *Consd.* Re Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868. *Reid.* De Wolf v. Archangel Maritime Bank & Insce. (1874), L. R. 9 Q. B. 451; King v. Parker (1876), 34 L. T. 887; Re Jamieson & Newcastle Steamship Freight Insce. Assn., [1895] 2 Q. B. 90; Weir v. Pirie (No. 2) (1898), 3 Com. Cas. 271; Turnbull Martin v. Hull Underwriters Assn., [1900] 2 Q. B. 402; Manchester Liners v. British & Foreign Marine Insce. (1901), 18 T. L. R. 183; Herne Bay Steam Boat Co. v. Hutton, [1903] 2 K. B. 688; Re Carver & Sassoon (1911), 17 Com. Cas. 59; Horlock v. Beal, [1916] 1 A. C. 486; Lelston Gas Co. v. Lelstoncum-Sizewell U. D. C., [1916] 2 K. B. 428; Heilgers v. Cambrian Steam Navigation Co. (1917), 33 T. L. R. 348; Blackburn Bobbin Co. v. Allen, [1918] 2 K. B. 467; Naylor, Benzon v. Krainische Industrie Gesellschaft (1918), 87 L. J. K. B. 1066; Larrinaga v. Soc. Franco-Américaine des Phosphates de Medulla (1928), 92 L. J. K. B. 455. *Mentd.* Poussard v. Spiers (1876), 1 Q. B. D. 410; Carlton S.S. Co. v. Castle Mail Packets Co. (1898), 78 L. T. 661; Nickoll & Knight v. Ashton, Edridge (1900), 69 L. J. Q. B. 640; Story v. Fulham Steel Works Co. (1907), 24 T. L. R. 89; Dunford v. Cia Anon. Maritima Union (1911), 104 L. T. 811; Porter v. Tottenham U. D. C., [1915] 1 K. B. 776; Smith, Coney, & Barrett v. Becker, Gray (1915), 112 L. T. 914; Inverkip S.S. Co. v. Bunge, [1917] 2 K. B. 193; Countess of Warwick S.S. Co. v. Le Nickel Soc. Anon., Anglo-Northern Trading Co. v. Emllyn Jones & Williams, [1918] 1 K. B. 372; Metropolitan Water Board v. Dick, Kerr, [1918] A. C. 119; Akt. Olivebank v. Dansk Svovlsyre Fabrik, [1919] 2 K. B. 162.

**2088. — — —.]—**INMAN S.S. Co. v. BISCHOFF, No. 1684, *ante*.

**PART II. SECT. 23, SUB-SECT. 2.—C. (b).**

*p.* Frustration through peril insured against.]—JORDAN v. GREAT WESTERN INSURANCE CO. (1885), 24 N. B. R. 421.—CAN.



**2089.** ——— **Warranted free from loss of time.]—**BENSAUDE *v.* THAMES & MERSEY MARINE INSURANCE CO., No. 93, *ante*.

**2090.** ——— **Warranted free from loss of time.]—**TURNBULL, MARTIN & CO. *v.* HULL UNDER-WRITERS' ASSOCN., No. 1690, *ante*.

**2091.** ——— **Offer of similar cargo.]—**A shipowner shipped goods of his own on his own ship, for a particular voyage from Sunderland to Valparaiso. & effected a policy of insurance on "freight." The ship was run into & damaged at the port of loading, with the goods on board, after the policy had attached, whereby the cargo was so damaged that it had to be unloaded, & the particular adventure was frustrated. The ship was detained in port some six weeks, & all expenses of repairs & demurrage were paid by the owners of the colliding ship. When again in a sea-going condition, she was offered a similar cargo to the same port. This the shipowner refused, & sailed with another cargo elsewhere:—*Held*: the shipowner could recover nothing on the policy, inasmuch as the salvage was, or might have been, equivalent to the freight insured.—GAYNER *v.* SUNDERLAND JOINT STOCK PREMIUM ASSOCN. (1884), 1 Cab. & El. 293.

**2092.** ——— **"No claim arising from cancelling of charter"—Frustration through peril insured against.]—**A policy of insurance upon freight contained a provision "No claim arising from the cancelling of any charter . . . shall be allowed." The vessel was delayed by perils of the sea; no agreement to set aside the charter was made, but the voyage contemplated by the charter became impossible:—*Held*: the charter had not been cancelled within the meaning of the provision, & the assured were entitled to recover upon the policy.—*Re* JAMIESON & NEWCASTLE STEAMSHIP FREIGHT INSURANCE ASSOCN., [1895] 2 Q. B. 90; 64 L. J. Q. B. 560; 72 L. T. 648; 43 W. R. 530; 11 T. L. R. 416; 7 Asp. M. L. C. 593; 14 R. 444, C. A.

*Annotations*:—*Consd.* Bensaude *v.* Thames & Mersey Marine Insce. (1896), 75 L. T. 155. *Reid.* Scottish Shire Line *v.* London & Provincial Marine & General Insce., [1912] 3 K. B. 51.

——— **During voyage.]—**See Sub-sect. 2, C. (c), *post*.

**2093. Abandonment of voyage—Outbreak of war.]—**On July 31, 1924, a German firm, who were the charterers of pltf's. ship, cabled instructions to them for the ship which was then at Portland, to proceed to Kustendji, a Roumanian port, & to load there a cargo for the charterers. On the same day pltf's., without disclosing the circumstance that the charterers were a German firm, effected an insurance against war risks with defts. on freight per the ship at & from Portland to Kustendji & back to certain Continental or English ports. The ship started forthwith on the voyage, & on Aug. 6 arrived at Gibraltar, where in consequence of the outbreak of war on Aug. 4 she remained awaiting orders. On Aug. 11, by pltf's. orders, the voyage to Kustendji was abandoned & the ship proceeded to Norfolk, Virginia. In an action to recover a total loss under the policy of insurance:—*Held*: (1) the outbreak of war having made it illegal for pltf's. to perform the charter-party, & there being no reasonable prospect of obtaining any other freight engagement at Kustendji, there had been an actual, not a constructive, total loss of the insured freight; & even if the loss were a constructive total loss, notice of abandonment was in the circumstances unnecessary; (2) having regard to the decision of *British & Foreign Marine Insurance Co. Ltd., v. Sanday (Samuel) & Co.*, No. 2236, *post*, the fact that

the charterers were a German firm was on July 31, 1924, material, but, as at that date that fact, if disclosed, would not in fact have influenced the judgment of a prudent insurer, it was not a "material circumstance" within Marine Insurance Act, 1906 (c. 41), s. 18, so as to necessitate its disclosure, & the non-disclosure therefore did not invalidate the insurance. — ASSOCIATED OIL CARRIERS, LTD. *v.* UNION INSURANCE SOCIETY OF CANTON, LTD., [1917] 2 K. B. 184; 86 L. J. K. B. 1068; 116 L. T. 503; 33 T. L. R. 327; 14 Asp. M. L. C. 48; 22 Com. Cas. 346.

*Annotation*:—*Mentd.* Yorke *v.* Yorkshire Insce., [1918] 1 K. B. 662.

### (c) *Damage to Ship during Voyage.*

**2094. Cost of repair more than value of ship.]—**

(1) Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expenses of repair ultimately prove to be greater than the value of the ship, will not be sufficient to show that he acted beyond the scope of his authority, or to entitle the owner in an action on a policy on freight, to recover as for a total loss.

(2) The owner of a ship insured ship & freight. On leaving Pernambuco in June, 1839, the ship struck on a rock, & put back. After a survey, repairs were begun. They were continued for a long period, & the expense of them much exceeded the value of the ship & freight. The master, not being able to procure money in any other manner, was compelled to borrow on a bottomry bond, charging freight, & cargo. On Dec. 30, 1839, the owner, in London, on being shown a letter addressed to the agents of the lenders on bottomry, in which the great expenses of the repairs were stated, gave notice of abandonment to the underwriters on ship & on freight. The ship arrived, & the freight was duly paid to the holders of the bottomry bond, under an order of the Ct. of Admty. The shipowner sued the underwriters on freight as for a total loss. The jury found, on a special verdict, that pltf. had acted *bonâ fide* without laches, & as a prudent owner of the ship & freight, if uninsured, would act:—*Held*: in this case, which was one of constructive total loss, the master might have abandoned at Pernambuco, but that having there elected to repair, he must be treated for that purpose as the agent of the owner, whose acts bound the owner.

(3) A partial loss of freight may be recovered on a declaration claiming a total loss.—BENSON *v.* CHAPMAN (1849), 2 H. L. Cas. 696; 8 C. B. 950; 13 Jur. 969; 9 E. R. 1256, H. L.; *affg.* S. C. *sub nom.* CHAPMAN *v.* BENSON (1847), 5 C. B. 330, Ex. Ch.

*Annotations*:—*As to* (1) *Consd.* Stewart *v.* Greenock Marine Insce. (1848), 2 H. L. Cas. 159; Knight *v.* Faith (1850), 15 Q. B. 649. *Expld. & Distd.* Scottish Marine Insce. *v.* Turner (1853), 21 L. T. O. S. 10. *Reid.* Kemp *v.* Halliday (1866), 6 B. & S. 723; Barber *v.* Fleming (1869), L. R. 5 Q. B. 59; Rankin *v.* Potter (1873), L. R. 6 H. L. 83; Macbeth *v.* Maritime Insce., [1908] A. C. 144. *As to* (2) *Consd.* Kemp *v.* Halliday (1866), 6 B. & S. 723; Atwood *v.* Sellar (1879), 4 Q. B. D. 342; Assicurazioni Generali & Sohener *v.* S.S. Beattie Morris Co. & Browne (1892), 61 L. J. Q. B. 754. *Reid.* Blasco *v.* Fletcher (1863), 14 C. B. N. S. 147; The Bahia (1864), Brown. & Lush. 292; Barber *v.* Fleming (1869), L. R. 5 Q. B. 59; Mavro *v.* Ocean Marine Insce. (1874), L. R. 9 C. P. 595. *As to* (3) *Reid.* Bowers *v.* Nixon (1848), 13 Jur. 334; Scottish Marine Insce. *v.* Turner (1853), 21 L. T. O. S. 10. *Generally, Mentd.* Great Indian Peninsular Ry. *v.* Saunders (1861), 1 B. & S. 41; The Lizzie (1868), L. R. 2 A. & E. 254; Provincial Insce. of Canada *v.* Leduc (1874), 31 L. T. 142.

**2095.** ———.]—RANKIN *v.* POTTER, No. 2259, *post*.

**2096. Cost of repair more than freight—Though less than value of ship.]—**A ship, valued at £12,000 was insured from Valparaiso to England; the freight, valued at £4,000 was also insured by a

*Sect. 23.—Total loss: Sub-sect. 2, C. (c) & (d), D. & E. (a), & (b).]*

separate policy: the ship, having sailed with a full cargo, consisting of eight hundred tons of merchandise, was compelled, by stress of weather, to put back to Valparaiso, where the master, finding, upon survey, that, to repair her so as to enable her to bring home the entire cargo, would cost a sum exceeding the value of the freight, though less than the value of the ship when repaired, sold her:—*Held*: not a total loss of either ship or freight.

Underwriters are responsible for losses arising from perils of the sea, for such perils as are mentioned in the policy. If the ship is actually lost by a peril of the sea, or any other peril covered by the policy, the assured may call it a total loss. If she sustains damage to such an extent that she cannot be repaired at all, that also is a total loss. It may be that the injury sustained by the ship is irreparable with reference to the place where she is; for instance, the ship may have met with the disaster at a place where no workmen of requisite powers are to be met with, or where the necessary materials are not to be found; so that to repair her there is altogether impracticable; & in such a case the loss would also be a total loss. But, short of that, it may be that it may be physically possible to repair the ship, but at an enormous cost; & there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; & a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling, when he has dropped it into deep water; though it might be possible, by some very expensive contrivance, to recover it. So, if a ship sustains such extensive damage, that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost (*MAULE, J.*).—*MOSS v. SMITH* (1850), 9 C. B. 94; 19 L. J. C. P. 225; 14 L. T. O. S. 376; 14 Jur. 1003; 137 E. R. 827.

*Annotations*:—*Consd.* *Dahl v. Nelson*, Doukin (1880), 6 App. Cas. 38; *Shepherd v. Henderson* (1881), 7 App. Cas. 49. *Expld.* *Assicurazioni Generali v. S.S. Bessie Morris Co.*, [1892] 2 Q. B. 652; *Angel v. Merchants' Marine Insce.*, [1903] 1 K. B. 811. *Consd.* *Macbeth v. Maritime Insce.*, [1908] A. C. 144; *Horlock v. Beal*, [1916] 1 A. C. 486. *Hallett v. Wigram* (1850), 9 C. B. 580; *Rosetto v. Gurney* (1851), 11 C. B. 176; *Philpott v. Swann* (1861), 11 C. B. N. S. 270; *Grainger v. Martin* (1862), 2 B. & S. 456; *Adams v. McKenzie* (1863), 32 L. J. C. P. 92; *De Cuadra v. Swann* (1864), 16 C. B. N. S. 772; *King v. Walker* (1864), 3 H. & C. 209; *Cartwright v. Forman* (1866), 7 B. & S. 243; *Farnworth v. Hyde* (1866), 15 L. T. 395; *Kemp v. Halliday* (1866), 6 B. & S. 723; *Rankin v. Potter* (1873), L. R. 6 H. L. 83; *Aitchison v. Lohre* (1879), 4 App. Cas. 755; *Langham S.S. Co. v. Gallagher* (1911), 12 Asp. M. L. C. 109. *Mentd.* *W— v. H—* (falsely called *W—*) (1861), 30 L. J. P. M. & A. 73.

**2097. Failure to repair at nearest port.]—***PHILPOTT v. SWANN*, No. 1681, *ante*.

**2098. Impossibility of repair—Transshipment of cargo to destination only at loss.]—***WADE v. SOUTH OF ENGLAND MARINE INSURANCE ASSOCN., LTD.* (1888), 5 T. L. R. 8.

**2099. Immediate action of peril insured against—Loss of time.]—***THE ALPS*, No. 1686, *ante*.

**2100. ———.]—***THE BEDOUIN*, No. 1687, *ante*

(d) *Freight Lost after having been earned.*

**2101. Ship driven out to sea before payment—Capture.]—**Policy upon the freight of the ship "Stranger," at & from London to Jamaica, with liberty to touch at Madeira, & discharge & take goods on board there. Pltfs. had agreed by charter-party that the ship should take in goods at London, to Madeira, & there deliver such part of the goods shipped at London as their agent should direct, & receive on board wine, & proceed to Jamaica, & there deliver; & the freighter agreed to pay £135 in full for freight during the whole voyage from London to Madeira, & from thence to Jamaica, such freight to be paid in Madeira, on delivery of the goods shipped at London for that place, by Madeira wine at £40 per pipe, to be carried in the said ship to Jamaica free of freight; the ship arrived at Madeira, & delivered all her London cargo, except 33 casks of coals, which the captain kept on board to stiffen the ship; having received part of his cargo for Jamaica, but not the wine to be paid for freight, a gale of wind arising, the captain was obliged to cut his cables & run out to sea, where he was captured:—*Held*: pltf. was entitled to recover for a total loss.—*ATTY v. LINDO* (1805), 1 Bos. & P. N. R. 236; 127 E. R. 451.

*Annotation*:—*Refd.* *Truscott v. Christie* (1820), 2 Brod. & Bing. 320.

**Loss by act or election of assured.]—***See Sect. 20, sub-sect. 2, D. (b), ante.*

#### D. Of Other Interests.

**2102. Profit on cargo—Cargo not taken on board.]—***ROYAL EXCHANGE ASSURANCE v. M'SWINNEY*, No. 558, *ante*.

**2103. ———.]—***HALHEAD v. YOUNG*, No. 644, *ante*.

**2104. ——— Cargo transhipped at time of loss.]—**Where profits are insured against perils of the sea, the liability of the underwriters does not attach unless the goods themselves are lost by a peril insured against.

A. bought goods of B. to arrive at Bristol by the ship *J. D.* from the west coast of Africa, & effected an insurance with C. against the ordinary perils, with a memorandum indorsed on the policy declaring the insurance to be on profit on palm-oil, valued at, etc. per *J. D.* The *J. D.*, while on her voyage to Bristol with the oil on board, was lost by a peril insured against, but the oil was brought home undamaged by another vessel, & was sold by B. to a third person:—*Held*: upon the authority of *Royal Exchange Assurance v. M'Swinney*, No. 558, *ante*, there had been no such loss of the subject matter of insurance as was contemplated by the policy.—*CHOPE v. REYNOLDS* (1859), 5 C. B. N. S. 642; 28 L. J. C. P. 194; 32 L. T. O. S. 278; 5 Jur. N. S. 822; 7 W. R. 208; 141 E. R. 258.

**2105. ——— Part reshipped to destination—Rejection by assured.]—**Pltfs. effected an insurance on profit on cargo per the *Giovanni Albanese*. The policy had a printed clause attached, which, as it stood originally, ran as follows: "Warranted free from all average & without benefit of salvage; but to pay a loss on such portion as does not reach its destination in the said ship," but the latter words, viz., "in the said ship," had been deleted. The cargo was bought under a contract which

#### PART II. SECT. 23, SUB-SECT. 2.—C. (c).

**2097 i. Failure to repair at nearest port.]—**An action is not maintainable

as for a total loss of freight when it appears that the vessel might have been repaired at a reasonable cost within a reasonable time, & conveyed a portion

of the cargo to the port of destination.—*WILSON v. MERCHANTS MARINE INSURANCE CO.* (1872), 9 N. S. R. 81.—*CAN.*



stated that it was "expected to arrive per sailer from Fray Bentos, & to discharge at Ayr as per charterparty, Aug., Sept., Oct., 1905, shipment." The contract also contained the following clause: "In case of non-arrival, this contract to be void, & should the vessel from any unforeseen circumstances be prevented from delivering the whole of the cargo originally shipped, this contract to be void as regards the undelivered portion." The cargo was loaded in the Giovanni Albanese in Sept. 1905, but in the course of the voyage the vessel became a total loss, & the sellers gave pltf's. notice that the cargo would not come forward as it had been abandoned to the underwriters. Part of the cargo was, however, reshipped, brought to this country by another vessel, & discharged in Mar. 1906, but pltf's. declined to accept it. In an action on the policy:—*Held*: there had been no loss of that portion of the cargo which was tendered to pltf's., as it had arrived at its destination within the meaning of the attached clause, although it did not arrive in the original ship.—*WYLLIE v. POVAH* (1907), 23 T. L. R. 687; 12 Com. Cas. 317.

**2106. Risk of laying cable—Rupture of cable—Salvage of one half.**—*WILSON v. JONES*, No. 709, *ante*.

*E. Constructive Total Loss followed by Justifiable Sale.*

(a) *Necessity for Notice of Abandonment.*

See Marine Insurance Act, 1906 (c. 41), ss. 57 (1), 62 (7).

See Sect. 24, sub-sect. 1, *post*.

(b) *What is Justifiable Sale of Ship.*

**2107. Extreme necessity—Sale in best interests of all concerned.**—*ALCOCK v. ROYAL EXCHANGE ASSURANCE CORPN.* (1849), 2 L. T. 730.

**2108. ———.**—*LINDSAY v. LEATHLEY*, No. 2117, *post*.

**2109. ———.**—The master of a ship may, under certain circumstances, effect the sale of his ship so as to thereby render the underwriters liable for a total loss without notice of abandonment, but he can only do so in cases of stringent necessity—that is to say, a necessity that leaves the master no alternative, as a prudent & skilful man acting *bonâ fide*, for the best interests of all concerned & with the best & soundest judgment that can be formed under the circumstances, but to sell the ship as she lies. If he comes to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power, with the means then at his disposal, to extricate her from the peril or to raise funds for her repair, he will not be justified in selling, even though the danger at the time appear exceedingly imminent.—*COBEQUID MARINE INSURANCE CO. v. BARTEAUX* (1875), L. R. 6 P. C. 319; 32 L. T. 510; 23 W. R. 892; 2 Asp. M. L. C. 536, P. C.

*Annotation*:—*Expld.* *Hall v. Jupe* (1880), 49 L. J. Q. B. 721.

**2110. ———.**—A ship, while coming out of harbour, struck on a reef on the morning of Oct. 6, 1876, & in order to get her off it was necessary to discharge a portion of the cargo. The master agreed with G., who was the only person at the harbour who had the requisite number of men, to lighten the vessel & get her off. Under

this agreement about eight men worked for two hours without succeeding. G. then persuaded the master to call a survey of the vessel & sell her, & in pursuance of the report of the survey which was made by G., the master sold the ship & cargo to G., at 6 p.m. on the same day on which the ship struck, for a very small sum. At the time of the sale the weather was fine, & the vessel was in no more danger than she had been in from the time she struck; but if the wind veered round to the south or west, the vessel would have broken up in a short time. As soon as G. purchased the ship he sent a sufficient number of men to discharge the cargo, & on the second high tide after the vessel struck she was floated. She was subsequently repaired, & made seaworthy for about £20. In an action against the underwriter on a policy of insurance on the vessel, pltf. claimed for a constructive total loss. The judge at the trial ruled that there was no evidence upon which the jury could reasonably find the urgent necessity for the sale of the ship at the time of the sale, which alone could justify the sale, that is, that at the time there was no reasonable evidence of a total loss, & he withdrew the case from the jury, & ordered the verdict & judgment to be entered for deft.:—*Held*: (1) (LORD COLERIDGE, C.J.) the ruling was right, & the only question was whether the ship was at the time she was sold constructively lost, & there was no evidence from which a jury could reasonably find this; the evidence must be limited to the stringent necessity of the sale, not to the question whether the sale was made under circumstances under which a prudent uninsured owner would have made it; (2) (GROVE, J.) the sole question was, not whether the circumstances were such as to justify the sale, but whether the circumstances detailed in the evidence were such as to afford sufficient evidence to be laid before a jury that the sale was justifiable, & it was not a case which should have been withdrawn from a jury; there was reasonable evidence upon which, in the absence of any answer, the jury might find a verdict.—*HALL v. JUPE* (1880), 49 L. J. Q. B. 721; 43 L. T. 411; 4 Asp. M. L. C. 328.

— **Authority of master to sell generally.**—*See SHIPPING.*

**2111. What is extreme necessity—Damage repairable—Lack of material.**—*FURNEAUX v. BRADLEY* (1780), 1 Park on Marine Insurances, 8th ed. p. 365.

*Annotation*:—*Repld.* *Provincial Insee. of Canada v. Leduc* (1874), 31 L. T. 142.

**2112. ——— Lack of money.**—Insurance for £8,000 on a ship & £4,000 on freight, at & from London to the East Indies & back. The ship sailed seaworthy from Calcutta on her voyage home, when, in addition to some damage which she sustained in the river Hooghly, she encountered two storms at sea, by which she was so shattered as to render it necessary for the captain to put back; & he returned to Calcutta on Aug. 30, 1820. On his arrival at Calcutta, he gave notice of abandonment to the agents for Lloyd's, resident there, & requested that their surveyor might be present at the surveys of the ship. The agents said they had no authority to accept the abandonment; but their surveyor attended the surveys, when it was found that the ship was so seriously damaged that the expense of repairing her would be nearly £5,000. The agents refused to undertake

**PART II. SECT. 23, SUB-SECT. 2.—**  
**E. (b).**

**2110i. Extreme necessity.**—*Held*: the sale by the master was not justified in

the absence of all evidence to show any "stringent necessity" for the sale after the failure of all available means to rescue the vessel.—*PROVIDENCE WASHINGTON INSURANCE CO. v. COR-*

*BETT* (1883), 15 N. S. R. (3 R. & G.) 109; 9 S. C. R. 256.—*CAN.*

**q. What is extreme necessity—Damage repairable.**—*WOOD v. STYMEST* (1862), 10 N. B. R. (5 All.) 309.—*CAN.*



**Sect. 23.—Total loss: Sub-sect. 2, E. (b) & (c).]**

the repairs; & the captain, having in vain attempted to borrow money for that purpose by hypothecation of ship, sold the ship for £1,200, conceiving that to be the best course for all parties. On Apr. 25, 1821, the captain arrived in London, where the owner resided; & on May 3, the ship's papers were delivered. On May 5, the ship's broker abandoned to the underwriters.—In an action on the policy on ship, the jury having found a verdict for pltf. as for a total loss, & that the captain had sold the ship for a justifiable cause, the ct. refused to grant a new trial, which was moved for, on the ground that the ship ought not to have been sold, & that notice of abandonment had not been given in due time.—**READ v. BONHAM** (1821), 3 Brod. & Bing. 147; 6 Moore, C. P. 397; 129 E. R. 1238.

**Annotations:—****Reid.** *Read v. Isaacs* (1821), 6 Moore, C. P. 437; *Cambridge v. Anderton* (1824), 2 B. & C. 691; *Robertson v. Clarke* (1824), 1 Bing. 445; *Roux v. Salvador* (1835), 1 Bing. N. C. 526; *Alcock v. Royal Exchange Assce.* (1849), 13 Q. B. 292; *Knight v. Faith* (1850), 15 Q. B. 649; *Tronson v. Dent* (1853), 8 Moo. P. C. C. 419; *Atlantic Mutual Insce. v. Huth* (1880), 16 Ch. D. 474. **Mentd.** *Drake v. Marryat* (1823), 1 B. & C. 473; *Manning v. Irving* (1845), 1 C. B. 168.

**2113.** ———.]—The captain of an insured ship, which has been injured by perils of the seas, is not justified in selling the ship instead of repairing it, unless he either has not the means of getting the repairs done at the place where the vessel is obliged to put in; or cannot get them done, except at such an expense as would render it undoubtedly improper to repair, if the ship were not insured; or has not money in his possession, sufficient to pay for the repairs nor is in a situation to raise it by loan or otherwise, except at such an extravagant rate as would prevent a prudent man, in the exercise of a sound & vigorous judgment, from undertaking the repairs under such circumstances.—**SOMES v. SUGRUE** (1830), 4 C. & P. 276, N. P.

Q. B. 292; *King v. Walker* (1864), 33 L. J. x. 325.

**2114.** ———.]—**At cost greater than value when repaired.**—If a vessel be so shattered by a storm that in the opinion of the master who exercises a fair & honest discretion on the subject, she cannot, without imminent peril to the lives of the crew, proceed on her voyage, & cannot be repaired but at an expense exceeding the amount of a total loss, & he accordingly abandons & sells her, the owner may recover from the insurer as for a total loss, although it eventually turn out to be possible that the vessel might have proceeded.—**ROBERTSON v. CARUTHERS** (1819), 2 Stark. 571, N. P.

**2115.** ———.]—In an action on a policy, whether an urgent necessity exists for the sale of a ship, is a question for the jury to determine; and they are correct in drawing a conclusion in favour of the existence of such a necessity, where it is shown that the expense of repairing her would exceed her original value.—**ROBERTSON v. CLARKE** (1824), 1 Bing. 445; 8 Moore, C. P. 622; 2 L. J. O. S. C. P. 71; 130 E. R. 179.

**Annotations:—****Consd.** *The Bonita, The Charlotte* Lush. 252. **Reid.**

*Roux v. Salvador* (1835), 3 Bing. N. C. 526; *Faith* (1850), 15 Q. B. 649; *Segredo* (otherwise *Eliza Cornish*) (1853), 1 Ecc. & Ad. 36; *Tronson v. Dent* (1853), 8 Moo. P. C. C. 419; *The Margaret*

**2122 i.** ———.]—**Question for jury.**—**DRISCOLL v. MILLVILLE MARINE INSURANCE CO.** (1883), 23 N. B. R. 160;

on appeal, 2 S. C. R. 183.—**CAN.**  
r. *Surveyors' advice & assured's bond*  
opinion.]—As pltf. had acted

*Mitchell* (1858), 4 Jur. N. S. 1193; *Cossman v. West, v. British America Assce.* (1887), 13 App. Cas. 180.

**2116.** ———.]—**SOMES v. SUGRUE**, No. 2113, ante.

**2117.** ———.]—Circumstances under which the master of a merchant vessel, without making any effort to save her, without communicating with the underwriter, & in the absence of any immediate peril, is justified in abandoning her, selling her, & treating her as a total loss. Owners cannot claim for a constructive total loss unless they prove that the vessel, being unseaworthy, required repairs which were either impossible at the place where she was, or which would entail upon them an expense so heavy as to exceed the value of her when repaired, that the injuries arose from the perils insured against, & that the sale was justifiable as being under the pressure of urgent necessity.—**LINDSAY v. LEATHLEY** (1863), 3 F. & F. 902; 11 L. T. 194; 2 Mar. L. C. 121, N. P.

**2118.** ———.]—**LOHRE v. AITCHISON**, No. 1904, ante.

**2119.** ———.]—**Negligence of owners' agents.**—(1) Where a ship received damage by striking on a rock, which rendered her unsafe for another voyage unless repaired; & she was twice surveyed & condemned by the authorities of the place to which she was insured; & the captain, *bonâ fide*, sold her for firewood; but she might have been repaired but for the negligence of the resident agents of the owners:—**Held:** the underwriters were not liable for a total loss.

(2) The jury found, "that the ship had sustained a partial loss, but to what amount there was no evidence:—**Held:** plt. was entitled to a verdict, with nominal damages only.—**TANNER v. BENNETT** (1825), Ry. & M. 182, N. P.

**2120.** ———.]—**Subsequent repair by purchaser.**—A ship, being wrecked, was sold by the owner & master, & soon afterwards got off by the purchaser & repaired, though at a great expense. The owner cannot treat this as a total loss, unless the sale at the time, in the exercise of a sound judgment, appeared most beneficial for all parties. If the ship was likely to be repairable, so as to come to England with any cargo, so as upon her arrival to be worth the sum laid out on her, it cannot be treated as a total loss, though she cannot be made fit to carry the cargo originally intended for her.

**Semble:** the law would be the same if she could only return in ballast. The loss of the voyage cannot make a constructive loss of the ship on a policy on the ship only.

The loss of the voyage will not in my opinion, make a constructive total loss of the ship. Some cases have been so decided; but as the thing insured remained *in specie* I do not think that amounted to a total loss (**LORD TENTERDEN, C.J.**).—**DOYLE v. DALLAS** (1831), 1 Mood. & R. 48, N. P.

**Annotation:—****Reid.** *Alcock v. Royal Exchange Assce.* (1849), 13 Q. B. 292.

**2121.** ———.]—**HALL v. JUPE**, No. 2110, ante.

**2122.** ———.]—**Question for jury.**—**ROBERTSON v. CLARKE**, No. 2115, ante.

**2123.** Where vessel would be sold by prudent uninsured owner.]—A ship which was insured ran aground and was much damaged. She was surveyed, & in consequence of the report of the surveyors, was sold as she lay:—**Held:** to entitle the assured to recover as for a total loss, they must

upon the judgment of competent surveyors that the vessel was not worth repairing, & upon their own

satisfy the jury, that, as prudent men & exercising a sound discretion, they would, if they had been uninsured, have sold the vessel as they did; & the jury must be satisfied not only that the assured, if uninsured, would have acted as they did, but that they did prudently in so acting.—*DOMETT v. YOUNG* (1842), Car. & M. 465, N. P.

2124. —.]—*HALL v. JUPE*, No. 2110, *ante*.

(c) *What is Justifiable Sale of Cargo.*

2125. General rule—Not whether prudent uninsured owner would have sold.]—Upon a policy on goods free from particular average, no damage short of the absolute destruction of the thing insured, will amount to a total loss. Pltf. insured certain bales of waste silk from Leghorn to Liverpool, with the usual memorandum declaring silk free from average, unless general, or the ship should be stranded. The vessel, being compelled by stress of weather to put into Gibraltar, was there repaired, her cargo being necessarily unloaded. Some of the bales of silk were found to be considerably damaged by sea-water, & were consequently sold at Gibraltar, by the master, in the exercise of what the jury found to be a reasonable discretion, & such as a prudent owner uninsured would have exercised. But the silk might at a reasonable or moderate expense have been put in a condition to be brought home by another vessel; & it was in fact brought to England, & sold as silk, though in a very deteriorated state:—*Held*: this was not a total loss; & consequently, that the assured was not entitled to recover.

A partial loss cannot be turned into a total loss, because those who have the control over the goods, may act prudently in selling them at an intermediate port, rather than incur the expense of cleansing & reshipping them. It may be that a prudent owner uninsured would not have thought it worth his while to carry these goods further, but would have left them behind; still, that alone would not make the loss total (*MAULE, J.*).—*NAVONE v. HADDON* (1850), 9 C. B. 30; 19 L. J. C. P. 161; 14 L. T. O. S. 419; 137 E. R. 802.

Annotation:—*Refd. Ralli v. Janson* (1856), 6 E. & B. 422.

2126. —.]—A cargo of corn was insured "free from average" on a voyage from Dantzic to Hull, by the ship *Isabella*. In the course of the voyage, the vessel & cargo sustained damage by the sea, & in consequence the vessel was obliged to put in a port in Norway; & there the corn was taken out for the purpose of drying it, & repairing the vessel, & so enabling her to proceed to England with the corn when dried. The corn, however, when taken out, appeared to have received considerable damage; & the master after calling in advice, resolved to sell it; & it was accordingly sold, after having been partially dried, as damaged corn, in the port in Norway:—*Held*: the insured could not recover as for a total loss, unless the corn was in such a state in the port in Norway as that, when brought home, it could not have been sold for an amount exceeding the expense of drying & bringing it home; & it was not a proper question to leave to the jury whether a prudent uninsured owner would, under similar circumstances, have sold the corn at the port in Norway.

—*REIMER v. RINGROSE* (1851), 6 Exch. 268; 20 L. J. Ex. 175; 17 L. T. O. S. 18; 155 E. R. 540.

Annotations:—*Consd. Rosetto v. Gurney* (1851), 11 C. B. 176. *Refd. Farnworth v. Hyde* (1865), 18 C. B. N. S. 835. *Mentd. Kemp v. Halliday* (1866), 6 B. & S. 723.

2127. Goods capable of reconditioning—At reasonable expense—Sale in deteriorated condition.]

—Where indigo was insured upon a valued policy at & from the loading port to the port of delivery, & the ship was sunk at the former port in consequence of which the indigo was immersed in salt water & after survey was sold by public auction there, at a loss of £71 per cent. & a verdict was found for the assured as for a total loss, subject to a reference to an arbitrator to ascertain the amount of such loss, who awarded a loss of £41 15s. 10d. per cent. on deft.'s subscription. The ct. refused to set aside such award although it appeared that the indigo had been dried by the purchasers at the loading port, & afterwards reshipped by them in other vessels, & that on its arrival at the port of delivery, it produced nearly as much as if it had received no injury whatever.—*HARDY v. INNES* (1822), 6 Moore, C. P. 574.

2128. —.]—*NAVONE v. HADDON*, No. 2125, *ante*.

2129. Destruction certain before arrival at destination—Putrescent hides.]—Hides insured from Valparaiso to Bordeaux free of particular average, unless the ship were stranded, arriving at Rio Janeiro on their way to Bordeaux, in a state of incipient putridity, occasioned by a leak in the ship, were sold for a fourth of their value at Rio, because, by the process of putrefaction, they would have been destroyed before they could have arrived at Bordeaux. The assured received the news of the damage to the hides & of their sale, at the same time:—*Held*: the assured might recover as for a total loss, without abandonment.

The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel: whether, upon such event, the loss is total or partial, no doubt, depends upon circumstances. But the existence of the goods, or any part of them, in specie, is neither a conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed or can have the control of them, if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of reshipment in another vessel. In such a case, the loss can be but a partial loss, & must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, & necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the

*bona fide* opinion:—*Held*: they were justified in the abandonment & sale of the vessel.—*BAKER v. BROWN* (1872), 9 N. S. R. 100.—*CAN.*

PART II. SECT. 23, SUB-SECT. 2.—E. (c).

2125. General rule—Not whether pru-

dent uninsured owner would have sold.]—The proper test in respect to goods which have been sea damaged & taken to an intermediate port is not whether an uninsured owner would have sold them there, but whether they can be sent on to their destination at a less expense than their value on arrival

there, for when the whole or any part of the cargo can be sent on, the master has no authority to sell, nor can the assured recover for a total loss.—*WATSON v. MERCANTILE MARINE INSURANCE CO.* (1873), 9 N. S. R. 396.—*CAN.*



. 23.—*Total loss: Sub-sect. 2, E. (c); sub-sect. 3, A. & B.]*

species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, & the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstance over which he has no control they can never, or within no assignable period, be brought to their original destination; in any of these cases, the circumstance of their existing in specie at that forced termination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle (LORD ARINGER, C.B.).—*ROUX v. SALVADOR* (1836), 3 Bing. N. C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L. J. Ex. 328; 132 E. R. 413, Ex. Ch.

*Annotations:—*Consd. *Farnworth v. Hyde* (1865), 18 C. B. N. S. 835; *Saunders v. Baring* (1876), 34 L. T. 419. *Refd.* *Fleming v. Smith* (1848), 1 H. L. Cas. 513; *Knight v. Faith* (1850), 15 Q. B. 649; *Navone v. Haddon* (1850), 9 C. B. 30; *Rosetto v. Gurney* (1851), 11 C. B. 176; *Tronson v. Dent* (1853), 8 Moo. P. C. C. 419; *Martin v. Granger* (1863), 11 W. R. 758; *Stringer v. English & Scottish Marine Insce.* (1870), 10 B. & S. 770; *Browning v. Provincial Insce. of Canada* (1873), 28 L. T. 853; *Rankin v. Potter* (1873), L. R. 6 H. L. 83; *Kaltenbach v. Mackenzie* (1878), 3 C. P. D. 467; *Cossman v. West*, *Cossman v. British America Asce.* (1887), 13 App. Cas. 160; *The Alsace Lorraine*, [1893] P. 209; *Thames & Mersey Marine Insce. v. Pitts & King*, [1893] 1 Q. B. 476; *Francis v. Boulton* (1895), 65 L. J. Q. B. 153; *Sanday v. British & Foreign Marine Insce.*, [1915] 2 K. B. 781; *Moore v. Evans*, [1918] A. C. 185; *Cohen v. Standard Marine Insce.* (1925), 30 Com. Cas. 139. *Mentd.* *Hills v. London Asce. Corp.* (1839), 9 L. J. Ex. 25; *Asfar v. Blundell*, [1896] 1 Q. B. 123; *Trinder, Anderson v. Thames & Mersey Marine Insce.*, *Trinder, Anderson v. North Queensland Insce.*, *Trinder, Anderson v. Weston, Crocker*, [1898] 2 Q. B. 114; *Fooks v. Smith*, [1924] 2 K. B. 508.

2130. *Loss of ship—Sale to prevent further damage.]—*REID v. NAIRNE (1839), 3 L. T. 181, N. P.

2131. *Unsaleable at destination—At price exceeding cost of repair & carriage.]—*REIMER v. RINGROSE, No. 2126, ante.

2132. ———.]—Where goods are in consequence of the perils insured against lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury, in order to ascertain whether there is a constructive total loss of the goods, must determine whether or not it is practically possible to carry them on, that is, whether to do so will cost more than they are worth; & in determining this, the jury are to take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing & reshipping the goods; but they are not to take into account the fact that, if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight contracted to be paid; that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not. Where the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods on, & he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened.—*FARNWORTH v. HYDE* (1866), L. R. 2 C. P. 204;

36 L. J. C. P. 33; 15 L. T. 395; 12 Jur. N. S. 997; 15 W. R. 340; 2 Mar. L. C. 429, Ex. Ch.

*Annotations:—*Refd. *Kidston v. Empire Marine Insce.* (1866), Har. & Ruth. 433; *Browning v. Provincial Insce. of Canada* (1873), 28 L. T. 853; *Rankin v. Potter* (1873), L. R. 6 H. L. 83; *Saunders v. Baring* (1876), 34 L. T. 419; *Kaltenbach v. Mackenzie* (1878), 3 C. P. D. 467; *Atlantic Mutual Insce. v. Huth* (1880), 44 L. T. 67; *Cossman v. West*, *Cossman v. British America Asce.* (1887), 13 App. Cas. 160.

2133. *Impossibility of carriage to destination.]—*

(1) The rule that an undisclosed principal may sue & be sued upon mercantile contracts made by an agent in his own name, subject to any defences or equities which without notice may exist against the agent, is applicable to policies of marine insurance under the Canadian as well as under the English law. L., an agent of B., insured some goods belonging to B. that were being sent by ship from Montreal to St. John's, Newfoundland. The insurance co.'s agent issued to L. a "certificate of insurance," which stated that L. had insured the goods. It was the custom of the co. to issue subsequently a policy stating that "X. Y., as well in his own name as in the name of every person to whom the same shall appertain," had insured the goods. On a loss occurring:—*Held*: the omission in the certificate of the words "as well in his own name, etc.," did not, either by the Canadian law or by the English law, preclude B. from suing the insurance co. in his own name.

(2) Where goods are insured for a voyage, the time of the loss occurring is not necessarily the time when the peril is encountered & the vessel driven ashore. A ship, with some flour as part of her cargo, was seen in the Gulf of St. Lawrence on Nov. 22, 1867, & nothing more was heard of her until May, 1868, when she was found ashore at Anticosti, all hands having been lost. On Nov. 29, 1867, a violent storm had commenced in the Gulf, & there was strong probability that the ship was capsized & driven ashore in that gale. Part of the flour insured was subsequently saved & sold by an agent of the insurance co. The action to recover on the policy was not brought until Mar. 1869. The policy containing a proviso that no action should be brought on it unless within a year after the loss was incurred, the insurance co. contended that the assured was too late to bring an action:—*Held*: the loss was not in its inception total, & only became so where it was found that it was impossible to carry the flour to its destination, & that it was necessary to sell it. Consequently the assured was not precluded by lapse of time from bringing his action.—*BROWNING v. PROVINCIAL INSURANCE CO. OF CANADA* (1873), L. R. 5 P. C. 263; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. L. C. 35, P. C.

2134. ———.]—In an action against underwriters on a policy of insurance upon a cargo of coals to Yokohama, it was proved that the ship received such damage as to render it necessary to put into Hong Kong; & that when there competent persons decided that the cargo should be sold, as there would be great danger of spontaneous combustion if it were conveyed to its original destination. No notice of the abandonment of the cargo was given to the underwriters, until the claim was made for the total loss, but the coals had been publicly sold at Hong Kong. The proceeds of the sale had been handed over to the shipowners, & they had offered them to the charterers, less a considerable sum which they withheld in payment of *pro rata* freight, on condition that they should receive a receipt in full of all demands. This the charterers declined to give. The underwriters now refused to pay, upon the ground that the charterers had



not abandoned the cargo:—*Held*: the public sale, *per se*, vested the proceeds of the sale in the underwriters, & the charterers had done nothing subsequently which showed an election on their part to take the proceeds.

The goods in this case having of necessity been turned into money there is a total loss (BLACKBURN, J.).

The mere fact that this cargo of coals had been so damaged by the perils of the sea as to render an immediate sale necessary & that they were so sold is sufficient to constitute a total loss (BLACKBURN, J.).—*SAUNDERS v. BARING* (1876), 34 L. T. 419; 3 Asp. M. L. C. 132.

**2135. Impossibility of salving ship—Failure by master to try to procure funds for salvage of cargo—Sale advised by consul.**—On Apr. 19, an Austrian ship with a valuable cargo on board ran upon a rock on the eastern side of Algoa Bay, distant 50 miles by sea & about 80 by land from Port Elizabeth. The Austrian consul at Port Elizabeth came to the spot, & there being no hope of getting the vessel off, he advised the master to sell her with the cargo. The master accordingly advertised the ship & cargo for sale, & they were sold in one lot by auction on Apr. 30 for £9,500, after a brisk competition. The purchaser got some part of the cargo out of the wreck, but on June 19 the ship went to pieces with the rest of the cargo on board. The owners of the cargo having abandoned it to the underwriters as a total loss, the underwriters filed their bill to have the goods which had been brought to land delivered to them as not having been effectually sold. The master had not gone to Port Elizabeth, nor endeavoured to procure funds to enable him to save the cargo; nor had he made any effort to induce any persons to undertake the salvage of the cargo. Several witnesses at Port Elizabeth deposed that in their opinion, no person could have been induced to undertake the salvage; others gave their opinion that efforts to save the cargo could have been obtained if a large percentage of the net proceeds had been offered. There was a good deal of evidence to show that, in the opinion of persons on the spot, the course which had been adopted of selling the wreck & cargo was the most advisable one on the interest of all parties concerned:—*Held*: no such necessity was proved to have existed as would make the master the agent of the owners of the cargo to effect a sale; the sale was void; & plffs. were entitled to the cargo saved, subject to a proper allowance for salvage & other expenses.—*ATLANTIC MUTUAL INSURANCE CO. v. HUTH* (1880), 16 Ch. D. 474; 44 L. T. 67; 29 W. R. 387; 4 Asp. M. L. C. 369, C. A.

*Annotation*:—*Refd. Prager v. Blatspiel, Stamp & Heacock*, [1924] 1 K. B. 566.

### SUB-SECT. 3.—ADEMPTION OF TOTAL LOSS.

#### A. In General.

**2136. Nature of doctrine.**—*SHEPHERD v. HENDERSON*, No. 2333, *post*.

**2137. — Whether confined to loss by capture.**—*SAILING SHIP BLAIRMORE CO. v. MACREDIE*, No. 2145, *post*.

**2138. What is restoration by foreign power—Of cargo.**—Goods having been detained by a foreign power are afterwards restored. As between the assurer & the assured, a yielding up of the goods *quasi in integro* is to be considered as a restoration, notwithstanding some spoliation during the detention.—*JORDAINE v. CORNWALL* (1814), 1 Stark. 6, N. P.

**2139. Policy to pay loss within specified time—After news of capture—Without waiting for condemnation.**—A policy was effected on a Prussian ship valued at £2,500, against such risks only as were excluded by the clause “warranted free from capture, seizure, & detention, or the consequences of any attempt thereof,” with a stipulation that the insurers “should pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation.” The ship was detained by an embargo in a Danish port, after the breaking out of hostilities between that power & Germany:—*Held*: (1) the right of the assured to claim for a total loss became vested on the expiration of the thirty days, notwithstanding that the vessel had never been actually taken out of the possession of the captain, & was afterwards, after action brought, restored, & arrived in safety in London; (2) the entry of the fact of the embargo in Lloyd’s “Loss-Book,” however the intelligence might have been received, was sufficient to satisfy the term “official news” in the policy.—*FOWLER v. ENGLISH & SCOTTISH MARINE INSURANCE CO., LTD.* (1865), 18 C. B. N. S. 818; 6 New Rep. 66; 34 L. J. C. P. 253; 12 L. T. 381; 11 Jur. N. S. 411; 13 W. R. 658; 2 Mar. L. C. 202; 144 E. R. 667.

#### B. What amounts to Ademption.

**2140. Restoration of ship—After notice of abandonment.**—A ship insured from Jamaica to Liverpool was captured in the course of her voyage, & recaptured in a few days; & the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment: & soon after receiving intelligence of the recapture, & that the ship was safe in the possession of the recaptors in a port in Ireland, but without any further knowledge of her state & condition, he persisted in his notice of abandonment; but the ship was afterwards restored to his possession without damage, & arrived at Liverpool, & earned her freight; the salvage & charges of the recapture amounting only to £15 4s. 8d. per cent.:—*Held*: (1) he was not entitled to abandon; it appearing in the result that at the time when the notice of abandonment was given, it was in fact only a partial & not a total loss, as the assured supposed; & there being no subsequent circumstances, such as the loss of voyage, high salvage, etc., to continue it a total loss. *Qu.*: whether in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought, the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss. The like point was ruled on the freight policy, on which there was a partial loss of £13 11s. 5d. per cent.

(2) At any rate if the underwriters accept the offer of abandonment, made upon such temporary total loss, both parties are bound by it.—*BAINBRIDGE v. NEILSON* (1808), 10 East, 329; 103 E. R. 800.

*Annotations*:—*As to* (1) *Folld. Brotherston v. Barber* (1816), 5 M. & S. 418. *Distd. M’Iver v. Henderson* (1816), 4 M. & S. 576. *Apld. Naylor v. Taylor* (1829), 9 B. & C. 718. *Consd. Ruys v. Royal Exchange Assce. Corpn.*, [1897] 2 Q. B. 135. *Refd. Connell v. Massie* (1833), 2 L. J. K. B. 160; *Dean v. Hornby* (1854), 3 E. & B. 180; *Sailing Ship Blairmore Co. v. Macrodie*, [1898] A. C. 593; *Moore v. Evans*, [1917] 1 K. B. 458. *As to* (2) *Distd. Smith v. Robertson* (1814), 2 Dow. 474. *Consd. Patterson v. Ritchie* (1815), 4 M. & S. 393. *Refd. Hudson v. Harrison* (1821), 3 Brod. & Bing. 97. *Generally, Refd. Provincial Insce. of Canada v. Leduc* (1874), 31 L. T. 142.

**2141. — — —**—Insurance on ship from Rio de Janeiro to Liverpool, & the ship was captured,

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& afterwards recaptured, but in the interval, the assured having received intelligence of the capture, gave notice of abandonment, & after the recapture, the ship arrived at Liverpool, having sustained a partial damage, & action brought to recover a total loss:—*Held*: the assured could only recover for a partial loss.—*BROTHERSTON v. BARBER* (1816), 5 M. & S. 418; 105 E. R. 1104.

*Annotations*:—*Folld. Naylor v. Taylor* (1829), 9 B. & C. 718; *Connell v. Massie* (1833), 2 L. J. K. B. 160. *Consd.* *Kemp v. Halliday* (1866), 6 B. & S. 723. *Refd.* *Ruys v. Royal Exchange Assee. Corp.*, [1897] 2 Q. B. 135.

**2142.** ————.]—A ship was captured by pirates, & partially plundered. On receiving intelligence of the capture, the assured gave notice of abandonment; but it afterwards turned out, that, at the time the notice was given, she had been left by the pirates in a Dutch port, whence she was afterwards taken by the British authorities for the owners. The ship afterwards arrived at her place of destination:—*Held*: the assured could not recover against the underwriters for a total loss.—*CONNELL v. MASSIE* (1833), 2 L. J. K. B. 160.

**2143.** ———— **Before action brought—Expenses exceeding value.**]—An abandonment made after capture, under circumstances which would entitle the assured at the time to recover as for a total loss, is not defeated so as to become an average loss only, by the mere restitution & return of the ship's hull, before action brought, if the restitution be under such condition as to make it uncertain whether the assured may not have to pay more than its worth: as where a ship insured from Liverpool to Sierra Leone was captured, plundered, her guns, stores, papers & instruments taken away, & her voyage lost, & was carried to Fayal, where proceedings were instituted in the Admlty. Ct., & sentence was pronounced in favour of the assured; but appeal was made against such sentence, & the assured abandoned, which abandonment the underwriter refused to accept, & afterwards the remainder of her cargo was sold at Fayal, & the law expenses paid thereout, & the rest left as a deposit to answer the event of the appeal in order to obtain the release of the ship, & afterwards the ship returned to Liverpool:—*Held*: the assured might recover as for a total loss in an action brought after the ship's return to Liverpool.—*M'IVER v. HENDERSON* (1816), 4 M. & S. 576; 105 E. R. 947.

*Annotations*:—*Consd.* *Patterson v. Ritchie* (1815), 4 M. & S. 393. *Apld.* *Cologan v. London Assee.* (1816), 5 M. & S. 447. *Consd.* *Provincial Insee. of Canada v. Leduc* (1874), 31 L. T. 142. *Refd.* *Holdsworth v. Wise* (1828), 7 B. & C. 794; *Dean v. Hornby* (1854), 3 E. & B. 180; *Lozano v. Janson* (1859), 2 E. & E. 160; *Polurrian S.S. Co. v. Young*, [1915] 1 K. B. 922.

**2144.** ————.]—(1) Where a ship, being in a very leaky state, was deserted at sea by her crew, acting *bond fide* for the preservation of their lives, & was, on the following day, found & taken possession of by the crew of another vessel, who succeeded in taking her into port where she was repaired, & afterwards sent to this country, but subject to claims for salvage & repairs equal to or exceeding her value:—*Held*: the owners having given notice of abandonment before they received any tidings of the ship's safety, were entitled to recover against the underwriters as for a total loss.

(2) The implied warranty of seaworthiness in a policy on a ship, does not extend to her being seaworthy at every port which she leaves in the course of her voyage.

(3) The term "seaworthiness" clearly includes a crew sufficient generally in number & skill for

the proper navigation of the vessel (*BAYLEY, J.*).—*HOLDSWORTH v. WISE* (1828), 7 B. & C. 794; 1 Man. & Ry. K. B. 673; 6 L. J. O. S. K. B. 134; 108 E. R. 919.

*Annotations*:—*As to* (1) *Folld. Parry v. Aberdeen* (1829), 9 B. & C. 411; *Benson v. Chapman* (1843), 6 Man. & G. 792 (*see* (1849), 2 H. L. Cas. 696). *Apld.* *Lozano v. Janson* (1859), 2 E. & E. 160. *Consd.* *Cossman v. West*, *Cossman v. British America Assee.* (1887), 13 App. Cas. 160; *Sailing Ship Blairmore Co. v. Macredie*, [1898] A. C. 593. *Refd.* *Naylor v. Taylor* (1829), 9 B. & C. 718; *Rosetto v. Gurney* (1851), 11 C. B. 176; *Dean v. Hornby* (1854), 3 E. & B. 180; *Shepherd v. Henderson* (1881), 7 App. Cas. 49; *Ruys v. Royal Exchange Assee. Corp.*, [1897] 2 Q. B. 135; *Moore v. Evans*, [1917] 1 K. B. 458. *As to* (2) *Refd.* *Sadler v. Dixon* (1841), 8 M. & W. 895; *Blecard v. Shepherd* (1861), 14 Moo. P. C. C. 471; *Bouillon v. Lupton* (1863), 15 C. B. N. S. 113. *As to* (3) *Refd.* *Blecard v. Shepherd* (1861), 14 Moo. P. C. C. 471.

**2145.** ———— **Raised by underwriters at own expense.**]—Where a ship has been sunk in deep water, the underwriters cannot escape liability as for a total constructive loss by gratuitously intervening & taking upon themselves, between the date of notice of abandonment & the time when legal proceedings are commenced under the policy, the expenses of raising the insured vessel & saving her from being a constructive total loss. Such a gratuitous expenditure will not relieve the underwriters from their contractual liability.

The test whether a ship has become a constructive total loss is the same in English as in Scottish law, although these laws may differ in regard to the date at which the test ought to be applied. In considering whether a constructive total loss has occurred, the question is whether a shipowner of ordinary prudence & uninsured would have gone to the expense of raising a sunken ship & repairing her.

A ship insured under a valued policy was struck by a squall & sunk in harbour. The underwriters received notice of abandonment from the insured; but before action brought they, by a large expenditure of their own, raised the ship & claimed that, as the ship could at the date of the action have been repaired by the expenditure of less money than her total value, the loss was not a total but a partial one:—*Held*: the underwriters could not change a constructive total loss into a partial loss by intervening & raising the ship at their own expense.

I myself should say a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again. . . . It is, I think, a total misapplication of what has been found to be a convenient test to distinguish a total from a partial loss to apply it to a case when the vessel insured has gone to the bottom. . . . The change of circumstances which in our jurisprudence has been held to turn a total into a partial loss has arisen . . . in respect of insurances against capture when to my mind totally different considerations arise. . . . But where the laws of other countries differ from ours in this respect I think it will be found that the difference arose from positive enactments & regulations apparently directed to avoid the solutions of difficult & complicated questions of fact (*LORD HALSBURY, C.*).—*SAILING SHIP BLAIRMORE CO. v. MACREDIE*, [1898] A. C. 593; 67 L. J. P. C. 96; 79 L. T. 217; 14 T. L. R. 513; 8 Asp. M. L. C. 429; 3 Com. Cas. 241; 24 R. 893, H. L.

*Annotations*:—*Refd.* *Angel v. Merchants' Marine Insee.*, [1903] 1 K. B. 811; *Macbeth v. Maritime Insee.*, [1908] A. C. 144; *Polurrian S.S. Co. v. Young*, [1915] 1 K. B. 922. *Mentd.* *Maine Spinning Co. v. Sutcliffe* (1917), 87 L. J. K. B. 382.

**2146.** ———— **After action brought.**]—A ship, insured under a policy covering war risks, was, whilst contraband of war destined for one of



belligerent governments, captured by a cruiser belonging to the other. Thereupon the ship-owners gave to the underwriters notice of abandonment, which was refused; & shortly afterwards they commenced an action on the policy. Subsequently, the war being at an end, the prize ct. of the captors decreed the ship to be returned to her owners:—*Held*: the return of the ship after the commencement of the action did not disentitle the owners to recover as for a total loss.—*RUYS v. ROYAL EXCHANGE ASSURANCE CORPN.*, [1897] 2 Q. B. 135; 66 L. J. Q. B. 534; 77 L. T. 23; 13 T. L. R. 444; 8 Asp. M. L. C. 294; 2 Com. Cas. 201.

*Annotations*:—*Folld.* Barque Robert S. Besnard Co. v. Murton (1909), 101 L. T. 285. *Refd.* Polurrian S.S. Co. v. Young, [1915] 1 K. B. 922; Roura & Forgas v. Townsend, [1919] 1 K. B. 189.

**2147. Restoration of cargo—Before action brought.**—An abandonment offered to be made by the assured to the underwriter, upon intelligence brought of the capture of the goods insured, which the underwriter refused to accept, was held not to entitle the assured to recover as for a total loss, where, before action brought, the goods were recaptured & arrived at the place of destination, by which a partial loss only was sustained; for the assured can only recover an indemnity for such loss as he has sustained at the time of action brought.—*PATTERSON v. RITCHIE* (1815), 4 M. & S. 393; 105 E. R. 879.

*Annotations*:—*Folld.* Naylor v. Taylor (1829), 9 B. & C. 718. *Refd.* Ruys v. Royal Exchange Assce. Corpn., [1897] 2 Q. B. 135.

**2148. ——— Expense of reshipment exceeding value.**—Pltfs., merchants in London, as agents for F., a Brazilian subject residing at Loanda, chartered the British ship *Newport* to carry a cargo of goods on behalf of F. from London to Ambriz or Loanda, on the coast of Africa, & to reload there a homeward cargo of African produce for London. They afterwards, on June 9, 1854, on F.'s behalf, insured the *Newport's* outward cargo at & from London to Ambriz or Loanda, by a policy underwritten by deft. The perils insured against were (*inter alia*) "takings at sea, arrests, restraints & detainments of all kings, princes & people, of what nature, condition, or quality soever." In June, 1854, the *Newport* sailed with this cargo, consigned to F. at Loanda. On Sept. 21, 1854, while on the voyage out, she was seized, near Ambriz, by a Queen's ship, for being illegally engaged in the slave trade, & was sent, with the cargo, to St. Helena for adjudication. On Oct. 16, 1854, *ex p.* proceedings were instituted in the Vice-Admiralty Ct. at St. Helena, which on Nov. 20, 1854, condemned the ship to be forfeited; & condemned pltfs., as shippers of the cargo, in penalties amounting to double the value of the goods, & in costs; & ordered the goods to be held in deposit till payment of the penalties & costs. The ship was sold under order of the ct.; as was a portion of the goods, being perishable, in Dec. 1854. The residue of the goods were detained, in specie, at St. Helena, by the ct. As soon as the proceedings at St. Helena were known in England, notice of abandonment was given to the underwriters on Dec. 30, 1854, being in due time. At that time the decree of the ct. at St. Helena was not known in England. An appeal to the Queen in council against this decree was lodged on Jan. 31, 1855. Pending the appeal, possession of such of the goods as remained in specie at St. Helena could not be obtained until Dec. 1856; & then only on the terms of giving security for the invoice cost, without regard to depreciation in value. On <sup>Mar.</sup> 3, 1858, the Privy Council gave judgment,

reversing the decree of the ct. below, & ordering restitution of the ship to her owners; & of the goods still unsold, & the proceeds of the goods sold, to F. On July 6, 1858, pltfs. on F.'s behalf, brought the present action against deft. on the policy, claiming as for a total loss of the cargo. At that time the goods still remaining in specie & unsold at St. Helena had deteriorated in value; but could have been forwarded thence to Loanda at a price less than their value when delivered there. On a case stated, in which power was reserved to the ct. to draw inferences of fact:—*Held*: (1) the seizure by the Queen's ship of the *Newport* with the goods insured on board, being wrongful, was a loss of the goods by a peril insured against; (2) the wrongful seizure & the notice of abandonment made the loss total; & it was still total at the time of action brought; the ct. drawing the inference of fact that F., as a prudent man, could not then be reasonably expected to take possession of the unsold goods at St. Helena.—*LOZANO v. JANSON* (1859), 2 E. & E. 160; 28 L. J. Q. B. 337; 33 L. T. O. S. 270; 5 Jur. N. S. 1401; 7 W. R. 654; 121 E. R. 61.

*Annotations*:—*As to* (1) *Consd.* Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781. *Refd.* Russian Bank for Foreign Trade v. Excess Insce., [1918] 2 K. B. 123. *As to* (2) *Refd.* Ruys v. Royal Exchange Assce. Corpn., [1897] 2 Q. B. 135; Sailing Ship Blairmore Co. v. Macredie, [1898] A. C. 593. *Generally, Refd.* Allkins v. Jupe, Pembroke, Oppenheim & Choisy (1877), 36 L. T. 851; Moore v. Evans, [1917] 1 K. B. 458.

**2149. ——— ——— ———]**—*COLOGAN v. LONDON ASSURANCE CO.*, No. 2058, *ante*.

**2150. ——— ——— ———]**—A vessel, having goods on board upon which an insurance was effected, but which were warranted free from average, unless general, was placed in so much danger by perils of the sea, that the crew deserted her in order to save their lives, & the owners of the goods, upon receiving intelligence of this, gave notice of abandonment. A few days afterwards the vessel was found by some fishermen, & towed into port & repaired, but the goods, which were of a perishable nature, had been so much injured by the salt water that they would not have been worth anything if forwarded to the place of destination:—*Held*: the assured were entitled to recover for a total loss.—*PARRY v. ABERDEIN* (1829), 9 B. & C. 411; Dan. & Ll. 228; 4 Man. & Ry. K. B. 343; 7 L. J. O. S. K. B. 260; 109 E. R. 153.

*Annotations*:—*Distd.* Roux v. Salvador (1835), 1 Bing. N. C. 526. *Consd.* Rosetto v. Gurney (1851), 11 C. B. 176; Cossman v. West, Cossman v. British America Assce. (1887), 13 App. Cas. 160. *Refd.* Naylor v. Taylor (1829), 9 B. & C. 718; Dean v. Hornby (1854), 3 E. & B. 180; Kemp v. Halliday (1866), 6 B. & S. 723.

**2151. ——— ——— ———]**—A policy on goods at & from Liverpool to any port in the river Plate was effected, after notification in the *London Gazette* that such ports were blockaded. The ship after such notification sailed from Liverpool, & was taken by a Brazilian frigate in the river Plate, & sent to Rio Janeiro for adjudication, but was rescued by the master & crew, who brought the ship & cargo back to Liverpool, where the master landed & warehoused the goods. The assurde, after they had heard of the capture, & after the rescue, but before they heard of it, gave notice of abandonment to the underwriters. The jury found, that the master did not intend to break the blockade:—*Held*: (1) the voyage insured was not illegal, as the vessel might sail for Buenos Ayres, without contravening the law of nations, for the purpose of inquiring whether the blockade continued; (2) the assured had no right to recover for a total loss by reason of their having offered to abandon, because the abandonment must be viewed with regard to the ultimate state



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of facts at the time when the offer to abandon was made.

(3) A mere loss of the adventure by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship, or spoiled, does not constitute a total loss, under a policy of insurance, unless by the aid & effect of an abandonment (LORD TENTERDEN, C.J.).—*NAYLOR v. TAYLOR* (1820), 9 B. & C. 718; *Dan. & Ll.* 240; 4 *Man. & Ry. K. B.* 526; 7 *L. J. O. S. K. B.* 311; 109 *E. R.* 267.

*Annotations:—As to (1) Folld. Dalgleish v. Hodgson* (1831), 5 *Moo. & P.* 407. *Consd. The Francisca* (1855), 2 *Ecc. & Ad.* 113. *As to (2) Consd. Connell v. Massie* (1833), 2 *L. J. K. B.* 160; *Roux v. Salvador* (1836), 4 *Scott*, 1; *Ruys v. Royal Exchange Assce. Corp.*, [1897] 2 *Q. B.* 135. *Refd. Kemp v. Halliday* (1866), 6 *B. & S.* 723. *Generally, Mentd. Medeiros v. Hill* (1832), 8 *Bing.* 231; *The Helen* (1865), *L. R.* 1 *A. & E.* 1.

#### SUB-SECT. 4.—CONSTRUCTIVE TOTAL LOSS.

##### A. Of Ship.

##### (a) In General.

*See, now, Marine Insurance Act, 1906 (c. 41), s. 60.*

**2152. Effect of constructive total loss—Equivalent to total loss.]**—A policy of insurance on a ship contained a clause that the insurance was against "total loss only." The ship went aground, & her owners gave to the underwriters notice of abandonment. The jury found that there was a constructive total loss:—*Held*: that the owners the policy

The universal rule is, unless excluded, that a constructive loss is as much a total loss as if the ship went to the bottom (WILLES, J.).—*ADAMS v. MACKENZIE* (1863), 13 *C. B. N. S.* 442; 1 *New Rep.* 274; 32 *L. J. C. P.* 92; 7 *L. T.* 711; 9 *Jur. N. S.* 849; 11 *W. R.* 342; 1 *Mar. L. C.* 272; 143 *E. R.* 175.

*Annotation:—Apprvd. Blairmore Sailing Ship Co. v. Macredie*, [1898] *A. C.* 593.

#### PART II. SECT. 23, SUB-SECT. 4.—A. (a).

**t. What amounts to.]**—*LESLIE v. TAYLOR* (1875), 10 *N. S. R. (I. R. & C.)* 352.—*CAN.*

**a. —.]**—*ALMON v. PROVIDENCE WASHINGTON INSURANCE CO.* (1883), 16 *N. S. R. (4 R. & G.)* 533; *Cass. Dig.* 220.—*CAN.*

**b. —.]**—*Pltfs.' vessel badly injured at sea was towed into G., where there were no facilities for repairs, & where she would have had to remain, exposed to the depredations of worms, until spars, etc., were brought from Y. The owners abandoned, but the underwriters refused to accept & made the necessary repairs at a cost greater than the value of the vessel restored:—Held: a constructive total loss of the vessel.*—*TROOP v. JONES* (1884), 17 *N. S. R. (5 R. & G.)* 230.—*CAN.*

**c. —.]**—*GEROW v. PROVIDENCE WASHINGTON INSURANCE CO.* (1889), 28 *N. B. R.* 435; *affd. on appeal*, 14 *S. C. R.* 731.—*CAN.*

**d. —.]**—*MORRISON MILL CO. v. QUEEN INSURANCE CO. OF AMERICA*, [1925] 1 *D. L. R.* 1159; 1 *W. W. R.* 691; 34 *B. C. R.* 509.—*CAN.*

**e. —.]**—In order to establish a constructive total loss, there must be a threatened destruction, or absolute temporary privation, of the insurer's ownership or an alienation of his property in the thing insured.—

*GAHAN v. OWEN* (1865), *Bourke*, 17; *Cor.* 149.—*IND.*

**1. Distinguished from absolute total loss.]**—The distinction between an absolute & a constructive total loss is a substantial & not merely a verbal distinction.—*SMITH v. NEW ZEALAND INSURANCE CO.*, *Mac.* 611.—*N.Z.*

**g. Sale of vessel—Ship saved by purchaser—Rights of assured as for constructive total loss.]**—*HART v. BOSTON MARINE INSURANCE CO.* (1894), 28 *N. S. R. (14 R. & G.)* 427.—*CAN.*

**h. —.]**—A vessel having met with great injury at sea, the owners tendered a total abandonment to the underwriters, which they refused. The vessel was not condemned, but was taken charge of by the owners, who sold her, not as a wreck, but with her register. Thereafter she was completely repaired, & sold by the purchasers at a profit:—*Held*: there was no proof that the vessel was constructively lost, & therefore the owners were not in a condition to abandon her, & were not entitled to recover from the underwriters as for a total loss.—*M'CORKELL & CO. v. MURISON* (1847), 9 *Dunl. (Ct. of Sess.)* 1491; 19 *Sc. Jur.* 658.—*SCOT.*

**k. Determination of loss—When determined—At commencement of action.]**—*TAYLOR v. SMITH* (1868), 12 *N. B. R.* (1 *Han.*) 120.—*CAN.*

*Necessity for Notice of Abandonment.*  
*See Sect. 24, sub-sect. 1, post.*

##### (c) Damaged Ship.

##### i. Cost of Repair Exceeding Value of Ship.

*See Marine Insurance Act, 1906 (c. 41), s. 60.*

**2153. Amounts to total loss.]**—Where a vessel insured in a valued policy at £2,000 received damage by perils of the sea which could have been repaired for £1,450, but the jury found that the vessel was not worth repairing:—*Held*: this was a total loss, & the assured were entitled to recover the sum at which the vessel was valued in the policy.

I am of opinion that the question, whether the loss sustained is a partial or total loss, is precisely the same when the value of the ship has been mentioned in the policy, & when that has been left open (LORD TENTERDEN, C.J.).

The ship was so much damaged as not to be worth repairing or, in other words, that though the materials of the ship remained the ship itself did not. That to my mind constitutes a total loss, & it would be strange if this were otherwise, for the ship ceased to exist for any useful purposes as a ship (LORD TENTERDEN, C.J.).—*ALLEN v. SUGRUE* (1828), 8 *B. & C.* 561; 108 *E. R.* 1151; *sub nom. ALLAN v. SUGRUE*, 3 *Man. & Ry. K. B.* 9; *Dan. & Ll.* 188; 7 *L. J. O. S. K. B.* 53.

*Annotations:—Apprvd. Irving v. Manning* (1847), 1 *H. L. Cas.* 287. *Refd. Dawson v. Wrench* (1849), 3 *Exch.* 359; *Provincial Insee. of Canada v. Leduc* (1874), 31 *L. T.* 142.

**2154. —.]**—*CASTLEMAN v. CAPPER* (1845), 6 *L. T.* 108.

*Annotation:—Consd. Boyd v. Royal Exchange Insee.* (1847), 10 *L. T. O. S.* 129.

**Justification for sale.]**—*BOYD v. ROYAL EXCHANGE INSURANCE CO.*, No. 2175, *post.*

**2156. —.]**—*LOHRE v. AITCHISON*, No. 1904, *ante.*

**2157. —.]**—*PHILLIPS v. NAIRNE*, No. 2180, *post.*

**2158. —.]**—*HANSON v. PORT OF LONDON SHIP LOAN & INSURANCE CO.* (1849), 6 *L. T.* 108; 10 *L. T.* 353.

**2159. —.]**—*MOSS v. SMITH*, No. 2096, *ante.*

**2160. —.]**—*Sunken ship.*—*HEYDORN v. BIBBY*

**1. Abandonment made & accepted for constructive total loss—Loss subsequently found partial.]**—*KENNY v. HALIFAX MARINE INSURANCE CO.* (1851), 1 *N. S. R. (1 Thom. (1st ed.))* 113; (2nd ed.) 141.—*CAN.*

#### PART II. SECT. 23, SUB-SECT. 4.—A. (c) i.

**2155 i. Amounts to total loss—Justification for sale.]**—Where the master having had a survey of the vessel, by which it was found it would cost more to repair her than she would be worth, sold her by auction:—*Held*: there was evidence of a constructive total loss to leave to the jury.—*DRISCOLL v. MILLVILLE MARINE INSURANCE CO.* (1883), 23 *N. B. R.* 160; *on appeal*, 2 *S. C. R.* 183.—*CAN.*

**2155 ii. —.]**—The cost of repairing the vessel would have exceeded her value when repaired, while the extent of the damage was such that it would have been hazardous to have attempted to remove her for permanent repair:—*Held*: the vessel was a constructive total loss, & the master was justified in selling.—*CHURCHILL v. NOVA SCOTIA MARINE INSURANCE CO.* (1895), 28 *N. S. R.* 52; 26 *S. C. R.* 65.—*CAN.*

**m. Cost of repairs exceeding declared value—But less than valuation in policy.]**—Where total loss should be claimed, the basis of ascertaining the value of the vessel should be her

(1855), 10 L. T. 243; *subsequent proceedings*, 25 L. T. O. S. 199.

2161. —.]—GIBBS v. HIND (1860), 6 L. T. 165.

2162. —.]—COMMERCIAL BANK OF SCOTLAND v. HEAD (1886), 2 T. L. R. 869, D. C.

2163. —.]—BEAVER LINE ASSOCIATED STEAMERS, LTD. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., LTD., No. 2184, *post*.

2164. —.]—ANGEL v. MERCHANTS MARINE INSURANCE CO., No. 2185, *post*.

2165. —.]—WESTERN ASSURANCE CO. OF TORONTO v. POOLE, No. 731, *ante*.

2166. —.]—NORTH ATLANTIC S.S. CO., LTD. v. BURR, No. 2193, *post*.

2167. —.]—In determining the question whether a ship seriously damaged by perils insured against can be treated as a constructive total loss, the test is whether a prudent uninsured owner would repair her having regard to all the circumstances. In this calculation the assured is entitled to add the break-up value of the ship to the estimated cost of repairs.

*Angel v. Merchants Marine Insurance Co.*, No. 2185, *post*, *overd*.

This question admits of ready answer as soon as it is ascertained what is the true test by which a ct. is to be guided. Really the choice lies between two. One is that a ship has become a constructive total loss if the cost of repairing her would exceed her value when repaired. The other is that she has become so when a prudent uninsured owner would not repair her having regard to all the circumstances. . . . When once the test of what a prudent uninsured owner would do, whether he would sell the ship where she lies or repair her, is admitted, it follows that the value of the ship where she lies must enter into the calculation; & this test has been laid down repeatedly by many high authorities over a long period of time. . . .

I will merely add that in my opinion the rule can only apply when there has been a wreck or something equivalent to a wreck (LORD LORE-BURN, C.).—MACBETH & CO., LTD. v. MARITIME INSURANCE CO., LTD., [1908] A. C. 144; 77 L. J. K. B. 498; 98 L. T. 594; 24 T. L. R. 403; 11 Asp. M. L. C. 52; 13 Com. Cas. 222, H. L.; *subsequent proceedings*, 24 T. L. R. 559.

*Annotation*:—*Consd. Hall v. Hayman*, [1912] 2 K. B. 5.

2168. —.]—A ship was insured by pltf. with underwriters by an increased value policy of marine insurance in the sum of £3,000 against total or constructive total loss by the usual perils of the sea. The policy contained the following clause: "No vessel insured in this assocn. shall be deemed to be a constructive total loss unless the cost of repairing the damage caused by perils insured against shall amount to 80 per cent. of the value in the ordinary hull 'all risks' policy—say £12,500." The form of the policy provided for a valuation of the vessel, but this was left blank. The vessel was also insured with underwriters in the sum of £12,500 by an ordinary hull "all

risks" policy. The ship met with damage from perils insured against. The estimated cost of repairs exceeded 80 per cent. of £12,500—namely, £10,000, but was very much less than the repaired value of the ship, which was about £25,000. Pltfs. claimed under the increased value policy as for a constructive total loss of the ship:—*Held*: the parties had not by the insertion of the clause in the policy substituted the agreed figure of £10,000 for the repaired value of the ship, in ascertaining whether the ship was a constructive total loss, but the vessel was to be deemed a constructive total loss if the cost of repairs exceeded the value of the ship when repaired with a proviso that the cost of repairs must amount to 80 per cent. of the value in the ordinary hull "all risks" policy.—*SAILING SHIP HOLT HILL CO. v. UNITED KINGDOM MARINE ASSOCN.*, [1919] 2 K. B. 789; 88 L. J. K. B. 1155; 121 L. T. 420; 35 T. L. R. 367; 14 Asp. M. L. C. 463.

## ii. Cost of Repair Equal to Value of Ship.

2169. Amounts to total loss.]—MARTEN v. SYDNEY LLOYDS (1896), *Times*, Dec. 19.

*Annotation*:—*Refd. Macbeth v. Maritime Insce.* (1908), 98 L. T. 594.

## iii. Ship Not Worth Repair by Uninsured Owner.

2170. Whether prudent uninsured owner would have repaired.]—THOMPSON v. COLVIN (1830), L. & Welsb. 140.

2171. —.]—THE PRINCESS ELIZABETH, HAMILTON v. LODGE (1839), 6 L. T. 108.

2172. —.]—THE EXCHANGE, TAYLOR v. LODGE (1839), 6 L. T. 108.

2173. —.]—YOUNG v. TURING, No. 2196, *post*.

2174. —.]—GLEN v. THOMPSON (1845), 6 L. T. 108.

2175. —.]—In an action on a marine policy, where a constructive total loss was claimed, & pltf. relied upon the fact that the owner was deprived of all means of ascertaining the amount of injury sustained by the vessel, the question was, whether he made proper use of the means which he possessed for making the discovery; & then whether the expense of doing the acts necessary for discovering the exact amount of damage, & of repairing it when done, would have been greater than the value of the vessel. If a prudent uninsured owner would have incurred the expense in preference to treating his ship as being incapable of being ever employed as a ship again, the insured owner ought to take the necessary measures to find out the fact, & was not justified in abandoning the vessel.

Notice of abandonment is not essential to entitle pltf. to recover for a total loss; & if such notice be given, it is not necessary to delay the giving of it until all such measures have been taken as were possible, without enormous expense, for ascertaining the precise state of the vessel; nor would any delay in taking those measures absolutely destroy pltf.'s claim for a total loss.—*BOYD v.*

valuation in the policy, & if not valued therein, her actual value at the time of the inception of the risk at the port to which she then belonged. The valuation stated in the policy was \$20,000. The vessel was injured on the voyage covered by the policy, the estimated cost of repairs being \$14,280, which exceeded her value when repaired in the port in which she then was:—*Held*: in an action on the policy, pltf. could only recover for a partial loss.—*VAUGHAN v. PROVIDENCE WASHINGTON INSURANCE CO.* (1887), 28 N. B. R. 133.—CAN.

## PART II. SECT. 23, SUB-SECT. 4.— A. (c) iii.

2170 i. Whether prudent uninsured owner would have repaired.]—The right to abandon a ship depends on the fact whether a prudent man, acting the best for his own interest, if he owned the vessel, without being insured, would have sold her on the spot for what could be got, & not have repaired her.—*THE PERTSHIRE, ROBERTSON v. PROVINCIAL MUTUAL & GENERAL INSURANCE CO.* (1855), 2 L. T. 730.—CAN.

2170 ii. —.]—*KING v. WESTERN ASSURANCE CO.* (1857), 7 C. P. 300.—CAN.

2170 iii. —.]—In determining whether a damaged ship can be treated as a constructive total loss, the test is, would a prudent uninsured owner repair her, having regard to all the surrounding circumstances.—*CUNNINGHAM v. ST. PAUL FIRE & MARINE INSURANCE CO.* (1914), 19

—CAN.



**Sect. 23.—Total loss: Sub-sect. 4, A. (c) iii. & iv.]**

**ROYAL EXCHANGE INSURANCE CO. (1847), 10 L. T. O. S. 129.**

**2176.** ———.]—(1) A vessel is totally lost, within the meaning of a policy, when it becomes, as a ship, of no use or value to the owner, & is as much lost as if it had gone to the bottom of the sea, or had been broken to pieces, & the whole or great part of the fragments had reached the shore as wreck. A loss is also to be considered as total where a prudent owner, if uninsured, would not have repaired.

A ship was insured in a policy, in which the value was stated at £17,500. The ship was injured by storms, was surveyed, & the repairs were estimated at £10,500. When repaired, the vessel would have been of the marketable value of £9,000. The assured abandoned & claimed as for a total loss. The jury found that, under the circumstances existing in the case, a prudent owner, uninsured, would not have repaired the vessel:—*Held*: the assured could recover as for a total loss.

(2) In a valued policy the agreed total value is conclusive.

(3) A policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree before hand in estimating the value of the subject assured by way of liquidated damages.—**IRVING v. MANNING (1847), 1 H. L. Cas. 287; 6 C. B. 391; 6 L. T. 108; 10 L. T. 877; 9 E. R. 766, H. L.; a. S. C. sub nom. MANNING v. IRVING (1845), 1 C. B. 168.**

*Annotations*:—As to (1) **Appld.** *Blairmore Sailing Ship Co. v. Macredie*, [1898] A. C. 593. **Consd.** *Angel v. Merchants Marine Insee.*, [1903] 1 K. B. 811; *Macbeth v. Maritime Insee.*, [1908] A. C. 144. **Refd.** *Grainger v. Martin (1863), 4 B. & S. 9; Kemp v. Halliday (1866), 6 B. & S. 723; Provincial Insee. of Canada v. Leduc (1874), 31 L. T. 142.* As to (2) **Appld.** *Barker v. Janson (1868), L. R. 3 C. P. 303.* **Consd.** *Burnand v. Rodocanachi (1880), 5 C. P. D. 424; Balmoral S.S. Co. v. Marten*, [1902] A. C. 511. **Refd.** *Rankin v. Potter (1873), 42 L. J. C. P. 169; The Main*, [1894] P. 320. As to (3) **Consd.** *Aitchison v. Lohre (1879), 4 App. Cas. 755.* **Refd.** *Dawson v. Wrench (1849), 3 Exch. 359.*

**2177.** ———.]—**SAILING SHIP BLAIRMORE CO. v. MACREDIE, No. 2145, ante.**

**2178.** ———.]—**MACBETH & CO., LTD. v. MARITIME INSURANCE CO., LTD., No. 2167, ante.**

**iv. What are Cost of Repairs and Repaired Value.**

See, now, Marine Insurance Act, 1906 (c. 41), s. 60 (1), (2), (ii).

**2179. Cost of repair—What may be excluded—Value of wreck.]—YOUNG v. TURING, No. 2196, post.**

**2180.** ———.]—A policy contained a clause, that the ship was to be "allowed to be seaworthy for the voyage." In the course of the voyage, she met with a violent storm, by which she was much damaged, & obliged to put into the Mauritius. On examination there, it was found that the ship would require very extensive repairs to make her seaworthy, & that the cost of such repairs would exceed her value when repaired; that many of the beams were broken, & many of the bolts & fastenings loosened; & that, the vessel being old, & in many parts decayed, the decayed parts could not be again made use of, as they would not bear re-bolting, but would require to be replaced with new timbers. In an action upon the policy, averring a total loss by a peril insured against, the judge left it to the jury to say whether the costs of the repair of the damage arising from the perils insured against would have been greater than the value of the ship when repaired; telling "that, if they were of that opinion, they should

find for pltf., which they did:—*Held*: this was a correct direction, & the verdict warranted by the evidence; for the judge was not bound to tell the jury that, in considering the repairs that were necessary, they must exclude from their estimate all such repairs as were rendered necessary by the decayed state of the ship.—**PHILLIPS v. NAIRNE (1847), 4 C. B. 343; 16 L. J. C. P. 194; 9 L. T. O. S. 295; 11 Jur. 455; 136 E. R. 539.**

*Annotation*:—**Refd.** *Provincial Insee. of Canada v. (1874), 31 L. T. 142.*

**2181.** ———.]—**LOZANO v. DURANT (1860), 2 L. T. 513.**

**2182.** ———.]—**GIBBS v. HIND (1860), 10 L. T. 877.**

**2183.** ———.]—**THE THORNHILL (circa 1898), cited in 5 Com. Cas. at p. 269.**

*Annotations*:—**Refd.** *Beaver Line v. London & Provincial Marine & General Insee. (1899), 5 Com. Cas. 269; Macbeth v. Maritime Insee. (1908), 98 L. T. 594.*

**2184.** ———.]—(1) In an action on a policy of marine insurance on ship, the question being whether or not the vessel was a constructive total loss, evidence as to the value of the wreck was tendered:—*Held*: the evidence was admissible.

(2) Where a ship is at the bottom, since the cost of raising is impracticably great, it is impossible to recover the ship & she is actually lost. So a ship is constructively lost if the owners would be worse off by repairing than by not repairing (**PHILLIMORE, J.**).—**BEAVER LINE ASSOCIATED STEAMERS, LTD. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., LTD. (1899), 5 Com. Cas. 269.**

*Annotations*:—As to (1) **Refd.** *Angel v. Merchants Marine Insee.*, [1903] 1 K. B. 811; *Macbeth v. Maritime Insee. (1908), 98 L. T. 594.*

**2185.** ———.]—By a policy of marine insurance a ship thereby insured was valued at £23,000, & that sum was to be taken to be the "repaired value," in ascertaining whether the vessel was a constructive total loss. The ship ran upon the rocks off the coast of Sicily, & the owner thereupon gave notice of abandonment, which was not accepted by the underwriters. A salvage assocn., acting by the consent, & for the benefit, of all parties concerned, got the ship off, & she was temporarily repaired, so as to enable her to be brought to an English port. The shipowner having brought an action on the policy, claiming as for a constructive total loss, the judge at the trial found that, if the ship were permanently repaired, the total cost of repairs would amount to £22,559, & he refused to take into consideration the value of the wreck. He therefore held that there was not a constructive total loss of the ship:—*Held*: the shipowner was not entitled to add the value of the wreck to the cost of repair, in determining whether there was a constructive total loss of the ship.—**ANGEL v. MERCHANTS MARINE INSURANCE CO., [1903] 1 K. B. 811; 72 L. J. K. B. 498; 88 L. T. 717; 51 W. R. 530; 19 T. L. R. 395; 9 Asp. M. L. C. 406; 8 Com. Cas. 179, C. A.**

*Annotations*:—**Overd.** *Macbeth v. Maritime Insee.*, [1908] A. C. 144. **Refd.** *Hall v. Hayman*, [1912] 2 K. B. 5.

**2186.** ———.]—**For breaking up purposes.]**—In ascertaining whether a ship is a constructive total loss the value of the wreck for breaking up purposes ought to be taken into account.—**WILD ROSE S.S. CO. v. JUPE (1903), 19 T. L. R. 289.**

*Annotations*:—**Refd.** *Angel v. Merchants Marine Insee.*, [1903] 1 K. B. 811; *Macbeth v. Maritime Insee. (1908), 98 L. T. 594.*

**2187.** ———.]—**MACBETH & CO., LTD. v. MARITIME INSURANCE CO., LTD., No. 2167, ante.**



**2188.** ——— **Marine Insurance Act, 1906 (c. 41), s. 60 (2), 11.]**—The law as laid down in *Macbeth & Co., Ltd. v. Maritime Insurance Co., Ltd.*, No. 2167, *ante*, is altered by above sub-sects. In determining whether a ship, which is seriously damaged by perils insured against, can be treated as a constructive total loss within the meaning of that enactment, the assured is not entitled to add the value of the wreck to the cost of repairs.—*HALL v. HAYMAN*, [1912] 2 K. B. 5; 81 L. J. K. B. 509; 106 L. T. 142; 28 T. L. R. 171; 56 Sol. Jo. 205; 12 Asp. M. L. C. 158; 17 Com. Cas. 81.

*Annotation*:—*Reid. Sanday v. British & Foreign Marine Insce.*, [1915] 2 K. B. 781.

**2189.** ——— **Earned freight.]**—*THE ALFRED, Moss v. SMITH* (1850), as reported in 6 L. T. 107.

*Annotations*:—*Reid. Rosetto v. Gurnoy* (1851), 11 C. B. 176; *Philpott v. Swann* (1861), 11 C. B. N. S. 270; *Farnworth v. Hyde* (1866), L. R. 2 C. P. 204; *Kemp v. Halliday* (1866), 6 B. & S. 723; *Rankin v. Potter* (1873), L. R. 8 H. L. 83; *Aitchison v. Lohre* (1879), 4 App. Cas. 755; *Assicurazioni Generali v. S.S. Bessie Morris Co.*, [1892] 2 Q. B. 652; *Angel v. Merchants' Marine Insce.*, [1903] 1 K. B. 811; *Macbeth v. Maritime Insce.*, [1908] A. C. 144. *Mentd. Hallett v. Wigram* (1850), 9 C. B. 580; *W— v. H—* (falsely called *W—*) (1861), 30 L. J. P. M. & A. 73; *Grainger v. Martin* (1862), 2 B. & S. 456; *Adams v. McKenzie* (1863), 32 L. J. C. P. 92; *De Cuadra v. Swann* (1864), 16 C. B. N. S. 772; *King v. Walker* (1864), 3 H. & C. 209; *Cartwright v. Forman* (1866), 7 B. & S. 243; *Dahl v. Nelson, Donkin* (1880), 6 App. Cas. 38; *Shepherd v. Henderson* (1881), 7 App. Cas. 49; *Langham S.S. Co. v. Gallagher* (1911), 12 Asp. M. L. C. 109; *Horlock v. Beal*, [1916] 1 A. C. 486.

**2190.** ——— **Freight earned by a ship & in the hands of the shipowner is not to be taken into account in considering whether the ship is a constructive total loss.**—*PARKER v. BUDD* (1896), 2 Com. Cas. 47.

**2191.** ——— **General average contributions.]**—A ship was submerged in deep water with heavy cargo on board; there was a common peril of destruction imminent over ship & cargo as they lay submerged the most convenient mode of saving ship or cargo or both was by raising the ship together with the cargo, the cost of the raising would be an extraordinary expense for the common benefit of both, & the cargo would be liable to general average contribution, & the shipowner would have a lien on the cargo to secure payment of that general average. The ship being insured:—*Held*: in determining whether the ship was a constructive total loss, or not, the amount of general average which would be contributed by the cargo must be taken into account & the account & the cost of raising the ship calculated as reduced by that amount.—*KEMP v. HALLIDAY* (1866), L. R. 1 Q. B. 520; 6 B. & S. 723; 35 L. J. Q. B. 156; 14 L. T. 762; 12 Jur. N. S. 582; 14 W. R. 607; 2 Mar. L. C. 370; 122 E. R. 1361, Ex. Ch.

*Annotations*:—*Consd. Anderson v. Ocean S.S. Co.* (1884), 10 App. Cas. 107. *Reid. Walthew v. Mavrojan* (1870), 39 L. J. Ex. 81; *Devon v. Home & Colonial Asso.* (1872), L. R. 7 C. P. 341; *Harrison v. Bank of Australasia* (1872), L. R. 7 Exch. 39; *Rankin v. Potter* (1873), L. R. 6 H. L. 83; *The Ralsby* (1885), 10 P. D. 114; *Marine Insce. v. China Transpacific S.S. Co.* (1886), 11 App. Cas. 573; *Macbeth v. Maritime Insce.*, [1908] A. C. 144.

**2192.** ——— **Deduction one-third new for old.]**—Where, a ship having sustained damage in a storm, it then became necessary, for the purpose of saving the ship & cargo, to make a general average sacrifice, the result of which was that the ship became a constructive total loss & was sold as such:—*Held*: the proper mode of ascertaining the amount of the shipowners' loss by the general average sacrifice was by taking the difference between the value of the ship undamaged & the estimated cost of repairing the particular average damage & deducting therefrom the proceeds of the sale of the ship; & no deduction of one-third

new for old was to be made from the estimated cost of the repairs.—*HENDERSON BROTHERS v. SHANKLAND & Co.*, [1896] 1 Q. B. 525; 65 L. J. Q. B. 840; 74 L. T. 238; 44 W. R. 401; 12 T. L. R. 250; 40 Sol. Jo. 334; 8 Asp. M. L. C. 136; 1 Com. Cas. 333, C. A.

**2193.** ——— **Cost to reinstate as at time of loss.]**—Where a Lloyd's policy of marine insurance contains the clause "the insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss" the words "repaired value" mean the repaired value with reference to the particular vessel. The vessel is not merely to be made seaworthy, nor, on the other hand, is she to be reconstructed, but, as far as repairs can effect it, she is to be made of the same classification & as nearly as possible the thing which was valued.—*NORTH ATLANTIC S.S. Co., LTD. v. BURR* (1904), 20 T. L. R. 266; 9 Com. Cas. 164.

**2194. What is repaired value—Not valuation in policy.]**—*ALLEN v. SUGRUE*, No. 2153, *ante*.

**2195.** ——— **EGGINGTON v. LAWSON** (1832), cited in 6 C. B. at p. 414; 136 E. R. 1311.

*Annotation*:—*Consd. Irving v. Manning* (1847), 1 H. L. Cas. 237.

**2196.** ——— **]**—A Dutch ship, valued in the policy at £8,000, was insured on a voyage from Rotterdam to Java & Sumatra, & back again to a port of discharge in Holland. After commencing her voyage, she was stranded on the Goodwin Sands & plundered. She was ultimately removed to London, & notice of abandonment was given to the underwriters. It was proved that, at the time she was cast away, she was worth £5,833, that her value as she lay was £700, & that the salvage was £420. It also appeared in evidence, that the expense of repairing the ship in England would have been £4,615; that if she had been entitled to an English register she would have been worth, when repaired, from £4,500 to £4,700; & that, if she had been a British ship, it would have been prudent for a British owner to repair her. It was proved by Dutch witnesses that the expense of repairing her in Holland would have been far greater, & that her value, when repaired in Holland, would not have exceeded £2,915; & that the trading cos. in Holland will not employ a vessel that has been stranded in the manner in which this vessel was stranded, however perfectly she might have been repaired, & that this circumstance would have affected her value in Holland. The judge told the jury that, in considering whether this was the case of a partial or total loss, they ought not to take into account the value stated in the policy, & that, in considering the same question, they ought to look at all the circumstances attending the ship, & to judge whether, under all those circumstances, a prudent owner, if uninsured, would have declined to repair the ship; & that, if so, they might find it a case of total loss:—*Held*: this direction was right.

The Chief Justice has laid down the usual & recognised rule that the jury ought to consider whether under all the circumstances attending the ship a prudent owner, if uninsured, would have repaired the vessel. Now to the value of the repairs must be added her value as she lay in the dock, that is to £4,615 must be added £700 making £5,315 (ABINGER, C.B.).—*YOUNG v. TURING* (1841), 2 Man. & G. 593; 2 Scott, N. R. 752; 133 E. R. 883.

*Annotation*:—*Consd. Irving v. Manning* (1847), 1 H. L. Cas. 237. *Reid. Macbeth v. Maritime Insce.*, [1908] A. C. 144. *Reid. Provincial Insce. of Canada v. Leduc*

**Sect. 23.—Total loss: Sub-sect. 4, A. (c) iv., v. & vi., & (d).]**

(1874), 31 L. T. 142; *Burnand v. Rodocanachi* (1880), 5 C. P. D. 424; *Pitman v. Universal Marine Insce.* (1882), 9 Q. B. D. 192.

**2197. ———.]—IRVING v. MANNING, No. 2176, ante.**

**2198. ——— Ship of exceptional character—Special value to owner.]—**In June, 1859, the owners of a ship valued at £17,000 caused themselves to be insured by policies in the usual form for £16,000 from Bombay to Liverpool. When off Algoa Bay she encountered very severe weather, & sustained such damage that it became necessary to put into Port Louis, in Mauritius, where she arrived on Aug. 21. On Sept. 8, the master wrote to the owners at Belfast a letter which they received about Oct. 10, giving a detailed account of the damage which the ship had met with, & estimates of the probable expenses of repairing & refitting her, etc. On Oct. 15, the owners wrote a letter to the captain, in which they left him to act as he considered best for the interests of all concerned. On Dec. 8, the captain wrote a letter to the owners, which they received on Jan. 9, 1860, stating that he had made up his mind to abandon & sell the hull, etc. on account & for the benefit of all concerned. On December 13 he attended before a notary public, & formally declared that he abandoned the ship to the underwriters. On Jan. 7, 1860, the ship was sold by auction under his orders, & was afterwards broken up. The owners had bought the ship in 1855 for £20,000, & 20 per cent. would be a reasonable deduction in respect of wear & tear at the time when the policy attached. The cost of building such a ship at that time would have been £20,000; & the cost of repairing her £10,500. Her value after she had been repaired would have been £7,500, she being a vessel of exceptional size & class; but an owner wanting such a ship for the particular purposes of his trade, & having to elect either to sell, or to repair, or to purchase, would have elected to repair her, for such a vessel could not have been built or purchased at that time for so small a sum as £10,500. On a case stated between the owners & an underwriter, the ct. having power to draw inferences of fact:—*Held*: (1) there was only an average, & not a constructive total loss; (2) the notice of abandonment was not in time.—*GRAINGER v. MARTIN* (1863), 4 B. & S. 9; 2 New Rep. 191; 122 E. R. 363; *sub nom.* *MARTIN v. GRANGER*, 8 L. T. 796; 11 W. R. 758; 1 Mar. L. C. 365, Ex. Ch.

*Annotations*:—As to (1) *Reid. Macbeth v. Maritime Insce.* (1908), 98 L. T. 594. *Generally, Reid. Stringer v. English & Scottish Marine Insce.* (1870), 10 B. & S. 770.

#### v. Irreparable Damage.

**2199. Impossibility of repair.]—**Insurance on ship, cargo, & freight from Tortola to London. The ship was driven back to Tortola; & being found unfit for the voyage, & it being impossible to repair her, was sold. There were no vessels at Tortola by which the cargo could be forwarded, & it was accordingly sold for nearly the sum insured. The insured having abandoned:—*Held*: this was a total loss.—*MANNING v. NEWMHAM* (1782), 3 Doug. K. B. 130; 2 Camp. 624, n.; 99 E. R. 575.

*Annotations*:—*Apld. Wilson v. Royal Exchange Assoe.* (1811), 2 Camp. 623. *Distd. Anderson v. Wallis* (1813), 2 M. & S. 240. *Reid. Hadkinson v. Robinson* (1803),

3 Bos. & P. 388; *Parsons v. Scott* (1810), 2 Taunt. 363; *Hunt v. Royal Exchange Assoe.* (1816), 5 M. & S. 47; *Idle v. Royal Exchange Assoe.* (1819), 8 Taunt. 755; *Hudson v. Harrison* (1821), 3 Brod. & Bing. 97; *Parry v. Aberdein* (1829), Dan. & Ll. 228; *Roux v. Salvador* (1835), 1 Bing. N. C. 526.

**2200. ——— By reason of lack of facilities.]—**In an action on a policy of insurance on a ship, pltf. claimed as for a total loss. The ship was abandoned to the underwriters & sold at Masulipatam, & the jury found that she could not have been repaired there so as to enable her to proceed to her port of destination; but in answer to a question whether she might have been partially repaired so as to enable her to proceed to some other port where she might have been more completely repaired, they found that there was no satisfactory evidence on that subject:—*Held*: in the absence of such evidence the opinion of the jury as to the course which a prudent uninsured owner would have taken could not be satisfactory, & a verdict for pltf. was therefore set aside, & a new trial granted.—*SMALL v. NAIRNE* (1849), 13 L. T. O. S. 527.

**2201. ——— By reason of lack of funds.]—***WADE v. SOUTH OF ENGLAND MARINE INSURANCE ASSOCN., LTD.* (1888), 5 T. L. R. 8.

#### vi. Loss of Voyage.

See Sub-sect. 4, A. (d), *post*.

#### (d) Deprivation of Possession of Ship.

See, now, Marine Insurance Act, 1906 (c. 41), s. 60 (2).

**2202. Whether loss of voyage amounts to total loss—Seizure by government of insured—Subsequent restitution.]—***BARCLAY v. COLLIER* (1744), 4 Bro. Parl. Cas. 445, n.; 2 E. R. 302.

**2203. ———.]—***STONE v. BROWN* (1746), 4 Bro. Parl. Cas. 445, n.; 2 E. R. 302.

**2204. ——— Capture by enemy—Subsequent recapture.]—**A ship insured for a voyage or cruise of three months is taken by the enemy within that time, but before she is carried *infra præsidia hostis*, is retaken by an Englishman, & is now a living ship; this is a total loss to the insured.—*POND v. KING* (1747), 1 Wils. 191; 4 Bro. Parl. Cas. 446, n.; 95 E. R. 567.

*Annotations*:—*Distd. Poole v. Fitzgerald* (1752), Amb. 145. *Reid. Goss v. Withers* (1758), 2 Burr. 683.

**2205. ———.]—***WHITEHEAD v. BANCE* (1749), 4 Bro. Parl. Cas. 446, n.; 2 E. R. 303.

**2206. ———.]—***JENKINS v. MACKENZIE* (1749), 4 Bro. Parl. Cas. 446, n.; 2 E. R. 303.

*Annotation*:—*Reid. Cazalet v. St. Barbe* (1786), 1 Term Rep. 187.

**2207. ———.]—**Where a ship is taken the insured may demand as for a total loss & abandon to the insurers.

The ship is lost, by the capture; though she be never condemned at all, nor carried into any port or fleet of the enemy; & the insurer pay the value. If, after condemnation, the owner recovers or retakes her, the insurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract. The insurer runs the risk of the insured, & undertakes to indemnify: he must therefore bear the loss actually sustained; & can be liable to no more (LORD MANSFIELD).—*Goss v. WITHERS* (1758), 2 Burr. 683; 2 Keny. 325; 97 E. R. 511.

*Annotations*:—*Consd. Hamilton v. Mendes* (1761), 2 Burr. 1198; *Rotch v. Edie* (1795), 6 Term Rep. 413;

#### PART II. SECT. 23, SUB-SECT. 4.— A. (c) v.

**2199. Impossibility of repair.]—**The

master of a damaged ship cannot abandon & sell her for account of the insurers, unless he prove that to navigate or to repair her was wholly

beyond his power.—*DE PASS v. COMMERCIAL MARINE INSURANCE CO.* (1857), 3 S. 46.—S. AF.



*v. Robinson* (1803), 3 Bos. & P. 388; *Andersen v. Marten*, [1908] A. C. 334. **Expld.** *Moore v. Evans*, [1918] A. C. 185. **Refd.** *Milles v. Fletcher* (1779), 1 Doug. K. B. 231; *Parsons v. Scott* (1810), 2 Taunt. 363; *Falkner v. Ritchie* (1814), 2 M. & S. 290; *Thornely v. Hebson* (1819), 2 B. & Ald. 513; *Roux v. Salvador* (1836), 3 Bing. N. C. 266; *Rodocanachi v. Elliott* (1873), L. R. 8 C. P. 649; *Polurrian S.S. Co. v. Young*, [1915] 1 K. B. 922; *Sanday v. British & Foreign Marine Insce.*, [1915] 2 K. B. 781; *Roura & Forgas v. Townend* (1918), 35 T. L. R. 88. **Mentd.** *Da Costa v. Firth* (1766), 4 Burr. 1966; *Anderson v. Royal Exchange Assce.* (1805), 3 Smith, K. B. 48; *Kleinwort v. Shepard* (1859), 1 E. & E. 447; *Horlock v. Beal*, [1916] 1 A. C. 486.

**2208.** ————.]—Insured who abandons can only recover for the actual loss at the time of his abandonment.—**HAMILTON v. MENDES** (1761), 2 Burr. 1198; 1 Wm. Bl. 276; 97 E. R. 787.

**Annotations:**—**Consd.** *Milles v. Fletcher* (1779), 1 Doug. K. B. 231. **Apld.** *Cazalet v. St. Barbe* (1789), 1 Term Rep. 187. **Consd.** *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388. **Apld.** *Bainbridge v. Neilson* (1808), 1 Camp. 237. **Consd.** *Dalby v. India & London Life Assce.* (1854), 15 C. B. 365; *Kemp v. Halliday* (1866), 6 B. & S. 723; *Ruys v. Royal Exchange Assce. Corp.*, [1897] 2 Q. B. 135. **Expld.** *Moore v. Evans*, [1918] A. C. 185. **Refd.** *Da Costa v. Firth* (1766), 4 Burr. 1966; *Aguilar v. Rodgers* (1797), 7 Term Rep. 421; *Godsall v. Boldero* (1807), 9 East, 72; *Patterson v. Ritchie* (1815), 4 M. & S. 393; *Brotherston v. Barber* (1816), 5 M. & S. 418; *M' Ivor v. Henderson* (1816), Holt, N. P. 55, n.; *Idle v. Royal Exchange Assce.* (1819), 3 Moore, C. P. 115; *Holdsworth v. Wise* (1828), 1 Man. & Ry. K. B. 673; *Roux v. Salvador* (1836), 3 Bing. N. C. 266; *Rankin v. Potter* (1873), L. R. 6 H. L. 83. **Mentd.** *Beale v. Thompson* (1804), 4 East, 546; *Naylor v. Taylor* (1829), 9 B. & C. 718; *Shepherd v. Henderson* (1881), 7 App. Cas. 49.

—**MILLES v. FLETCHER**,

No. 2247, *post*.

**2210.** ————.]—A vessel chartered to Oporto, St. Ubes, & Gottenburgh, being taken at Oporto by the enemy, was liberated on payment by the master of a sum of money, & on condition of his bringing home in her to England, English prisoners, to be exchanged for an equal number of French. Upon the news of the capture, but after the time of the ship's liberation, the owners abandoned the ship to the insurers. Upon her arrival at Portsmouth, the captain refused to deliver her, unless on repayment of the ransom, which the owner refused:—**Held:** the owner being entitled to retake his ship, which was safe at Portsmouth, the loss of the voyage did not enable him to recover upon a policy on the ship as for a total loss, nor could he recover, as for an average loss, the sum which had been paid by the master for the ship's ransom, & which, being an illegal payment, *pltf.* was not bound to repay to the master.—**PARSONS v. SCOTT** (1810), 2 Taunt. 363; 127 E. R. 1118.

**Annotations:**—**Consd.** *Hunt v. Royal Exchange Assce.* (1816), 5 M. & S. 47. **Refd.** *Falkner v. Ritchie* (1814), 2 M. & S. 290. **Mentd.** *Wilson v. Forster* (1815), 6 Taunt. 25.

**2211.** ————.]—**Repurchase by master.**—Where a ship insured had been captured & brought into a neutral port, & sold by the captors, & the captain bought her for the benefit of the owners, they shall only be entitled to recover on a policy the sum paid by the captain, & what may be expended in her outfit, & cannot recover for a total loss.—**M'MASTERS v. SHOOLBRED** (1794), 1 Esp. 236, N. P.

**Annotations:**—**Foldd.** *Wilson v. Forster* (1815), 1 Marsh. 425. **Mentd.** *Havelock v. Rockwood* (1799), 8 Term Rep. 268.

**2212.** ————.]—The seizure & sale of a vessel by a neutral state, no sentence of condemnation by any competent ct. being shown, does not change the property. Therefore, where in such a case the master had repurchased the vessel, though he acted without authority from the assured, who refused to accept the ship or repay him the price the assureds who had not abandoned were not permitted to recover for a total loss.—

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**WILSON v. FORSTER** (1815), 6 Taunt. 25; 1 Marsh. 425; 128 E. R. 941.

**2213.** ————.]—**Unlikelihood of recovery—Marine Insurance Act, 1906 (c. 41), s. 60.**—A neutral ship carrying a cargo of coal & insured against the consequence of warlike operations was captured by a belligerent, deprived of her cargo, & detained for about six weeks, when she was released. In an action claiming to recover on the policy:—**Held:** on the facts, if the present action had come on for decision before the above Act, the owners would have been entitled to recover upon the policy of insurance as for a constructive total loss; before 1906, if the taking of the vessel out of the possession of the owners continued in operation at the commencement of the action & the owners' loss, once total, was one which might be permanent & was at any rate of uncertain continuance, they were entitled to recover for a constructive total loss; but by above Act the test of "unlikelihood of recovery" had been substituted for "uncertainty of recovery"; & the owners had not shown that there was more likelihood that they would not, than that they would recover the ship, & their claim failed.—**POLURRIAN S.S. Co., LTD. v. YOUNG**, [1915] 1 K. B. 922; 84 L. J. K. B. 1025; 112 L. T. 1053; 31 T. L. R. 211; 59 Sol. Jo. 285; 13 Asp. M. L. C. 59; 20 Com. Cas. 152, C. A.

**Annotations:**—**Consd.** *Horlock v. Beal* (1916), 114 L. T. 193. **Apld.** *Roura & Forgas v. Townend*, [1919] 1 K. B. 189. **Refd.** *Sanday v. British & Foreign Marine Insce.*, [1915] 2 K. B. 781; *Wilson Bobbin Co. v. Green* (1915), 31 T. L. R. 605; *Moore v. Evans*, [1917] 1 K. B. 458; *Wilson Bobbin Co. v. Green* (1917), 22 Com. Cas. 185; *Cohen v. Standard Marine Insce.* (1925), 30 Com. Cas. 139.

—.]—*Pltfs.* sold a quantity of jute to Spanish buyers under contracts, an essential term of which was that the jute should be shipped before the end of Jan. 1918. To, implement these contracts *pltfs.*, on Sept. 13, 1917, chartered the Spanish steamship *Igotz Mendi*, which was under another charter to carry a cargo of coal from Delagoa Bay to Colombo, to proceed to Calcutta to load the jute & to proceed thence to Valencia to deliver the cargo. *Pltfs.*, anticipating making a profit of £30,000 from the venture, took out a policy of insurance with *defts.* for that amount on profit on charter so valued against total &/or constructive loss of steamer only from Delagoa Bay via Colombo to Calcutta & until sailed. The policy was against marine & war risks, including capture by enemies of Great Britain, but excluding all claims arising from delay. The *Igotz Mendi*, which sailed from Delagoa Bay on Nov. 4, 1917, with a cargo of coal for Colombo, & should have arrived at Calcutta during the first week of Dec. was not heard of until Feb. 27, 1918, when news arrived that she had stranded on the coast of Denmark while in charge of a German prize crew, she having been captured on Nov. 10, 1917, by a German cruiser in the Indian Ocean. The prize crew left her on Feb. 27, & she was eventually refloated on Mar. 9 by a salvage co. employed by the shipowners, & was under repair until Sept. 1918, having been considerably damaged. Her owners were uninsured, & therefore did not, when they heard that the ship had stranded, give any notice of abandonment. *Pltfs.*, on Mar. 14, 1918, commenced an action claiming for a loss under the policy:—**Held:** (1) there was a constructive total loss of the vessel, within above sect. on her capture, as the balance of probability was that the owners would never recover her; (2) the giving of a notice of abandonment was not an essential element of a

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**Sect. 23.—Total loss: Sub-sect. 4, A. (d) & (e), & B. (a) & (b) i.]**

constructive total loss; (3) the capture of the vessel resulted in a total loss to pltf's. of their venture; (4) the fact that the vessel was restored to her owners did not preclude pltf's. from recovering, as their loss was not thereby extinguished; (5) pltf's. loss was not one arising from delay within the meaning of the policy.—**ROURA & FORGAS v. TOWNEND**, [1919] 1 K. B. 189; 88 L. J. K. B. 393; 120 L. T. 116; 35 T. L. R. 88; 14 Asp. M. L. C. 397; 24 Com. Cas. 71.

**2215. — Selzure by mutineers—Subsequent recovery.]**—Valued policy free of average on a privateer going on a cruise for four months. The crew mutinied & brought the ship home a fortnight before the cruise so insured would have determined:—**Held**: the policy not broken.—**POLE v. FITZGERALD** (1754), Amb. 214; Willes, 650, n.; 27 E. R. 142; *sub nom.* **FITZGERALD v. POLE**, 4 Bro. Parl. Cas. 439, H. L.; *affg.* S. C. *sub nom.* **POOLE v. FITZGERALD** (1752), Amb. 145, Ex. Ch.

**Annotations:—****Expld.** **Pelly v. Royal Exchange Assce.** (1757), 1 Burr. 341. **Consd.** **Goss v. Withers** (1758), 2 Burr. 683. **Expld.** **Hamilton v. Mendes** (1761), 2 Burr. 1198. **Consd.** **Lucena v. Craufurd** (1806), 2 Bos. & P. N. R. 269. **Refd.** **Brown v. Smith** (1813), 1 Dow. 349; **Falkner v. Ritchie** (1814), 2 M. & S. 290; **Hudson v. Harrison** (1821), 6 Moore, C. P. 288. **Mentd.** **Vallozjo v. Wheeler** (1774), Lofft, 631; **Milles v. Fletcher** (1779), 1 Doug. K. B. 231; **Parker v. Potts** (1815), 3 Dow. 23.

**2216. — — — — —.]**—Ship insured "at & from Liverpool to the coast of Africa," etc., & from "thence to the West Indies, & America." On her arrival on the coast, the crew mutiny, & resolve to carry the ship to an enemy's port; but, not being able to navigate the vessel, this is entrusted to the boatswain, who, instead of making for Cayenne, as the crew imagined, steered for Barbadoes, where the ringleaders were seized, & some executed. Govt. agent takes possession of the ship, & sells her, & her outward cargo & stores, for the benefit of all concerned:—**Held**: in these circumstances, the assured were entitled to

(1813), 1 Dow. 349; 3 E. R. 725, H. L.

**Annotation:—****Refd.** **Kleinwort v. Shepard** (1859), 1 E. & E. 447.

**2217. — — — — —.]**—Insurance on ship, & the ship during her voyage while loading her homeward cargo was seized by the crew & carried away to a distant country, & her cargo plundered, & the ship deserted, but was afterwards retaken by another ship, & was brought with a small remaining part of her cargo to an English port, not the port of her destination, & part of her rigging was gone, & she could not be made fit for a voyage again without considerable expense in providing a crew & stores:—**Held**: this was not a total loss so as to entitle the assured to abandon after notice of the recapture.—**FALKNER v. RITCHIE** (1814), 2 M. & S. 290; 105 E. R. 389.

**Annotations:—****Dbtd. & Distd.** **Hudson v. Harrison** (1821), 3 Brod. & Bing. 97. **Refd.** **Smith v. Robertson** (1814), 2 Dow. 474; **Holdsworth v. Wise** (1828), 1 Man. & Ry. K. B. 673; **Ruys v. Royal Exchange Assce. Corp'n.**, [1897] 2 Q. B. 135; **Sailing Ship Blairmore Co. v. Macredie**, [1898] A. C. 593.

**2218. — Desertion by crew—Salvage by fresh crew.]**—A ship received considerable damage from tempestuous weather, & the crew, completely exhausted, deserted the ship on the high seas for the mere preservation of their lives; & the ship was then taken possession of by a fresh crew, who

succeeded in conducting her safely into port:—**Held**: (1) such desertion of the crew did not of itself amount to a total loss; (2) the ship having been sold under the decree of the Admlty. Ct. to pay the salvage, & it not appearing that the assured had taken any means to prevent such sale, they had no right to abandon, & there was no more than a partial loss.—**THORNELY v. HEBSON** (1819), 2 B. & Ald. 513; 106 E. R. 453.

**Annotations:—****As to (1) Refd.** **Kemp v. Halliday** (1866), 6 B. & S. 723. **As to (2) Expld. & Distd.** **Holdsworth v. Wise** (1828), 7 B. & C. 794; **Parry v. Aberdein** (1829), 9 B. & C. 411. **Consd.** **Rosetto v. Gurney** (1851), 20 L. J. C. P. 257; **Stringer v. English & Scottish Marine Insce.** (1870), 10 B. & S. 770. **Expld. & Distd.** **Cossmann v. West**, **Cossmann v. British America Assce.** (1887), 13 App. Cas. 160. **Refd.** **Dean v. Hornby** (1854), 3 E. & B. 180.

**2219. — — — — —.]**—(1) The Royal Exchange Assurance co. is liable for a total loss upon a cargo of corn, where the ship from the perils insured against, becomes incapable of pursuing the voyage & another vessel cannot be procured to forward the corn to its port of destination.

Where a ship is obliged to put back & the damage she has sustained is of such a nature that she cannot pursue her voyage, & other ships cannot be procured to take the cargo, this is a total loss of ship, cargo & freight, however inconsiderable the damage sustained may be, because the voyage in contemplation is off.

(2) A policy of insurance on money lent to the captain payable out of the freight is illegal; & the premium cannot be recovered back from the underwriters.—**WILSON v. ROYAL EXCHANGE ASSURANCE CO.** (1811), 2 Camp. 623, N. P.

**Annotation:—****As to (1) Folld.** **Parry v. Aberdein** (1829), Dan. & Ll. 228.

**2220. — — — — —.]**—**DOYLE v. DALLAS**, No. 2120, *ante*.

*(e) Special Provisions in Policy.*

**2221. Insurers only to be liable for absolute damage—Whether constructive total loss covered.]**—A policy of marine insurance effected by pltf. with defts. a mutual insurance co., incorporated certain bye-laws of the co. indorsed thereon. The policy (*inler alia*) expressed it to be thereby declared that the acts of the assurer or assured in recovering, saving, or preserving the property insured should not be considered a waiver or acceptance of abandonment. One of the bye-laws provided that in the event of any ship being stranded or damaged, & not taken into a place of safety, it should be lawful for the directors of the co. to use every possible means in their power to procure the safety of the ship, the owner bearing his proportion of the expense incurred; & that no acts of the co. or its agents under or in pursuance of the power thereby reserved to the co. should be deemed, or taken to be, an acceptance or recognition of any abandonment, of which the assured might have given notice to such co., & the co. under any circumstances should only pay for the absolute damage caused by the perils insured against, which was in no case to exceed the sum insured. Pltf.'s vessel was, while the policy was in force, damaged by perils of the sea to such an extent that the cost of repairing would have amounted to more than the ship would have been worth when repaired. Pltf. within a reasonable time gave notice of abandonment:—**Held**: a constructive total loss was covered by the policy & by the bye-laws,

**PART II. SECT. 23, SUB-SECT. 4.—**  
**A. (e).**

**n. Insurers' limited liability for total loss—Assured's rights on constructive**

**total loss.]**—Where a ship is insured on a valued policy, with a condition that the insurers will not be liable as for a total loss, unless the estimated cost of repairing damage shall exceed

the declared value, such condition does not affect the right to abandon, in case of a constructive total loss, though it affects the right to recover for a total loss.—**CORR v. STANDARD**

& pltf. could maintain an action.—*FORWOOD v. NORTH WALES MUTUAL MARINE INSURANCE CO.* (1880), 9 Q. B. D. 732; 49 L. J. Q. B. 593; 42 L. T. 837; 28 W. R. 938; 4 Asp. M. L. C. 293, C. A.

**2222. Liability if ship stranded for fixed period—Special provision when ice-bound—Meaning of “open water.”**—*Re SUNDERLAND S.S. CO. & NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCN.* (1894), 11 T. L. R. 106; 14 R. 196, C. A. *Annotation*:—*Apld.* *Rowland & Marwood S.S. Co. v. Maritime Insee.* (1901), 17 T. L. R. 516.

**2223. —** *Impossibility to salve within that time—Salvage possible at future date.*—A rule of a marine insurance co. provided that if any ship insured in the co. had been stranded & remained in such position for a period of six months, & during such period it had been found impracticable to save her, the ship should be held to be a constructive total loss, & the insured member might abandon her.

A vessel insured under a policy, which incorporated the above rule, was stranded, & remained stranded for more than six months, during which time she was not saved, but it was admitted that it would be practicable to save the vessel at a future date:—*Held*: the vessel, not having been saved within the six months, was a constructive total loss.—*ROWLAND & MARWOOD S.S. CO., LTD. v. MARITIME INSURANCE CO. LTD.*, (1901), 17 T. L. R. 516; 6 Com. Cas. 160.

**2224. Increased value policy—Liability if cost of repairs 80 per cent. of value in “all risks” policy—Interpretation of clause.**—*SAILING SHIP HOLT HILL CO. v. UNITED KINGDOM MARINE ASSOCN.*, No. 2168, *ante*.

#### B. Of Cargo.

##### (a) Necessity for Notice of Abandonment.

See Sect. 24, sub-sect. 1, *post*.

##### (b) What amounts to Constructive Total Loss.

###### i. Damaged Cargo.

See Marine Insurance Act, 1906 (c. 41),

s.

**Constructive loss followed by justifiable sale.**—See Sub-sect. 2, E. (c), *ante*.

**2225. General rule.**—As a general rule, where the whole or any part of a cargo, having suffered sea-damage, is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, & therefore, as between the underwriters & the assured, impossible: if it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it, & the assured cannot recover as for a constructive total loss. The same rule applies, if a part only of the cargo can be saved. A cargo consisting of 3,700 quarters of wheat, valued at £6,400, was insured on a voyage from Odessa to

Liverpool. Shortly after she sailed, the vessel received sea-damage, & was compelled to put back to refit. The repairs & expenses amounted to £1,800, to raise which the master hypothecated the ship & cargo for £1,850 by a bottomry-bond payable ten days after her arrival at the port of delivery. The ship again sailed, & before her arrival, was wrecked, & carried into Cork by salvors, where, the cargo being found to be considerably damaged, & the vessel not worth repairing, both were sold. The jury found that about one half of the wheat might have been dried, & conveyed from Cork to Liverpool, at a cost less than its value on its arrival at Liverpool. The vessel & cargo were taken possession of by the Ct. of Admty., who directed their sale, by whom £450, & costs were awarded to the salvors, & £188 & costs to the holders of the bottomry bond:—*Held*: (1) the evidence disclosed a partial loss only; (2) in ascertaining whether or not it was practicable to send the whole or any part of the cargo to its port of destination in a marketable state, the jury were bound to take into consideration the cost of unshipping the cargo, the cost of drying & warehousing it, the cost of transshipping it into a new bottom, & the cost of the difference of transit, if it could only be effected at a higher than the original rate of freight, adding the salvage allowed in proportion to the value of the cargo saved; but not the debt & costs paid to the holders of the bottomry bond; & the loss would be total or partial, as the aggregate of these exceeded or fell short of the value of the cargo when delivered at the port of discharge.—*ROSETTO v. GURNEY* (1851), 11 C. B. 176; 20 L. J. C. P. 257; 17 L. T. O. S. 242; 15 Jur. 1177; 138 E. R. 438.

*Annotations*:—*As to* (2) *Apld.* *Farnworth v. Hyde* (1866), L. R. 2 C. P. 204. *Consd.* *Kemp v. Halliday* (1866), 6 B. & S. 723; *Svensden v. Wallace* (1885), 10 App. Cas. 404. *Refd.* *Great Indian Peninsula Ry. v. Saunders* (1861), 1 B. & S. 41; *Adams v. Mackenzie* (1863), 13 C. B. N. S. 442; *Kidston v. Empire Insee.* (1866), L. R. 1 C. P. 535; *Meyer v. Ralli* (1876), 1 C. P. D. 358; *Assicurazioni Generali v. S.S. Bessie Morris Co.*, [1892] 1 Q. B. 571; *Macbeth v. Maritime Insee.*, [1908] A. C. 144; *British & Foreign Marine Insee. v. Sanday*, [1916] 1 A. C. 650; *Wilson Bobbin Co. v. Green*, [1917] 1 K. B. 860. *Generally, Refd.* *The Bahia* (1864), 11 Jur. N. S. 90. *Mentd.* *The Newport* (1858), Sw. 335.

**2226. Sale price less than freight.**—Where salvage falls short of the freight it is a total loss.—*BOYFIELD v. BROWN* (1736), 2 Stra. 1065; 93 E. R. 1035.

**2227. —**—*MASON v. SKURRAY* (1780), 1 Park on Marine Insurances, 8th ed. p. 253; Marshall on Marine Insurances, 4th ed. p. 185, N. P.

*Annotations*:—*Consd.* *Cocking v. Fraser* (1785), 4 Doug. K. B. 295. *Refd.* *Bird v. Apploton* (1800), 1 East, 111; *Anderson v. Royal Exchange Assee.* (1805), 3 Smith, K. B. 48; *Gabay v. Lloyd* (1825), 5 Dow. & Ry. K. B. 641; *Hart v. Standard Marine Insee.* (1889), 22 Q. B. D. 499.

**2228. —**—Insurance at & from C. to L. on goods, in a ship by name, until the same should be there safely discharged & landed, rice free of particular average, & the ship with rice & other goods arrived within the limits of the port of L., but before she could be brought to her moorings or be at all unloaded, ran aground & was wrecked, & the whole cargo was greatly damaged, & was

FIRE & MARINE INSURANCE CO. OF NEW ZEALAND (1881), 7 V. L. R. 504.—AUS.

#### PART II. SECT. 23, SUB-SECT. 4.—B. (b) i.

**2225 i. General rule.**—When a cargo was injured, & the vessel was so damaged as to be forced into a port of refuge, from whence she could not reach her port of destination, without such a delay as would have occasioned

the total destruction of the cargo, the owners may abandon & claim for total loss.—*FAIRBANKS v. UNION MARINE INSURANCE CO.* (1856), 3 N. S. R. (2 Thom.) 67.—CAN.

**2226 i. Sale price less than freight.**—*Held*: in the absence of conclusive evidence that the cargo might not have been sent on to its destination, at an expense less than its probable value there, the loss must be considered partial.—*WATSON v. MERCANTILE*

MARINE INSURANCE CO. (1873), 9 N. S. R. 396.—CAN.

**o. Damaged goods sold—Reconditioned by purchaser—Damage found slight.**—*HEARD & HALL v. PRINCE EDWARD ISLAND MARINE INSURANCE CO.* (1871), 1 P. E. I. 381.—CAN.

**p. Goods damaged but marketable.**—Where goods on board a ship that was wrecked, although much damaged, were of such merchantable value as to



**Sect. 23.—Total loss: Sub-sect. 4, B. (b) i., ii. & iii.]**

taken out of her in craft, & carried to the consignees at L. & sold, & produced upon the whole little more than sufficient to pay freight & salvage, but the rice did not produce sufficient to pay the freight:—*Held*: this was a case of particular average only, & therefore as to the rice the underwriter was exempted by the warranty.—*GLENNIE v. LONDON ASSURANCE CO.* (1814), 2 M. & S. 371; 105 E. R. 420.

*Annotations*:—*Refd.* *Hudson v. Harrison* (1821), 6 Moore, C. P. 288; *Dixon v. Reid* (1822), 5 B. & Ald. 597; *Roux v. Salvador* (1836), 3 Bing. N. C. 266; *Ralli v. Janson* (1856), 6 E. & B. 422; *Francis v. Boulton* (1895), 65 L. J. Q. B. 153.

**2229. Goods unprofitable to assured.]—**Where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured:—*Held*: the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by a notice of abandonment.—*THOMPSON v. ROYAL EXCHANGE ASSURANCE CO.* (1812), 16 East, 214; 104 E. R. 1070.

*Annotations*:—*Consd.* *Hunt v. Royal Exchange Assce.* (1816), 5 M. & S. 47; *Roux v. Salvador* (1836), 3 Bing. N. C. 266. *Mentd.* *Barr v. Gibson* (1837), 3 M. & W. 390.

**2230. Goods capable of being reconditioned—For less than value.]—***ROSETTO v. GURNEY*, No. 2225, *ante*.

**2231. ———.]—***FARNWORTH v. HYDE*, No. 2132, *ante*.

**2232. Part of goods marketable.]—***THE CUREEM BUX, LECOTT v. GURNEY* (1858), 7 L. T. 286.

## ii. Frustration of Adventure.

**2233. Ship unable to proceed—Impossibility of forwarding part of goods.]—***MANNING v. NEWNHAM*, No. 2199, *ante*.

**2234. ——— Impossibility of forwarding cargo.]—***WILSON v. ROYAL EXCHANGE ASSURANCE CO.*, No. 2219, *ante*.

**2235. ——— Goods partially damaged—Imperishable goods.]—**Where goods were insured "at & from London to Quebec, warranted free of particular average" & the ship was driven back from the banks of Newfoundland & obliged to put into Kinsale, where it was impossible to repair her so as to enable her to complete the voyage the same season, & the goods, which though not of a perishable nature were to a certain degree damaged, could not be forwarded the same season by any other conveyance:—*Held*: the assured could not by giving notice of abandonment come upon the underwriters for a total loss.—*ANDERSON v. WALLIS* (1813), 2 M. & S. 240; 3 Camp. 440; 105 E. R. 372.

*Annotations*:—*Appld.* *Everth v. Smith* (1814), 2 M. & S. 278. *Consd.* *Falkner v. Ritchie* (1814), 2 M. & S. 290. *Foll.* *Hunt v. Royal Exchange Assce.* (1816), 5 M. & S. 47. *Distd.* *Idle v. Royal Exchange Assce.* (1819), 8 Taunt. 755. *Consd.* *Hudson v. Harrison* (1821), 6 Moore, C. P. 288. *Distd.* *Dixon v. Reid* (1822), 5 B. & Ald. 597. *Consd.* *Roux v. Salvador* (1836), 3 Bing. N. C. 266; *British & Foreign Marine Insce. v. Sanday*, [1916] 1 A. C. 650; *Moore v. Evans*, [1917] 1 K. B. 458. *Refd.* *Naylor v. Taylor* (1829), 9 B. & C. 718; *Navone v. Haddon* (1850), 9 C. B. 30; *Royal Exchange Assce. v. M'Swiny* (1850), 16 L. T. O. S. 22; *Great Indian Peninsula Ry. v. Saunders* (1862), 2 B. & S. 266; *Rodocanachi v. Elliott* (1874), L. R. 9 C. P. 518.

**2236. ——— Detention by peril insured against—Outbreak of war—Effect of Marine Insurance Act,**

**1906 (c. 41).]**—Two British vessels laden with merchandise belonging to British merchants for sale in Germany were on a voyage from the Argentine to Hamburg when war broke out between the United Kingdom & Germany & the further prosecution of the voyage became illegal. The cargo owners had insured the goods on both vessels by identical voyage policies in the ordinary form, & the perils insured against included restraints of princes. Shortly after the outbreak of the war the vessels were directed, in one case by a French cruiser & in the other case by the shipowners at the suggestion of the Admiralty, to proceed to British ports, which they did. The cargo owners warehoused their goods & gave notice of abandonment to their underwriters claiming a constructive total loss:—*Held*: (1) the rule that, where goods are insured by a marine policy at & from the port of loading to the port of destination, the frustration of the voyage by detention of the goods for an indefinite time by a peril insured against entitles the owner, on giving notice of abandonment, to recover as from a constructive total loss has not been altered by above Act, & still prevails; (2) the loss was directly caused by His Majesty's declaration of war, which was a restraint of princes within the meaning of the policies; therefore, there was a constructive total loss of the goods on both ships by a peril insured against, & the cargo owners were entitled to recover.—*BRITISH & FOREIGN MARINE INSURANCE CO., LTD. v. SANDAY (SAMUEL) & CO.*, [1916] 1 A. C. 650; 85 L. J. K. B. 550; 114 L. T. 521; 32 T. L. R. 266; 60 Sol. Jo. 253; 13 Asp. M. L. C. 289; 21 Com. Cas. 154, II. L.; *affg.* *S. C. sub nom. SANDAY & Co. v. BRITISH & FOREIGN MARINE INSURANCE CO.*, [1915] 2 K. B. 781, C. A.

*Annotations*:—*As to* (1) *Refd.* *Wilson Bobbin Co. v. Green*, [1917] 1 K. B. 860. *As to* (2) *Distd.* *Becker, Gray v. London Assce. Corp.*, [1918] A. C. 101. *Foll.* *Fooks v. Smith*, [1924] 2 K. B. 508. *Refd.* *Russian Bank for Foreign Trade v. Excess Insce.*, [1918] 2 K. B. 123. *Generally, Refd.* *Associated Oil Carriers v. Union Insce. Soc. of Canton*, [1917] 2 K. B. 184. *Mentd.* *Mitsui v. Watts, Watts*, [1916] 2 K. B. 826; *F. A. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 1 K. B. 485; *Furness, Withy v. Rederiaktieselskabet Banco*, [1917] 2 K. B. 873; *Ertel Bieber v. Rio Tinto Co., Dynamit Act. v. Same, Vereinigte Königs & Laurahütte Act. v. Same*, [1918] A. C. 260.

**2237. ——— Obstruction of voyage by belligerent—Where not unlikely that goods would reach destination.]—***WILSON BROTHERS BOBBIN CO., LTD. v. GREEN*, No. 1921, *ante*.

**2238. ——— Fear of capture by enemy—Whether within perils insured against.]—***BECKER, GRAY & CO. v. LONDON ASSURANCE CORPN.*, No. 1675, *ante*.

**2239. ——— Imminent outbreak of war.]—**Where by a peril insured against there is a constructive total loss & no notice of abandonment is given, then, if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss, the underwriter is liable in respect of the total loss.

Goods on an Austrian ship bound to Bourgas were insured (*inter alia*) against loss by restraint of princes. In view of the imminent outbreak of war the Austrian Govt. issued general instructions to Austrian shipowners to put their ships in safety, & accordingly the above ship, by order of the owners, put into Trieste, & did not complete her voyage, the above goods being landed there

make it worth while to send them on to their port of destination:—*Held*: a claim for constructive total loss was maintainable.—*LATHAM v. HURRUCK-CHAND SOORATRAM* (1878), 1 L. R. 4

Bom. 314.—IND.

PART II. SECT. 23, SUB-SECT. 4.—  
B. (b) ii.

2234 i. Ship unable to proceed—Im-

possibility of forwarding cargo.]—*EAS INDIAN RY. CO. v. AUSTRALASIAN INSURANCE CO.* (1871), 6 B. L. R. 218; 7 B. L. R. 347.—IND.



No notice of abandonment was given. About a year later the Austrian Govt. requisitioned the goods & sold them, this being held to be an actual total loss:—*Held*: (1) this was a constructive total loss caused by restraint of princes; (2) as the confiscation was not an event which in the ordinary sequence of events followed the restraint of princes the underwriter was not liable for the total loss.—*FOOKS v. SMITH*, [1924] 2 K. B. 508; 94 L. J. K. B. 23; 132 L. T. 486; 16 Asp. M. L. C. 435; 30 Com. Cas. 97.

**2240. — Voyage rendered impossible by act of enemy—Closing of Dardanelles—Effect of delay.]—**RUSSIAN BANK FOR FOREIGN TRADE *v.* EXCESS INSURANCE CO., No. 1750, *ante*.

**2241. Embargo on goods.]—**A policy of assurance on a ship & stores "at & from a port" in a foreign country, in the common form against arrests of princes, people, etc. extends to an embargo laid on by the Govt. of that country in the loading port, & if the embargo continue, the assured may abandon & recover as for a total loss.—*ROTCH v. EDIE* (1795), 6 Term Rep. 413; 101 E. R. 623.

*Annotations*:—*Refd.* *Touteng v. Hubbard* (1802), 3 Bos. & P. 291; *Rodocanachi v. Elliott* (1873), L. R. 8 C. P. 649; *Sanday v. British & Foreign Marine Insco.*, [1915] 2 K. B. 781.

**2242. — When act of foreign assured's own country.]—**A foreigner insuring in this country his ship or goods on a voyage is not entitled to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own govt. & makes such embargo his own voluntary act. Goods having been consigned by such foreigner on his own account & risk to British merchants here, who in consequence of such consignment made advances to the foreigner, & made insurance upon the goods on his account; debiting him with the premiums; & the goods were afterwards abandoned in consequence of such embargo:—*Held*: as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names, as interest might appear; however they might have insured their separate interests by a policy made on their own account.

In all questions arising between the subjects of different states, each is a party to the public authorisation acts of its own government; &, on that account, a foreign subject is as much incapacitated from making the consequences of an act of state the foundation of a claim to indemnity upon a British subject in a British ct. of justice, as he would be if such act had been done immediately & individually by such foreign subject himself (*LORD ELLENBOROUGH, C.J.*).—*CONWAY v. GRAY* (1809), 10 East, 536; 103 E. R. 879.

*Annotations*:—*Folld.* *Mennett v. Bonham* (1812), 15 East, 477. *Distd.* *Simeon v. Bazett* (1813), 2 M. & S. 94; *Flindt v. Scott* (1814), 5 Taunt. 674; *Camelo v. Britten* (1820), 4 B. & Ald. 184. *Dbtd.* *Aubert v. Gray* (1862), 3 B. & S. 169. *Consd.* *Janson v. Drefontein Consolidated Mines*, [1902] A. C. 484. *Refd.* *Usparicha v. Noble* (1811), 13 East, 332.

**2243. S. P. CONWAY v. FORBES** (1809), 10 East, 539; 103 E. R. 880.

*Annotations*:—*Distd.* *Simeon v. Bazett* (1813), 2 M. & S. 94. *Dbtd.* *Aubert v. Gray* (1861), 3 B. & S. 163.

**2244. S. P. MAURY v. SHEDDEN** (1809), 10 East, 540; 103 E. R. 881.

*Annotations*:—*Distd.* *Schnakoneg v. Andrews* (1814), 5 Taunt. 716. *Dbtd.* *Aubert v. Gray* (1861), 3 B. & S. 163.

**2245. Prohibition on landing cargo—Slaughter of cattle.]—**Pltf., having shipped goods on an adventure to St. P., on board a vessel chartered

for the purpose, made insurance on ship & goods in the common printed form, in blank; & by a written memorandum in the policy "the underwriters agreed to pay a total loss in case the ship *Ann* should not be allowed by the Russian Govt. to discharge her cargo at St. P., on which voyage the vessel had then sailed chartered by pltf." :—*Held*: the insured were entitled to recover upon this policy on an allegation that the vessel on her arrival at St. P. was not allowed by the Russian Govt. to discharge her cargo, but was obliged to return back with it by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, & the premiums of insurance, etc.—*PULLER v. GLOVER* (1810), 12 East, 124; 104 E. R. 49.

**2246. — — — Though landing not impossible.]—**Cattle were insured on a voyage from Liverpool to Buenos Ayres against the usual marine risks, including restraints of princes & people, & also against all risks of mortality & injury from any cause whatever. On arrival at Buenos Ayres the cattle were not allowed to be landed by order of the Argentine Govt. on account of certain other cattle on board suffering from cattle disease. The cattle insured were taken to sea & slaughtered, & in doing so the assured acted as a prudent uninsured owner would have done. No notice of abandonment was given to the underwriters:—*Held*: as in the circumstances it was not impossible that the difficulty of landing the cattle might have been got over, the loss was not an absolute one, but was a constructive total loss, & the underwriters were not liable for the loss in the absence of a notice of abandonment.—*MANSELL & CO. v. HOADE* (1903), 20 T. L. R. 150.

*Annotation*:—*Refd.* *Sanday v. British & Foreign Marine Insco.*, [1915] 2 K. B. 781.

### iii. Deprivation of Possession.

**2247. Capture & recapture of ship—Followed by sale of cargo—For benefit of employers.]—**A ship & goods being insured for a voyage, if the ship is taken & recaptured, & on the recapture the captain acting fairly for the benefit of his employers, sells the ship & cargo, & thereby puts an end to the voyage, the insured shall recover as for a total loss.—*MILLES v. FLETCHER* (1779), 1 Doug. K. B. 231; 99 E. R. 151.

*Annotations*:—*Consd.* *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388. *Apld.* *Idle v. Royal Exchange Assee.* (1819), 3 Moore, C. P. 115. *Consd.* *Read v. Bonham* (1821), 3 Brod. & Bing. 147. *Refd.* *Plantamour v. Staples* (1781), 3 Doug. K. B. 1; *Reid v. Darby* (1808), 10 East, 143; *Young v. Turing* (1841), 2 Man. & G. 593. *Mentd.* *Blairmore Sailing Ship Co. v. Macredie*, [1898] A. C. 593.

**2248. — — — ]—**COLOGAN *v.* LONDON ASSURANCE CO., No. 2058, *ante*.

**2249. — — — Sale to pay salvage.]—***Held*: the underwriters on goods insured from London to Demerara were only liable for an average loss where the ship being captured & recaptured was sent into St. Thomas's stripped of all her hands, & the captain not being able on his arrival there to procure a fresh crew, or to raise money to pay the salvage, immediately sold the ship & cargo, & broke up the adventure.—*UNDERWOOD v. ROBERTSON* (1815), 4 Camp. 138, N. P.

**2250. — — — Sale by order of foreign court.]—**—*STRINGER v. ENGLISH & SCOTTISH MARINE INSURANCE CO.*, No. 2067, *ante*.

**2251. — — — Cargo damaged by delay.]—***M'ANDREWS v. VAUGHAN* (1793), 1 Park on Marine Insurances, 8th ed. p. 252.

*Annotations*:—*Refd.* *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388; *Anderson v. Royal Exchange Assee.* (1805), 3 Smith, K. B. 48.

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taken out of her in craft, & carried to the consignees at L. & sold, & produced upon the whole little more than sufficient to pay freight & salvage, but the rice did not produce sufficient to pay the freight:—*Held*: this was a case of particular average only, & therefore as to the rice the underwriter was exempted by the warranty.—*GLENNIE v. LONDON ASSURANCE CO.* (1814), 2 M. & S. 371; 105 E. R. 420.

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*Annotations*:—*Consd.* *Hunt v. Royal Exchange Assce.* (1816), 5 M. & S. 47; *Roux v. Salvador* (1836), 3 Bing. N. C. 266. *Mentd.* *Barr v. Gibson* (1837), 3 M. & W. 390.

**2230. Goods capable of being reconditioned—For less than value.]**—*ROSETTO v. GURNEY*, No. 2225, *ante*.

**2231. ———.]**—*FARNWORTH v. HYDE*, No. 2132, *ante*.

**2232. Part of goods marketable.]**—*THE CUREEM BUX, LECOTT v. GURNEY* (1858), 7 L. T. 286.

## ii. Frustration of Adventure.

**2233. Ship unable to proceed—Impossibility of forwarding part of goods.]**—*MANNING v. NEWNHAM*, No. 2199, *ante*.

**2234. ——— Impossibility of forwarding cargo.]**—*WILSON v. ROYAL EXCHANGE ASSURANCE CO.*, No. 2219, *ante*.

**2235. ——— Goods partially damaged—Imperishable goods.]**—Where goods were insured "at & from London to Quebec, warranted free of particular average" & the ship was driven back from the banks of Newfoundland & obliged to put into Kinsale, where it was impossible to repair her so as to enable her to complete the voyage the same season, & the goods, which though not of a perishable nature were to a certain degree damaged, could not be forwarded the same season by any other conveyance:—*Held*: the assured could not by giving notice of abandonment come upon the underwriters for a total loss.—*ANDERSON v. WALLIS* (1813), 2 M. & S. 240; 3 Camp. 440; 105 E. R. 372.

*Annotations*:—*Apld.* *Everth v. Smith* (1814), 2 M. & S. 278. *Consd.* *Falkner v. Ritchie* (1814), 2 M. & S. 290. *Foll.* *Hunt v. Royal Exchange Assce.* (1816), 5 M. & S. 47. *Dist.* *Idle v. Royal Exchange Assce.* (1819), 8 Taunt. 755. *Consd.* *Hudson v. Harrison* (1821), 6 Moore, C. P. 288. *Dist.* *Dixon v. Reid* (1822), 5 B. & Ald. 597. *Consd.* *Roux v. Salvador* (1836), 3 Bing. N. C. 266; *British & Foreign Marine Insce. v. Sanday*, [1916] 1 A. C. 650; *Moore v. Evans*, [1917] 1 K. B. 458. *Refd.* *Naylor v. Taylor* (1829), 9 B. & C. 718; *Navone v. Haddon* (1850), 9 C. B. 30; *Royal Exchange Assce. v. M'Swiny* (1850), 16 L. T. O. S. 22; *Great Indian Peninsula Ry. v. Saunders* (1862), 2 B. & S. 266; *Rodocanachi v. Elliott* (1874), L. R. 9 C. P. 518.

**2236. ——— Detention by peril insured against—Outbreak of war—Effect of Marine Insurance Act,**

**1906 (c. 41).]**—Two British vessels laden with merchandise belonging to British merchants for sale in Germany were on a voyage from the Argentine to Hamburg when war broke out between the United Kingdom & Germany & the further prosecution of the voyage became illegal. The cargo owners had insured the goods on both vessels by identical voyage policies in the ordinary form, & the perils insured against included restraints of princes. Shortly after the outbreak of the war the vessels were directed, in one case by a French cruiser & in the other case by the shipowners at the suggestion of the Admiralty, to proceed to British ports, which they did. The cargo owners warehoused their goods & gave notice of abandonment to their underwriters claiming a constructive total loss:—*Held*: (1) the rule that, where goods are insured by a marine policy at & from the port of loading to the port of destination, the frustration of the voyage by detention of the goods for an indefinite time by a peril insured against entitles the owner, on giving notice of abandonment, to recover as from a constructive total loss has not been altered by above Act, & still prevails; (2) the loss was directly caused by His Majesty's declaration of war, which was a restraint of princes within the meaning of the policies; therefore, there was a constructive total loss of the goods on both ships by a peril insured against, & the cargo owners were entitled to recover.—*BRITISH & FOREIGN MARINE INSURANCE CO., LTD. v. SANDAY (SAMUEL) & CO.*, [1916] 1 A. C. 650; 85 L. J. K. B. 550; 114 L. T. 521; 32 T. L. R. 266; 60 Sol. Jo. 253; 13 Asp. M. L. C. 289; 21 Com. Cas. 154, H. L.; *affg. S. C. sub nom. SANDAY & Co. v. BRITISH & FOREIGN MARINE INSURANCE CO.*, [1915] 2 K. B. 781, C. A.

*Annotations*:—*As to* (1) *Refd.* *Wilson Bobbin Co. v. Green*, [1917] 1 K. B. 860. *As to* (2) *Dist.* *Becker, Gray v. London Assce. Corp.*, [1918] A. C. 101. *Foll.* *Fooks v. Smith*, [1924] 2 K. B. 508. *Refd.* *Russian Bank for Foreign Trade v. Excess Insce.*, [1918] 2 K. B. 123. *Generally, Refd.* *Associated Oil Carriers v. Union Insce. Soc. of Canton*, [1917] 2 K. B. 184. *Mentd.* *Mitsui v. Watts*, [1916] 2 K. B. 826; *F. A. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 1 K. B. 485; *Furness, Withy v. Rederiaktieselskabet Banco*, [1917] 2 K. B. 873; *Ertel Bleber v. Rio Tinto Co.*, *Dynamit Act. v. Same*, *Vereinigte Königs & Laurahütte Act. v. Same*, [1918] A. C. 260.

**2237. ——— Obstruction of voyage by belligerent—Where not unlikely that goods would reach destination.]**—*WILSON BROTHERS BOBBIN CO., LTD. v. GREEN*, No. 1921, *ante*.

**2238. ——— Fear of capture by enemy—Whether within perils insured against.]**—*BECKER, GRAY & CO. v. LONDON ASSURANCE CORPN.*, No. 1675, *ante*.

**2239. ——— Imminent outbreak of war.]**—Where by a peril insured against there is a constructive total loss & no notice of abandonment is given, then, if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss, the underwriter is liable in respect of the total loss.

Goods on an Austrian ship bound to Bourgas were insured (*inter alia*) against loss by restraint of princes. In view of the imminent outbreak of war the Austrian Govt. issued general instructions to Austrian shipowners to put their ships in safety, & accordingly the above ship, by order of the owners, put into Trieste, & did not complete her voyage, the above goods being landed there.

make it worth while to send them on to their port of destination:—*Held*: a claim for constructive total loss was maintainable.—*LATHAM v. HURRUCK-CHAND SOORATRAM* (1878), 1 L. R. 4

Bom. 314.—IND.

PART II. SECT. 23, SUB-SECT. 4.—B. (b) ii.

2234 i. Ship unable to proceed—Im-

possibility of forwarding cargo.]—*EAST INDIAN RY. CO. v. AUSTRALASIAN INSURANCE CO.* (1871), 6 B. L. R. 218; 7 B. L. R. 347.—IND.



No notice of abandonment was given. About a year later the Austrian Govt. requisitioned the goods & sold them, this being held to be an actual total loss:—*Held*: (1) this was a constructive total loss caused by restraint of princes; (2) as the confiscation was not an event which in the ordinary sequence of events followed the restraint of princes the underwriter was not liable for the total loss.—*FOOKS v. SMITH*, [1924] 2 K. B. 508; 94 L. J. K. B. 23; 132 L. T. 486; 16 Asp. M. L. C. 435; 30 Com. Cas. 97.

**2240. — Voyage rendered impossible by act of enemy—Closing of Dardanelles—Effect of delay.]—RUSSIAN BANK FOR FOREIGN TRADE v. EXCESS INSURANCE CO.**, No. 1750, *ante*.

**2241. Embargo on goods.]—A policy of assurance on a ship & stores "at & from a port" in a foreign country, in the common form against arrests of princes, people, etc. extends to an embargo laid on by the Govt. of that country in the loading port, & if the embargo continue, the assured may abandon & recover as for a total loss.**—*ROTCH v. EDIE* (1795), 6 Term Rep. 413; 101 E. R. 623.

*Annotations*:—*Reid*. *Toutong v. Hubbard* (1802), 3 Bos. & P. 291; *Rodocanachi v. Elliott* (1873), L. R. 8 C. P. 649; *Sanday v. British & Foreign Marine Insce.*, [1915] 2 K. B. 781.

**2242. — When act of foreign assured's own country.]—A foreigner insuring in this country his ship or goods on a voyage is not entitled to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own govt. & makes such embargo his own voluntary act. Goods having been consigned by such foreigner on his own account & risk to British merchants here, who in consequence of such consignment made advances to the foreigner, & made insurance upon the goods on his account; debiting him with the premiums; & the goods were afterwards abandoned in consequence of such embargo:—*Held*: as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names, as interest might appear; however they might have insured their separate interests by a policy made on their own account.**

In all questions arising between the subjects of different states, each is a party to the public authorisation acts of its own government; & on that account, a foreign subject is as much incapacitated from making the consequences of an act of state the foundation of a claim to indemnity upon a British subject in a British ct. of justice, as he would be if such act had been done immediately & individually by such foreign subject himself (*LORD ELLENBOROUGH*, C.J.).—*CONWAY v. GRAY* (1809), 10 East, 536; 103 E. R. 879.

*Annotations*:—*Folld*. *Monnett v. Bonham* (1812), 15 East, 477. *Distd*. *Simeon v. Bazett* (1813), 2 M. & S. 94; *Flindt v. Scott* (1814), 5 Taunt. 674; *Camelo v. Britten* (1820), 4 B. & Ald. 184. *Dbtd*. *Aubert v. Gray* (1862), 3 B. & S. 169. *Consd*. *Janson v. Drefontein Consolidated Mines*, [1902] A. C. 484. *Reid*. *Usparicha v. Noble* (1811), 13 East, 332.

**2243. S. P. CONWAY v. FORBES** (1809), 10 East, 539; 103 E. R. 880.

*Annotations*:—*Distd*. *Simeon v. Bazett* (1813), 2 M. & S. 94. *Dbtd*. *Aubert v. Gray* (1861), 3 B. & S. 163.

**2244. S. P. MAURY v. SHEDDEN** (1809), 10 East, 540; 103 E. R. 881.

*Annotations*:—*Distd*. *Schnakoneg v. Andrews* (1814), 5 Taunt. 716. *Dbtd*. *Aubert v. Gray* (1861), 3 B. & S. 163.

**2245. Prohibition on landing cargo—Slaughter of cattle.]—Pltf., having shipped goods on an adventure to St. P., on board a vessel chartered**

for the purpose, made insurance on ship & goods in the common printed form, in blank; & by a written memorandum in the policy "the underwriters agreed to pay a total loss in case the ship *Ann* should not be allowed by the Russian Govt. to discharge her cargo at St. P., on which voyage the vessel had then sailed chartered by pltf." :—*Held*: the insured were entitled to recover upon this policy on an allegation that the vessel on her arrival at St. P. was not allowed by the Russian Govt. to discharge her cargo, but was obliged to return back with it by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, & the premiums of insurance, etc.—*PULLER v. GLOVER* (1810), 12 East, 124; 104 E. R. 49.

**2246. — Though landing not impossible.]—Cattle were insured on a voyage from Liverpool to Buenos Ayres against the usual marine risks, including restraints of princes & people, & also against all risks of mortality & injury from any cause whatever. On arrival at Buenos Ayres the cattle were not allowed to be landed by order of the Argentine Govt. on account of certain other cattle on board suffering from cattle disease. The cattle insured were taken to sea & slaughtered, & in doing so the assured acted as a prudent uninsured owner would have done. No notice of abandonment was given to the underwriters:—*Held*: as in the circumstances it was not impossible that the difficulty of landing the cattle might have been got over, the loss was not an absolute one, but was a constructive total loss, & the underwriters were not liable for the loss in the absence of a notice of abandonment.**—*MANSELL & CO. v. HOADE* (1903), 20 T. L. R. 150.

*Annotation*:—*Reid*. *Sanday v. British & Foreign Marine Insce.*, [1915] 2 K. B. 781.

### iii. Deprivation of Possession.

**2247. Capture & recapture of ship—Followed by sale of cargo—For benefit of employers.]—A ship & goods being insured for a voyage, if the ship is taken & recaptured, & on the recapture the captain acting fairly for the benefit of his employers, sells the ship & cargo, & thereby puts an end to the voyage, the insured shall recover as for a total loss.**—*MILLES v. FLETCHER* (1779), 1 Doug. K. B. 231; 99 E. R. 151.

*Annotations*:—*Consd*. *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388. *Apld*. *Idle v. Royal Exchange Assee.* (1819), 3 Moore, C. P. 115. *Consd*. *Read v. Bonham* (1821), 3 Brod. & Bing. 147. *Reid*. *Plantamour v. Staples* (1781), 3 Doug. K. B. 1; *Reid v. Darby* (1808), 10 East, 143; *Young v. Turing* (1841), 2 Man. & G. 593. *Mentd*. *Blairmore Sailing Ship Co. v. Macredie*, [1898] A. C. 593.

**2248. — — —.]—COLOGAN v. LONDON ASSURANCE CO.**, No. 2058, *ante*.

**2249. — — — Sale to pay salvage.]—*Held*: the underwriters on goods insured from London to Demerara were only liable for an average loss where the ship being captured & recaptured was sent into St. Thomas's stripped of all her hands, & the captain not being able on his arrival there to procure a fresh crew, or to raise money to pay the salvage, immediately sold the ship & cargo, & broke up the adventure.**—*UNDERWOOD v. ROBERTSON* (1815), 4 Camp. 138, N. P.

**2250. — — — Sale by order of foreign court.]—STRINGER v. ENGLISH & SCOTTISH MARINE INSURANCE CO.**, No. 2067, *ante*.

**2251. — — — Cargo damaged by delay.]—M'ANDREWS v. VAUGHAN** (1793), 1 Park on Marine Insurances, 8th ed. p. 252.

*Annotations*:—*Reid*. *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388; *Anderson v. Royal Exchange Assee.* (1805), 3 Smith, K. B. 48.



*Sect. 23.—Total loss: Sub-sect. 4, B. (b) iii., & C. (a) & (b).]*

**2252. — Where abandonment before news of rescue.]—**NAYLOR *v.* TAYLOR, No. 2151, *ante*.

**2253. Goods passed into hands of strangers—Without possibility of recovery.]—**ROUX *v.* SALVADOR, No. 2129, *ante*.

**2254. Sale by order of foreign court—To repay advances incurred by master.]—**(1) The expenses which may be recovered by the assured under the suing & labouring clause in a policy of insurance free of particular average, are confined to the expenses which are necessary to avert a total loss, for which the insurer would be liable.

(2) A sale of the subject-matter of insurance ordered by a foreign tribunal within whose jurisdiction it has been originally thrown by perils insured against does not amount to a constructive total loss, where the sale is not due to perils insured against, such perils having ceased to operate but is made for the purpose of repaying advances incurred through the captain's breach of duty in not transshipping the subject-matter of insurance to its destination.

A cargo of rye, shipped on an Austrian ship for carriage from Enos, a Turkish port, to Schiedam, was insured by a policy warranted free of particular average. The ship meeting with stormy weather a portion of the cargo was damaged, & the ship had to put into the port of La Rochelle. Proceedings were taken at the instance of the captain in the Tribunal of Commerce at that port, & in consequence the cargo was landed & warehoused. It was necessary to sell a portion of the cargo immediately, which was accordingly done. On Feb. 21 the ct. on the petition of the captain, ordered a sale of the residue, & notice of abandonment was given to defts. as insurers on the ground that, in the opinion of the experts or surveyors the rye could not be forwarded to its destination. This notice defts. refused to accept, & on Mar. 5, defts., as insurers, summoned the captain before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye. The ct. accordingly ordered the residue of the rye to be surveyed & the surveyors reported that it could be re-shipped & conveyed to its destination. This report was confirmed by the ct., & notice of it given to the assured, together with notice that any course pursued with the cargo would be for their account, & on their responsibility. The rye, however, was not forwarded & remained until Dec. warehoused at La Rochelle, although the captain might have procured a ship to carry it on. The captain having in the meantime procured advances to meet the expenses caused by the interruption of the voyage, was summoned by the parties who had made the advances, before the Tribunal of Commerce; & on Sept. 14 the ct. decreed a sale of the ship, & a statement of general & particular average of the ship & cargo to be drawn up which was accordingly done. On Dec. 21, the Tribunal of Commerce decreed the sale of the rest of the cargo on the ground that the weather was unfavourable for its preservation. On Jan. 25 the Tribunal of Commerce decreed that the full amount of the freight due upon the whole voyage was chargeable upon the proceeds of such sale; & an amended average statement, which proceeded on this footing was confirmed by the ct. If the proportion of freight so payable was to be added to the extra

expenses incurred in respect of the residue of the cargo so sold, by reason of the interruption of the voyage, including the extra freight in respect of forwarding to the port of destination, the amount would exceed the value of the rye at the port of destination. It was admitted that neither the law of France nor Austria was in accordance with the decree of Jan. 25, & if the proper proportion of freight had been charged to the residue of cargo sold, the value at the port of destination would have exceeded the expenses:—*Held*: there was no constructive total loss of the cargo; inasmuch as the decree for the sale of the residue of the cargo was not due to the perils insured against, but was made for the purpose of paying advances incurred through the captain's breach of duty in not forwarding such rye to its destination; & the insurers were not concluded by the judgment of the French Ct. from denying that there was not total loss because it was admitted that such judgment was erroneous according to the law which it professed to administer.—MEYER *v.* RALLI (1876), 1 C. P. D. 358; 45 L. J. Q. B. 741; 35 L. T. 838; 24 W. R. 963; 3 Asp. M. L. C. 324.

**2255. Detention in besieged town.] —**RODOCONACHI *v.* ELLIOTT, No. 1747, *ante*.

### C. Of Freight.

#### (a) Necessity for Notice of Abandonment.

See Sect. 24, sub-sect. 1, D., *post*.

#### (b) What amounts to Constructive Total Loss.

See Marine Insurance Act, 1906 (c. 41), s. 60.

**2256. Constructive total loss of ship—Impossibility to forward cargo.]—**MANNING *v.* NEWNHAM, No. 2199, *ante*.

**2257. —.]—**WILSON *v.* ROYAL EXCHANGE ASSURANCE CO., No. 2219, *ante*.

**2258. — Cargo forwarded at higher freight.]—**DE CUADRA *v.* SWANN, No. 2086, *ante*.

**2259. —.]—**It is a principal of insurance law that no abandonment is necessary where there is nothing which, on abandonment, can pass to or be of value to the underwriters. Where, therefore, there was a policy on ship, & also on charterparty freight, i.e. freight to be earned by the carriage homeward of a cargo chartered to be put on board at a distant port, & the ship was so injured on the outward voyage that the shipowner abandoned to the underwriter on ship, there was nothing to pass to the underwriter on charterparty freight, & consequently, there was no necessity for abandonment to him. The damage to the ship from perils of the sea during the voyage covered by the policy on ship, being such as to justify abandonment to the underwriter on ship before the cargo was put on board, the insured freight could not be earned, & there would therefore be a total loss on the policy on freight. A ship sailed on its outward voyage to New Zealand. More than a month afterwards the owners chartered it to M. to bring home a cargo from Calcutta. By this charterparty, after discharging at New Zealand, it was to sail to Calcutta, & being there "tight, staunch, & strong, & every way fitted for the voyage," the charterer bound himself to put on board a specified cargo for England at a stipulated freight. The owners then effected a policy, in the usual form, against perils of the sea, etc., upon the freight to be earned on this homeward voyage. The ship was seriously injured in the outward voyage; it

### PART II. SECT. 23, SUB-SECT. 4.—B. (b) III.

*Goods passed into hands of strangers—Without possibility of recovery.]—*DWARKADAS LAIUBHAI *v.* ADAM ALI SULTAN, 3 Bom. A. C. 1.—IND.

was repaired as well as the master, with insufficient funds, & at a place not capable of making full examination & effecting complete repairs, could get it repaired; & with the ship thus partially repaired he sailed from the place where the ship then was, & arrived at Calcutta, where the fullest examination & the completest repairs could be had. He immediately tendered the ship to the agents of the charterers for the homeward cargo. They, on the ground that the charterer had become bkpt. refused to load a cargo. The master then had the ship fully examined, & it was found that the injuries on the outward voyage had been such that the complete repair of the ship, to render it fit for the voyage home, would exceed the value of the ship when repaired. & the amount of freight to be earned. The owners, on receiving this intelligence, abandoned:—*Held*: this was a loss of freight occasioned by the perils of the sea; no notice of abandonment to the underwriters on freight was necessary; if a notice of abandonment to the underwriters on freight had been necessary, the notice here would not, in the circumstances, have been too late.—*RANKIN v. POTTER* (1873), L. R. 8 H. L. 83; 42 L. J. C. P. 169; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. L. C. 65, H. L.; *affg. S. C. sub nom. POTTER v. RANKIN* (1870), L. R. 5 C. P. 341, Ex. Ch.

*Annotations*:—*Consd.* Jackson v. Union Marine Insee. (1874), L. R. 10 C. P. 125. *Distd.* Kaltenbach v. Mackenzie (1878), 3 C. P. D. 467. *Apld.* Trinder, Anderson v. Thames & Mersey Marine Insee., Trinder, Anderson v. North Queensland Insee., Trinder, Anderson v. Weston, Crocker, [1898] 2 Q. B. 114. *Distd.* Guthrie v. North China Insee., Guthrie & North China Insee. v. London Assee. Corpn. (1900), 17 T. L. R. 79; Carlsbrook S.S. Co. v. London & Provincial Marine & General Insee., [1902] 2 K. B. 681. *Consd.* Angol v. Merchants' Marine Insee., [1903] 1 K. B. 811; Macbeth v. Maritime Insee., [1908] A. C. 144. *Apld.* Mitsui v. Mumford, [1915] 2 K. B. 27; Roura & Forgas v. Townend, [1919] 1 K. B. 189. *Refd.* Beckett v. West of England Marine Insee. (1871), 25 L. T. 739; Hendricks v. Australasian Insee. (1874), 30 L. T. 419; Inman S.S. Co. v. Bischoff (1882), 7 App. Cas. 670; Wade v. South of England Marine Insee. Assocn. (1888), 5 T. L. R. 8; The Alps, [1893] P. 109; Ruys v. Royal Exchange Assee. Corpn., [1897] 2 Q. B. 135; Ward v. Weir (1899), 4 Com. Cas. 216; Polurrian S.S. Co. v. Young (1915), 112 L. T. 1053; Moore v. Evans, [1918] A. C. 185; Cohen v. Standard Marine Insee. (1925), 30 Com. Cas. 139. *Mentd.* Hudson v. Hill (1874), 43 L. J. C. P. 273.

**2260. — Cargo forwarded under salvage contract.]—**A ship was chartered for a voyage from Chittagong with a cargo of jute in bales for delivery at Dundee. The ship, cargo & chartered freight were insured. When about 50 miles from Dundee, the ship went ashore, & the master & the crew, in order to save their lives, abandoned her, but it was not proved that they at that time had no intention of returning. Notices of abandonment were given to underwriters on all three interests & were all refused in the first instance, but eventually the underwriters on ship & cargo paid a total loss. The underwriters on all three interests instructed the Salvage Assocn. independently to protect their interests, & the Assocn. entered into a salvage contract with a salvage co. A large quantity of the jute was salvaged, partly in bulk, & partly in bales, & was carried to Dundee, where it was sold on behalf of whom it might concern:—*Held*: (1) upon the facts there was nothing to show that the shipowners by any act or omission on their part prevented the transshipment of the goods & their delivery under the contract of affreightment, inasmuch as the cargo owners, by their underwriters dealt with the

cargo at a time when the shipowners, without fault of theirs, had not resumed possession or control of the cargo; (2) the adventure was determined, if not by the action of the cargo owners alone, at all events by the common action of all parties interested through their underwriters; (3) the jute having been carried to Dundee under the salvage contract & not under the charterparty the chartered freight had not been earned, & the underwriters on chartered freight were liable to pay a total loss without any deduction in respect of actual or possible salvage.—*GUTHRIE v. NORTH CHINA INSURANCE CO., LTD.* (1902), 18 T. L. R. 412; 7 Com. Cas. 130, O. A.; *affg. S. C. sub nom. GUTHRIE v. NORTH CHINA INSURANCE CO., LTD., GUTHRIE & NORTH CHINA INSURANCE CO., LTD. v. LONDON ASSURANCE CORPN.* (1900), 17 T. L. R. 79.

*Annotations*:—*Generally, Refd.* Barque Robert S. Besnard Co. v. Murton (1909), 101 L. T. 285; Newsum v. Bradley (1917), 33 T. L. R. 309.

**2261. — Freight subsequently earned.]—**Pltfs. being owners of a ship, insured the freight intended to be earned on a particular voyage with deft. & other underwriters. Owing to stress of weather, the ship became a constructive total loss, & on Jan. 20, 1906, notice of abandonment was given to deft. The notice contained the following footnote: "In the event of your declining to accept abandonment, it shall be understood that you agree to the assured being placed in the same position as if a writ had been issued this day for the amount of your policy." The notice of abandonment was not accepted, but deft. initialed the footnote. The ship was subsequently sold to the cargo owners who carried on the voyage, but the cost of repairs & towage necessary for earning the freight considerably exceeded the amount of freight receivable by them:—*Held*: the date on which the notice of abandonment was given must be taken as the date of writ, on which date there was a total loss of freight, & the fact that the freight was earned subsequently did not disentitle pltf. to recover.—*BARQUE ROBERT S. BESNARD CO., LTD. v. MURTON* (1909), 101 L. T. 285; 53 Sol. Jo. 717; 11 Asp. M. L. C. 299; 14 Com. Cas. 267.

**2262. Justifiable sale of ship—Ship repaired by purchaser.]—**An insurance was effected on the freight of a ship, & on the cargo from Quebec to London. The ship sailed from Quebec, & on her voyage sprung a leak, & in that state was run aground on a reef of rocks, & was in imminent danger of being carried away & destroyed. The captain, by the advice of a surveyor & of an agent for the owners, who was also a part owner himself, sold the vessel whilst in this dangerous situation. The ship was afterwards saved by the purchasers, & repaired, & brought a cargo to London. The jury found that, in effecting the sale, the master had acted fairly for the benefit of all concerned. In an action by the assured against the underwriters on freight for a total loss:—*Held*: the captain was justified in making such sale, & an abandonment of the freight was not necessary.—*IDLE v. ROYAL EXCHANGE ASSURANCE CO.* (1819), 8 Taunt. 755; 3 Moore, C. P. 115; 129 E. R. 577; *on appeal*, 3 Brod. & Bing. 151, n.

*Annotations*:—*Dbtd.* Cambridge v. Anderton (1824), 4 Dow. & Ry. K. B. 203. *Foll'd.* Mount v. Harrison (1827), 4 Bing. 388. *Apld.* Scottish Marine Insee. v. Turner (1853), 17 Jur. 631, n. *Dbtd.* Atlantic Mutual Insee. v. Huth (1880), 16 Ch. D. 474. *Refd.* Robertson v. Clarke (1824), 1 Bing. 445; Roux v. Salvador (1836), 3 Bing.

**PART II. SECT. 23, SUB-SECT. 4.—**  
C. (b).

**2262 1. Justifiable sale of ship—Ship repaired by purchaser.]—**Pltf.'s steamer

was disabled. At the request of the shippers, the cargo was returned to them. The ship was sold & repaired. Pltf. sued for the amount insured upon freight to be earned.

The ship could not have been repaired in time to have carried the cargo without material deterioration of the cargo:—*Held*: the venture having been made of no effect by a per



## INSURANCE.

**Sect. 23.—Total loss: Sub-sect. 4, C. (b), & D.**  
**Sect. 24: Sub-sect. 1, A., B., C. & D.]**

N. C. 266; *Alcock v. Royal Exchange Assce.* (1849), 13 Q. B. 292; *Knight v. Faith* (1850), 15 Q. B. 649; *Segredo* (otherwise *Eliza Cornish*) (1853), 1 Ecc. & Ad. 36; *Tronson v. Dent* (1853), 8 Moo. P. C. C. 419; *Cossmann v. West*, *Cossmann v. British America Assce.* (1887), 13 App. Cas. 160; *Wade v. South of England Marine Insce. Asscn.* (1888), 5 T. L. R. 8.

**2263.** ———.]—*HALL v. SECRETAN* (1839), 6 L. T. 836.

**2264. Damage to ship—Voyage in fact completed.]—***BENSON v. CHAPMAN*, No. 2094, *ante*.

**2265.** ——— **Cost of repairs exceeding value of freight—But not value of ship when repaired.]—***MOSS v. SMITH*, No. 2096, *ante*.

**2266. Retardation of adventure—Not preventing freight being earned.]—**Policy on freight, valued, at & from R. & any ports in the Baltic to any ports in the United Kingdom, & the ship was chartered to sail with a cargo from L. to some port in the Baltic not beyond R., & from thence to R., there to take in a homeward cargo, etc., & sailed from L. & arrived at R., where she was detained for five weeks & prevented from loading by order of the Govt., & the freighter never loaded her, & a few days after the detention ceased the frost set in, which detained her there till the spring, when she procured a freight from other persons, & returned with it to L., but the expenses of her detention exceeded such freight:—*Held*: the policy had attached at the time of the detention, but, freight having been afterwards earned, the underwriter was not liable.

It appears to me that the mere retardation of the adventure, & the consequent inconvenience & expense arising from it are not a substantive cause of loss where this particular thing insured has not received damage (*LORD ELLENBOROUGH, C.J.*).—*EVERTH v. SMITH* (1814), 2 M. & S. 278; 105 E. R. 385.

*Annotations*:—*Appld.* *Moss v. Smith* (1850), 19 L. J. C. P. 225; *The Main*, [1894] P. 320; *Scottish Shire Line v. London & Provincial Marine & General Insce.*, [1912] 3 K. B. 51. *Refd.* *Falkner v. Ritchie* (1814), 2 M. & S. 290; *Royal Exchange Assce. v. M'Swiney* (1850), 16 L. T. O. S. 22; *Scottish Marine Insce. v. Turner* (1853), 21 L. T. O. S. 10; *Great Indian Peninsula Ry. v. Saunders* (1862), 2 B. & S. 266; *Barber v. Fleming* (1869), L. R. 5 Q. B. 59; *Inman S.S. Co. v. Bischoff* (1882), 7 App. Cas. 670; *Associated Oil Carriers v. Union Insce. Soc. of Canton*, [1917] 2 K. B. 184; *Moore v. Evans*, [1917] 1 K. B. 458.

**2267. Damage to cargo—Where cost of restoration more than value.]—***MICHAEL v. GILLESPIE*, No. 785, *ante*.

**2268. Loss of ship—Goods forwarded at less freight.]—***KIDSTON v. EMPIRE MARINE INSURANCE CO.*, No. 1898, *ante*.

**2269. Part of cargo only loaded—Special clause in policy—Vessel compelled to leave by ice.]—***Pltfs.* had chartered the *Gladys Royle* to load a cargo at Taganrog at a certain rate of freight, & were in a position to make a profit by the shipment of cargo by other shippers at higher rates of freight. *Pltfs.* effected with *defts.* a policy for £150 "on difference of freight by the *Gladys Royle*, to pay a total loss in the event of the steamer being unable to fulfil her charter by non-arrival or inability to load by Nov. 20 from any cause whatever." On Nov. 20 the *Gladys Royle* had loaded half her cargo, & on Nov. 24 she was compelled by ice to leave with only four-fifths of her cargo on board:—*Held*: *defts.* were not liable for a

total loss.—*SMITH & SCARAMANGA v. FENNING* (1898), 14 T. L. R. 222; 3 Com. Cas. 75.

**2270. Loss of venture—Insurance of profit on charter—Capture & restoration of ship.]—***ROURA & FORGAS v. TOWNEND*, No. 2214, *ante*.

### D. Insurance on Bottomry.

**2271. Doctrine not applicable.]—**An assured on bottomry cannot recover against the underwriter unless there has been an actual total loss of the ship: for if the ship exist in specie, in the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry bond.—*THOMSON v. ROYAL EXCHANGE ASSURANCE CO.* (1813), 1 M. & S. 30; 105 E. R. 11.

*Annotations*:—*Fold.* *Broomfield v. Southern Insce.* (1870), L. R. 5 Exch. 192. *Refd.* *The Elephanta* (1851), 18 L. T. O. S. 248; *Stephens v. Broomfield, Re The Great Pacific* (1869), L. R. 2 P. C. 516. *Mentd.* *Barr v. Gibson* (1838), 3 M. & W. 390; *The Catharina* (formerly *Croxdale*) (1851), 17 L. T. O. S. 43.

**2272.** ———.]—The condition of a bottomry bond provided that the obligation should be void if the obligators should pay, "in case of loss of the ship or vessel such an average as by custom should have become due on the salvage or if on the said voyage the said ship or vessel should be utterly lost, cast away, or destroyed, in consequence of the perils of the seas, etc." The vessel during her voyage was obliged to put into port in a damaged state, & was there sold for a sum less than the amount of the bond, under circumstances, which it was admitted would, as between assurers & assured, have constituted a constructive total loss. In an action by the bondholders against the underwriters on a policy of insurance on the bond:—*Held*: upon the true construction of the condition, the loss was not a "loss" within the meaning of the condition so as to discharge the obligor, & the holders of the bond were not entitled to sue the underwriters on the policy, the doctrine of constructive total loss not being applicable to a policy of insurance on bottomry.—*BROOMFIELD v. SOUTHERN INSURANCE CO.* (1870), L. R. 5 Exch. 192; 39 L. J. Ex. 186; 22 L. T. 371; 18 W. R. 810; 3 Mar. L. C. 3

## SECT. 24.—NOTICE OF ABANDONMENT.

### SUB-SECT. 1.—NECESSITY FOR.

#### A. In General.

*See* Marine Insurance Act, 1906 (c. 41), s. 62.

**2273. Reason for rule.]—**Where the assured receives full & reliable information that the subject-matter of the insurance is in imminent danger of becoming a total loss, he is bound, in order to enable him to recover as for a constructive total loss, immediately to give notice of abandonment to the underwriter, & his omission to do so will not be excused because afterwards the subject-matter of the insurance is justifiably sold.

*Pltfs.* received on Feb. 7 at Singapore reports of the nature of certain damage sustained by one of their vessels, from which they made up their minds to treat the loss as a constructive loss. The vessel was sold on Feb. 23. The reports were forwarded to a co-owner at Zurich on Feb. 27, &

insured against, there was a constructive total loss of the freight.—*MUSGRAVE v. MANNHEIM INSURANCE CO.* (1899), 32 N. S. R. (20 R. & G.) 405.—*CAN.*

**PART II. SECT. 24, SUB-SECT. 1.—A.**  
**g. Absolute necessity must be proved.]**  
*—SMITH v. DREEVER* (1823), 2 Sh. (Ct. of Sess.) 494.—*SCOT.*

*r. Circumstances in which notice given.]—Held*: there was no ground for saying there was either a total or constructive total loss, or that there ought to have been a loss of the



it was assumed at the trial that these reports reached the underwriters on Mar. 11; in addition to the regular mails there was telegraphic communication between Singapore & Europe:—*Held*: plffs. were not excused from giving notice of abandonment, & no proper notice had been given within a reasonable time.

The general rule is that he, the assured, must, as soon as he has the information which enables him to make his election, give notice to the underwriters that he has so elected. That rule is founded upon two grounds, when the assured has once elected to treat the loss as a total loss, the underwriters can insist upon his abiding by the election, so as to enable them to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice, which is entirely different from abandonment, is that he may tell the underwriters at once what he has done, & not keep it secret in his mind, to see if there will be a change of circumstances. There is another reason: the thing in various ways may be profitably dealt with, as the ship was in this case. Therefore, the second reason for requiring notice of abandonment to be given to the underwriters is, that they may do, if they think fit, what in their opinion is best, & make the most they can out of that which is abandoned to them as the consequence of the election which the assured has come to (COTTON, L.J.).—*KALTENBACH v. MACKENZIE* (1878), 3 C. P. D. 467; 48 L. J. Q. B. 9; 39 L. T. 215; 26 W. R. 844; 4 Asp. M. L. C. 39, C. A.

*Annotations*:—*Distd.* Trinder, Anderson v. Thames & Mersey Marine Insco., Trinder, Anderson v. North Queensland Insce., Trinder, Anderson v. Weston, Crocker, [1898] 2 Q. B. 114. *Refd.* Mitsui v. Mumford, [1915] 2 K. B. 27. *Mentd.* Moore v. Evans, [1918] A. C. 185.

#### B. Actual Total Loss.

**2274. Unnecessary — Freight.]** — *RANKIN v. POTTER*, No. 2259, *ante*.

**2275.** — — —.]—*COSSMAN v. WEST, COSSMAN v. BRITISH AMERICA ASSURANCE CO.*, No. 2054, *ante*.

#### C. Partial Loss.

**2276. No notice can be given.]** — Owners of ships are not entitled to abandon, unless at some period of the voyage there has been a total loss. Where the jury have found only an average loss occasioned by the perils of the sea, the ct. are precluded from saying there has been a total loss.—*CAZALET v. ST. BARBE* (1786), 1 Term Rep. 187; E. R. 1044.

#### D. Constructive Total Loss.

See Marine Insurance Act, 1906 (c. 41), ss. 61, 62.

**2277. Freight—Whether necessary—Goods specifically existing.]**—*PARMETER v. TODHUNTER*, No. 2299, *post*.

**2278.** — — —.]—If, pending an insurance on freight, & a cargo shipped, the vessel becomes

incapable of bringing the cargo home, the master is bound, or not bound, to repair her, & earn what he can on the homeward voyage, as a salvage for the underwriters on freight, according as a prudent owner, having regard to the state of his ship, but without reference to any insurance on the freight, would pursue or not pursue that course for his own advantage. *Semble*: an abandonment of freight to the underwriters on freight is impossible & unnecessary.—*GREEN v. ROYAL EXCHANGE ASSURANCE CO.* (1815), 6 Taunt. 68; 1 Marsh. 447; 128 E. R. 958.

*Annotations*:—*Apld.* *Idle v. Royal Exchange Assce.* (1819), 3 Moore, C. P. 115. *Consd.* *Mount v. Harrison* (1827), 4 Bing. 388. *Refd.* *Davidson v. Case* (1820), 8 Price, 542; *Roux v. Salvador* (1836), 3 Bing. N. C. 266; *Cossmann v. West, Cossmann v. British America Assce.* (1887), 13 App. Cas. 160.

**2279.** — — —.]—*IDLE v. ROYAL EXCHANGE ASSURANCE CO.*, No. 2262, *ante*.

**2280.** — — —.]—Abandonment is not necessary upon a loss in an insurance on freight.—*MOUNT v. HARRISON* (1827), 4 Bing. 388; 1 Moo. & P. 14; 6 L. J. O. S. C. P. 6; 130 E. R. 817.

**2281.** — — —.]—*RANKIN v. POTTER*, No. 2259, *ante*.

**2282.** — — —.]—*TRINDER, ANDERSON & CO. v. THAMES & MERSEY MARINE INSURANCE CO.*, *TRINDER, ANDERSON & CO. v. NORTH QUEENSLAND INSURANCE CO.*, *TRINDER, ANDERSON & CO. v. WESTON, CROCKER & CO.*, No. 1562, *ante*.

**2283.** — — —.]—*ASSOCIATED OIL CARRIERS, LTD. v. UNION INSURANCE SOCIETY OF CANTON, LTD.*, No. 2093, *ante*.

**2284.** — — —.]—*ROURA & FORGAS v. TOWN- END*, No. 2214, *ante*.

**2285. Goods — Necessary.]** — The assured of goods having received intelligence on Jan. 8, 1811, that the ship's papers were taken away on Dec. 7, preceding, by the Swedish Govt. within whose port she was, did not give notice of abandonment to the deft. underwriter till Jan. 17; but though such notice was too late, supposing an abandonment to be necessary; yet as the goods were finally seized & unladen by orders of that Govt. on Apr. 30 following:—*Held*: that the ineffectual notice of abandonment before given did not preclude the assured from recovering as for a total loss, without any abandonment.—*MELLISH v. ANDREWS* (1812), 15 East, 13; 104 E. R. 749.

*Annotations*:—*Apld.* *Roux v. Salvador* (1836), 3 Bing. N. C. 266; *Fooks v. Smith*, [1924] 2 K. B. 508. *Refd.* *Cossmann v. West, Cossmann v. British America Assce.* (1887), 13 App. Cas. 160.

**2286.** — — —.]—*FOOKS v. SMITH*, No. 2239, *ante*.

**2287. Ship—Necessary.]**—*FLEMING v. SMITH*, No. 2322, *post*.

**2288.** — — —.]—*KNIGHT v. FAITH*, No. 790, *ante*.

**2289.** — — —.]—*KALTENBACH v. MACKENZIE*, No. 2273, *ante*.

**2290.** — — —.]—*WADE v. SOUTH OF ENGLAND MARINE INSURANCE ASSOCN., LTD.* (1888), 5 T. L. R. 8.

voyage; & therefore no question of abandonment arose.—*PATCH v. PITMAN* (1883), 19 N. S. R. (7 R. & G.) 298; 7 C. L. T. 374; Cass. Dig. 219.—*CAN.*

#### PART II. SECT. 24, SUB-SECT. 1.—B.

**i. Unnecessary—Ship.]**—The vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed:—*Held*: assured was entitled to recover for actual total loss, & no notice of abandonment was necessary.—*ANCHOR MARINE INSUR-*

*Co. v. KEITH* (1884), 9 S. C. R. 483.—*CAN.*

#### PART II. SECT. 24, SUB-SECT. 1.—D.

**2285 i. Goods — Necessary.]** — *CUNNINGHAM v. MARITIME INSURANCE CO.*, [1899] 2 I. R. 257.—*IR.*

**2287 i. Ship — Necessary.]** — In an action for the insurance on a ship:—*Held*: if there was a constructive total loss, which would have entitled insured to abandon, they could not recover for such loss, not having given notice of

abandonment.—*WOODFORD v. FEEHAN* (1866), 5 Nfld. L. R. 148.—*NFLD.*

**2287 ii.** — — —.]—The case being one of constructive total loss & no circumstances being proved to take it out of the established rule of law:—*Held*: due notice of abandonment to the underwriters was an essential condition to plff.'s right to recover.—*MORTON v. PATILLO* (1872), 9 N. S. R. 17.—*CAN.*

**2287 iii.** — — —.]—*DICKIE v. MERCHANTS MARINE INSURANCE CO.* (1883), 16 N. S. R. (4 R. & G.) 244.—*CAN.*

*Sect. 24.—Notice of abandonment: Sub-sect. 1, D. E.; sub-sects. 2, 3 & 4, ' '*

**2291.** ———.]—WESTERN ASSURANCE CO. OF TORONTO *v.* POOLE, No. 731, *ante*.

**As between reinsurer & reinsured.]—See Sect. 9, sub-sect. 1, *ante*.**

*E. Constructive Total Loss followed by Justifiable Sale.*

**2292. Whether notice necessary—Ship & cargo.]—HODGSON *v.* BLACKISTON (1798), 1 Park on Marine Insurances, 8th ed. p. 400, n.**

*Annotations:—Apld.* Roux *v.* Salvador (1835), 1 Bing. N. C. 526 (see (1836), 3 Bing. N. C. 266). *Refd.* Road *v.* Bonham (1821), 6 Moore, C. P. 397.

**2293.** ——— *Cargo.*]—ROUX *v.* SALVADOR, No. 2129, *ante*.

**2294.** ———.]—Where a cargo is still in specie but the expense of forwarding it to its destination would exceed its value when so forwarded & the master rightly sells it under urgent necessity, so that the property passes from the assured, & everything has been done *optima fide* for the benefit of all concerned, there may be an actual total loss, & no notice of abandonment is necessary.—FARNWORTH *v.* HYDE (1865), 18 C. B. N. S. 835; 5 New Rep. 488; 34 L. J. C. P. 207; 12 L. T. 231; 11 Jur. N. S. 349; 13 W. R. 613; 2 Mar. L. C. 187; 144 E. R. 674; *on appeal* (1866), L. R. 2 C. P. 204, Ex. Ch.

*Annotations:—Consd.* Rankin *v.* Potter (1873), L. R. 6 H. L. 83; Cossman *v.* West, Cossman *v.* British America Assce. (1887), 13 App. Cas. 160. *Refd.* Kidston *v.* Empire Marine Insce. (1866), Har. & Ruth. 433; Browning *v.* Provincial Insce. of Canada (1873), 28 L. T. 853; Saunders *v.* Baring (1876), 34 L. T. 419; Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. 467. *Mentd.* Atlantic Mutual Insce. *v.* Hull (1880), 44 L. T. 67.

**2295.** ——— *Ship.*]—KNIGHT *v.* FAITH, No. 790, *ante*.

**2296.** ———.]—COBEQUID MARINE INSURANCE CO. *v.* BARTEAUX, No. 2109, *ante*.

#### SUB-SECT. 2.—WHO MAY GIVE NOTICE.

**2297. Joint owner insuring for all—May abandon for all.]—HUNT *v.* ROYAL EXCHANGE ASSURANCE, No. 2308, *post*.**

**2298. Assignee of policy—Without authority of assured.]—Notice of abandonment, given to the underwriters by the assignee of a policy on a ship, though "on behalf of the assured," if without his assent or authority is not valid, in order to fix the underwriter with a constructive total loss, & the notice ought to be given by the party interested in the ship.—JARDINE *v.* LEATHLEY (1863), 3 B. & S. 700; 1 New Rep. 394; 32**

#### PART II. SECT. 24, SUB-SECT. 1.—E.

**2298 i. Whether notice necessary—Cargo.]—Held:** the sale of the goods was justifiable & therefore notice of abandonment was not necessary.—RUMSEY *v.* PROVIDENCE WASHINGTON INSURANCE CO. (1880), 13 N. S. R. (1 R. & G.) 393.—CAN.

**2298 ii.** ———.]—EAST INDIAN RY. CO. *v.* AUSTRALASIAN INSURANCE CO. (1871), 6 B. L. R. 218; 7 B. L. R. 347.—IND.

**2298 i. Ship.]—Held:** the master was not justified in selling the vessel, & the underwriters were not liable for a total loss without notice of abandonment.—WOOD *v.* STYMEST (1862), 10 N. B. R. (5 All.) 309.—CAN.

**2298 ii.** ———.]—GALLAGHER *v.*

TAYLOR (1881), 5 S. C. R. 368.—CAN.

**2298 iii.** ———.]—If the ship is in a place of safety, but cannot be repaired where she is, nor taken to a port of repair, & if instructions from the owner cannot be received for some weeks, the expense of preserving her, the danger of her being driven on shore, & the probability of great deterioration in value during the delay will justify the master, when acting *bona fide* & for the benefit of all concerned, in selling without waiting for instructions, & the sale will excuse notice of abandonment.—CHURCHILL *v.* NOVA SCOTIA MARINE INSURANCE CO. (1895), 28 N. S. R. 52; 26 S. C. R. 65.—CAN.

#### PART II. SECT. 24, SUB-SECT. 2.

**a. Legal owner.]—Notice of aban-**

L. J. Q. B. 132; 7 L. T. 783; 9 Jur. N. S. 1085; 11 W. R. 432; 1 Mar. L. C. 288; 122 E. R. 262.

*Annotation:—Refd.* Williams *v.* North China Insce. (1876), 35 L. T. 884.

#### SUB-SECT. 3.—FORM OF NOTICE.

*See, now, Marine Insurance Act, 1906 (c. 41), s. 62 (2).*

**2299. Request by broker to settle & direct disposition.]—(1)** If an insurance broker requires the underwriters upon a policy to settle as for a total loss, & to give directions for the disposition of the property insured, this does not amount to an abandonment.

**(2)** There must be an abandonment of freight where the goods specifically exist, although the ship is incapable of prosecuting the voyage.—PARMETER *v.* TODHUNTER (1808), 1 Camp. 541, N. P.

*Annotations:—As to (1)* *Consd.* Currie *v.* Bombay Native Insce. (1869), L. R. 3 P. C. 72. *Refd.* Green *v.* Royal Exchange Assce. (1815), 6 Taunt. 68; Mount *v.* Harrison (1827), 4 Bing. 388; Russian Bank for Foreign Trade *v.* Excess Insce., [1918] 2 K. B. 123. It is not necessary to give notice in any particular form, or to use the word "abandon," in spite of LORD ELLENBOROUGH's observations in *Parmeter v. Todhunter*; it is now sufficient that the notice should be in such terms as conveyed the assured's instruction to the underwriters (BAILHACHE, J.).

**2300. Letter from master to ship's husband—Communicated to insurers.]—(1)** To a declaration, on a marine policy of insurance, for a total loss, the only plea was a plea of fraudulent concealment, which was abandoned at the trial:—*Held:* upon the pleadings, although the averment of a total loss was not traversed, an average or partial loss only was admitted.

A ship having been compelled by sea damage to put into a port near the Cape on Sept. 27, the captain had her surveyed, & on Oct. 18, wrote to the ship's husband at Liverpool, describing her condition. On Nov. 18, the captain again wrote, describing the damaged state of the ship; that he deemed it best to consult the surveyors, & that they advised that the ship could not go home with a partial repair, but she would not be worth the amount it would take to repair her, & that in consequence he had asked the advice of high legal authority, but had not then got the opinion. On Nov. 20, the master executed a notarial act of abandonment, & on Dec. 9, sold the ship. On Dec. 20, he again wrote, stating that it would be for the interest of all concerned to abandon & sell, & that he had sold; & the letter concluded, "Give the underwriters due notice." All the letters were duly communicated to the underwriters:—*Held:* (2) the letter of Dec. 20, was a sufficient notice of abandonment to make a constructive total loss; (3) between Nov. 18, &

donment must be given by the legal owner of a vessel.—MILLIDGE *v.* STYMEST (1864), 11 N. B. R. (6 All.) 164.—CAN.

**b. Agent.]—An agent effecting insurance under authority for that purpose only, may, in case of loss, give notice of abandonment to the underwriters without any other or special authority.—MERCHANTS MARINE INSURANCE CO. *v.* BARRS (1888), 15 S. C. R. 185.—CAN.**

#### PART II. SECT. 24, SUB-SECT. 3.

**a. No special form required—Provided intention to abandon clear.]—BAKER *v.* BROWN (1872), 9 N. S. R. 100.—CAN.**

**d. Notice signed by agent of assured.]—BARRS *v.* MERCHANTS**



Dec. 20, there had been no unreasonable delay in giving the notice of abandonment, for that the captain was entitled to a reasonable time to make up his mind, & in obtaining legal advice in perplexing circumstances had acted prudently.

*Qu.*: whether the loss could have been treated as total without abandonment.—**KING v. WALKER** (1864), 3 H. & C. 209; 33 L. J. Ex. 325; 11 Jur. N. S. 43; 13 W. R. 232; 159 E. R. 509, Ex. Ch. *Annotation*:—*As to* (2) **Expld.** *Farnworth v. Hyde* (1865), 18 C. B. N. S. 835.

**2301. "Abandon" not necessary—Where intention of assured communicated.**—**CURRIE & Co. v. BOMBAY NATIVE INSURANCE CO.**, No. 1914, *ante*.

**2302. Announcement of loss by cablegram—Offer to release insurers on payment of difference in value.**—*Pltfs.* in Oct. 1914, insured with defts. a parcel of barley placed on board a steamer at a Black Sea port for carriage to England. The policy insured against the usual perils, including restraints of princes & the risks excluded by the f.c. & s. clause, but excluded all claims due to delay. Before the steamer started the Turkish Govt. closed the Dardanelles, & on Nov. 5, 1914, Turkey declared war on England & the adventure was frustrated. The barley was unloaded & warehoused, & on Mar. 5, 1915, the British Admiralty requisitioned the steamer on behalf of the Russian Govt. The shipowners complied with the requisition & *pltfs.* sent a cablegram to England in the following terms: "Wolverton requisitioned by British Govt. account Russian Govt. Impossible reload barley. Consider case covered by war risk. Agreeable release underwriters from all risks if underwriters will pay difference between present value in Novorossisk & insured value." The underwriters refused to pay, & *pltfs.* then brought this action to recover as for a constructive total loss of the barley by restraint of princes:—*Held*: without deciding any of the other points raised in the case, the cablegram did not constitute a sufficient notice of abandonment, & as no sufficient notice of abandonment had been given the action failed.—**RUSSIAN BANK FOR FOREIGN TRADE v. EXCESS INSURANCE CO.**, [1919] 1 K. B. 39; 88 L. J. K. B. 209; 119 L. T. 733; 35 T. L. R. 42; 63 Sol. Jo. 40; 14 Asp. M. L. C. 362, C. A.

*Annotation*:—**Expld. & Distd.** *Roura & Forgas v. Townend*, [1919] 1 K. B. 189.

#### SUB-SECT. 4.—TIME WHEN NOTICE GIVEN.

##### A. Must be in Reasonable Time.

*See, now*, Marine Insurance Act, 1906 (c. 41), s. 62 (3).

**2303. General rule.**—When the assured receive intelligence of such a loss as entitles them to abandon, they must make their election in the first instance; & if they abandon, they must give the underwriters notice in a reasonable time; otherwise they waive their right to abandon & can only recover as for an average loss.—**MITCHELL v. EDIE** (1787), 1 Term Rep. 608; 99 E. R. 1278.

*Annotations*:—**Consd.** *Roux v. Salvador* (1836), 3 Bing. N. C. 266; *Rankin v. Potter* (1873), L. R. 6 H. L. 83. **Refd.** *Davy v. Milford* (1813), 15 East, 559; *Hudson v. Harrison* (1821), 3 Brod. & Bing. 97. **Mentd.** *Stringer v. English & Scottish Marine Insce.* (1870), 10 B. & S. 770; *Saunders v. Baring* (1876), 34 L. T. 419.

**MARINE INSURANCE CO.** (1887), 26 N. B. R. 339.—**CAN.**

#### PART II. SECT. 24, SUB-SECT. 4.—A.

**2303 i. General rule.**—The assured have a right to a reasonable time in which to ascertain the condition of the

ship, before giving notice of abandonment.—**CORR v. STANDARD FIRE & MARINE INSURANCE CO. OF NEW ZEALAND** (1881), 7 V. L. R. 504.—**AUS.**

**2303 ii.** —.]—The owner of a vessel which has been damaged by the peril insured against is entitled to reason-

**2304.** —.]—(1) Where, by a memorandum of a policy, the underwriter was to adjust the loss in three months after notice, a direct notice from the assured is not required, if he has had notice by other means.

(2) Upon the first notice of a total loss, the assured are bound to abandon; but it must appear that they had notice or the policy will not be vitiated.—**ABEL v. POTTS** (1800), 3 Esp. 242, N. P.

**2305.** —.]—A vessel sailing with corn insured, from Waterford in Ireland to Liverpool, by a policy with a memorandum to be free from all but general average, was stranded near Waterford on Jan. 28, & the vessel continued at high tide under water for near a month, during which time, from Jan. 31, the assured at low water were employed in saving the cargo, the whole of which was damaged, but the greater part recovered & kiln-dried; but no notice of abandonment was given to the underwriters in London till Feb. 18, though there is a constant regular intercourse between Waterford & Liverpool, where some of the assured lived; which was held to be out of time. For whether or not upon such a policy, where there was an opportunity of sending on the corn which was saved to the place of its destination within two months after the accident in another vessel, the assured were entitled to abandon as in case of a total loss; at all events they ought to have made their election to abandon within a reasonable time, on which it seems that the judge ought to instruct the jury under the circumstances of the case, & they cannot take the chance of endeavouring first to save & make the best of the cargo on their own account, & afterwards abandon when they find that they cannot turn it to their advantage.—**ANDERSON v. ROYAL EXCHANGE ASSURANCE CO.** (1805), 7 East, 38; 3 Smith, K. B. 48; 103 E. R. 16.

*Annotations*:—**Apld.** *Kelly v. Walton* (1808), 2 Camp. 155. **Expld.** *Davy v. Milford* (1812), 15 East, 559. **Refd.** *Roux v. Salvador* (1836), 3 Bing. N. C. 266; *Kemp v. Halliday* (1866), 6 B. & S. 723.

**2306.** —.]—**BARKER v. BLAKES**, No. 2315, *post*.

**2307.** —.]—An assured is entitled to a reasonable time for acquiring a full knowledge of the state of a damaged cargo, before he is bound to elect, whether he shall abandon to the underwriters as for a total loss. Where a cargo of sugar damaged by sea water came into port on Dec. 20, began to be unshipped & examined on Dec. 21, but the assured did not receive the complete report of the survey till Jan. 7:—*Held*: an abandonment on Jan. 7 was made within a reasonable time, though *pltf.* had in the meantime contemplated that the loss would be partial, & that the adventure might be pursued. If a cargo be so much damaged that it is not fit to be sent forward to a market, the assured may abandon as a total loss.—**GERNON v. ROYAL EXCHANGE ASSURANCE** (1815), 6 Taunt. 383; Holt, N. P. 53, n.; 2 Marsh. 88; 128 E. R. 1083.

*Annotations*:—**Refd.** *Parry v. Aberdeen* (1829), 9 B. & C. 411; *Stringer v. English & Scottish Marine Insco.* (1870), 10 B. & S. 770; *Rankin v. Potter* (1873), L. R. 6 H. L. 83. **Mentd.** *Navone v. Haddon* (1850), 9 C. B. 30.

**2308.** —.]—A loss of voyage for the season by perils of the sea, is not a ground of abandonment upon a policy on goods, with a clause of

able time to make inquiries after hearing of the damage before giving notice of abandonment.—**DRISCOLL v. MILLVILLE MARINE INSURANCE CO.** (1883), 23 N. B. R. 160; *on appeal*, 2 S. C. R. 183.—**CAN.**

**2308 iii.** —.]—**SEEDICK DHOOSAL v. APCAR** (1865), Bourke, 391.



97; Dixon v. Reid (1822), 3 B. & Ald. 597; Roux v. Salvador (1836), 3 Ring. N. C. 266; Navone v. Haddon (1850), 9 C. B. 30; Potter v. Rankin (1870), L. R. 5 C. P. 341.

2309. —.}—Insurance on a cargo of wine, to be discharged partly at B., partly at D., & partly at L. The vessel which conveyed the cargo being wrecked near B., & three-fourths of the cargo being either lost or so impregnated with salt water as to render it imprudent to delay the sale till the ports of D. or L. could be reached, the assured, on Dec. 23, the day they heard of the loss, gave notice of abandonment; & on Dec. 27 called a meeting of underwriters, which three underwriters attended, & ordered the assured to do the best for all parties. On ensuing Feb. 28, & not before, some of the underwriters interfered, forbidding a sale of the damaged wines about to take place at B., & rejecting the abandonment:—*Held*: this was a total loss, & entitled the assured to abandon; & at all events, the underwriters, not having stirred for more than two months after notice of the abandonment, must be taken to have acquiesced in it. An insurer, who rejects an abandonment, must do so within a reasonable time.

The law is, that the assured shall abandon in reasonable time, that he may not lie by to see whether it may be more to his interest not to abandon; he must, therefore, in reasonable time, & what is reasonable time is a matter of law for the decision of the ct., give notice of abandonment. What is reasonable time in each case, must depend on circumstances (DALLAS, C.J.).—HUDSON v. HARRISON (1821), 3 Brod. & Bing. 97; 6 Moore, C. P. 288; 129 E. R. 1219.

*Annotations*:—**Consd. Provincial Inscce. of Canada v. Leduc** (1874), L. R. 6 P. C. 224; **Shepherd v. Henderson** (1881), 7 App. Cas. 49.

**2310.** —.]—CURRIE & Co. v. BOMBAY NATIVE INSURANCE Co., No. 1914, *ante*.

### B. What is Reasonable Time.

88. *See* Marine Insurance Act, 1906 (c. 41), ss. 62 (3),

**2311. Question of law.]—HUDSON v. HARRISON,**  
No. 2309, *ante*.

*See, now, Marine Insurance Act, 1906 (c. 41), s. 88.*

**2312. After notice of loss—Six months.]—ALL-  
WOOD v. HENCKELL (1795), 1 Park on Marine  
Insurances, 8th ed. p. 399.**

**Annotations:—***Consd.* Mellish v. Andrews (1812), 15 East, 13; Roux v. Salvador (1835), 1 Bing. N. C. 526. **Refd.** Read v. Bonham (1821), 6 Moore, C. P. 397.

**2315. — One month.]—**(1) It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage & commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country; though the neutral thereby subject his ship to be detained & carried into a British port for the purpose of search; & therefore a British underwriter, after condemnation of the enemy's goods found on board, & liberation of the ship & the rest of the cargo, is liable to the neutral owner of goods insured in the same ship whose voyage was so interrupted; either as for a total loss, if notice of abandonment upon the loss of the voyage be given in reasonable time; or for an average loss if such notice be given out of time.

(2) Where a neutral ship bound from America to Havre was so detained & brought into a British port; & pending proceedings in the Admty. the King declared Havre in a state of blockade, by which the further prosecution of the voyage was prohibited:—*Held*: a total loss of the voyage, which entitled the neutral assured to abandon.

(3) The blockade of Havre having been publicly notified here on Sept. 6, & no notice of abandonment given till Oct. 14, nor any excuse substantiated for not giving it sooner for want of competent authority before, nor any new authority shown for giving it then :—*Held* : the notice was out of time ; & this, though pltf.'s agents in this country had no notice till Oct. 17 of the decree for restoration of the ship & goods in question, which had been pronounced on Oct. 8.—*BARKER v. BLAKES* (1808), 9 East, 283 ; 103 E. R. 581.

*Annotations:—As to (2) Consd. British & Foreign Marine Insce. v. Sanday, [1916] 1 A. C. 650. Reifd. Rodoconachi v. Elliott (1874), L. R. 9 C. P. 518.*

2316. ———.]—GRAINGER v. MARTIN, No.  
2198, *ante*.

2317. ———.}—KALTENBACH v. MACKENZIE,  
No. 2273, *ante*.

2318. — Nine days.]—MELLISH v. ANDREWS,  
No. 2285, *ante*.

**2319. — Five days.]—HUNT v. ROYAL EXCHANGE ASSURANCE, No. 2308, ante.**

2320. — **Sixteen days.**]—An insured vessel arrived at the port of Kinsale, on Nov. 24; on Dec. 14, a second survey was had, when it was found that the expenses of the repairs would exceed the value of the ship; notice of abandonment to the insurers in London on Jan. 6 held to be too late.—**ALDRIDGE v. BELL** (1816), 1 Stark. 498, N. P.

**PART II. SECT. 24, SUB-SECT. 4.—B.**

**e. After notice of loss — Seventy-two days.]—**The vessel ran upon the

rocks, & depts.' agent was informed of it by the insured on Oct. 16. No formal abandonment in writing, under the terms of the policy, was made until

Dec. 27 :—*Held* : the notice was too late to be available.—**HARKLEY v. PROVINCIAL INSURANCE Co.** (1868), 18 C. P. 335.—**OAN.**

2321. — Two days.]—*READ v. BONHAM*, No. 2112, *ante*.

2322. — Six months.]—A vessel insured under a time policy from Aug. 1841, to Aug. 1842, encountered very severe weather in the Indian seas, & was compelled, in May, 1842, to put into the Mauritius. The master wrote to the owners, telling them of the injuries which the vessel had received, of the necessity to make extensive repairs, of his intention to borrow money on bottomry for that purpose, of the sum required, & of the impossibility of getting the money except on the undertaking to return direct to England, instead of proceeding to Bombay, as originally intended. He further stated, that on account of the very low state of freights in India, this would be better for their interests, which he said he consulted in everything he did. The agents for Lloyd's at the Mauritius, who were employed by the captain to act for him, wrote letters to the same effect. These letters were received at intervals between Sept. & Dec. 1842, & in the latter month the owners wrote to the agents expressing their surprise at the amount required, but saying, at the same time, that they supposed what was done was the best that could be done under the unfortunate circumstances in which the ship was placed. The owners wrote to agents in London, apprising them of the expected arrival of the vessel, & directing them to do what was needful. The vessel did arrive on Mar. 27 & was at first taken possession of by the agents for the owners. On Mar. 30 the owners abandoned to the underwriters:—*Held*: under these circumstances they were not entitled to recover as for a total loss; for, first, assuming notice of abandonment to be necessary in a case of constructive total loss, the notice here had not been given in time; & secondly, the conduct of the owners on the receipt of the letters amounted to an election to treat this as a partial loss, & they could not afterwards, on the arrival of the vessel, when they found that the cost of repairs much exceeded the market value of the vessel itself, convert this partial into a total loss.

Though the master may, by an ordinary rule of law, be considered, whenever the vessel is, by capture or other detentions & casualties, prevented from continuing the voyage, as the agent for all parties concerned, yet the owners, even under such circumstances, may by their conduct make him their sole agent, so as to be bound by his acts.

Notice of abandonment is necessary in order to convert a constructive into an absolute total loss.

The cases of *Cambridge v. Anderton*, No. 2043, *ante*, & *Roux v. Salvador*, No. 2129, *ante*, show that where a ship, in consequence of the inability of the master to get it off the rocks where it has struck, has been actually sold, or where a cargo of a perishable nature has been so damaged by the sea that its substance is gone, & it can never reach the destined port in specie, the loss, in each instance, is actual, & not constructive total loss. Where a prudent owner uninsured would have sold, the case amounts to one of actual total loss.—*FLEMING v. SMITH* (1848), 1 H. L. Cas. 513; 9 E. R. 859, H. L.

*Annotations*:—*Refd.* *Knight v. Faith* (1850), 15 Q. B. 649; *Rankin v. Potter* (1873), L. R. 6 H. L. 83; *Macbeth v. Maritime Insee.*, [1908] A. C. 144. *Mentd.* *Stainbank v. Fenning* (1851), 11 C. B. 51; *Kemp v. Halliday* (1866), 6 B. & S. 723.

2323. Where amount of damage in doubt—Insured entitled to reasonable time to make

*inquiries.*]—*GERNON v. ROYAL EXCHANGE ASSURANCE*, No. 2307, *ante*.

2324. — —.]—*CURRIE & Co. v. BOMBAY NATIVE INSURANCE Co.*, No. 1914, *ante*.

2325. — Delay by master in making survey.]—A ship was insured from the Clyde to New Zealand, where she grounded at Bluff harbour, & sustained considerable damage; but, as there was no dry dock in New Zealand, the amount of damage could not be there ascertained. She then proceeded, after temporary repairs, to Port Chalmers, her port of destination in New Zealand, to discharge her cargo, & after a stay of nine months there, proceeded in ballast to Calcutta, where she was dry-docked, & thoroughly surveyed, & it was then found that the cost of repairing the damage she had sustained at Bluff harbour, would exceed her value when repaired. The owners at home, on learning the result of this survey, gave notice of abandonment to the underwriters of this policy, on Aug. 2. While the ship was at Calcutta in July, another insurance, which was a time policy was effected on her, in which she was valued at £8,000 & during the currency of this policy she became a total wreck, on Oct. 5. In an action on the first policy:—*Held*: the stay at Port Chalmers was an unreasonable delay on the part of the ship-owner in giving notice of abandonment, which was therefore too late, & consequently he could recover for a partial loss only.

Whether there has been such delay is not a mere question of time, but of substantial delay out of the ordinary course of maritime affairs; but the consequences flowing from the damage upon which the question arises may be taken into account.—*POTTER v. CAMPBELL*, *WINGATE v. JAMES* (1867), 2 L. J. N. C. 223; 17 L. T. 474, n.; 16 W. R. 399, 401; 3 Mar. L. C. 29, n.

*Annotations*:—*Apprvd.* *Rankin v. Potter* (1873), L. R. 6 H. L. 83. *Refd.* *Lidgett v. Secretan* (1871), L. R. 6 C. P. 616. *Mentd.* *British & Foreign Insee. v. Wilson Shipping Co.*, [1921] 1 A. C. 188.

#### SUB-SECT. 5.—ELECTION NOT TO ABANDON.

2326. Assured cannot afterwards claim for total loss.]—A ship being obliged to put into a place of safety in the course of her voyage, in consequence of damage incurred by a sea peril; if the owner do not abandon, but merely apply to the underwriters for directions how to proceed upon an estimate of the expenses of repair, who decline interfering, he cannot afterwards convert it into a total loss, on account of the expenses of the salvage being found in the result to have exceeded the value of the ship, which was ultimately sold in the place into which she had been driven by distress; though the sale was directed by the assured to be made on account of all concerned.—*MARTIN v. CROKATT* (1811), 14 East, 465; 104 E. R. 679.

*Annotation*:—*Refd.* *Knight v. Faith* (1850), 15 Q. B. 649.

2327. —.]—*FLEMING v. SMITH*, No. 2322, *ante*.

#### SUB-SECT. 6.—ACCEPTANCE OF NOTICE.

*See Marine Insurance Act*, 1906 (c. 41), s. 62 (4), (5), (6), (8).

2328. What amounts to acceptance—Question of fact.]—*SHEPHERD v. HENDERSON*, No. 2333, *post*.

2329. — Insurer's request to "do the best

#### PART II. SECT. 24, SUB-SECT. 5.

2326 i. Assured cannot afterwards claim for total loss.]—*SMITH v. FLEMING & Co.* (1849), 23 Sc. Jur. 7.—*SCOT*

**Sect. 24.—Notice of abandonment: Sub-sects. 6 & 7, A., B. & C.]**

they can."—Where a ship sustains a partial loss, the insured cannot abandon, nor is the answer of the underwriters desiring them "to do the best they can with the damaged property," evidence of their assent, so as to make it a total loss.—*THELLUSON v. FLETCHER* (1793), 1 Esp. 73, N. P.

**2330. — Silence of insurers—Non-repudiation for two months.]—***HUDSON v. HARRISON*, No. 2309, *ante*.

**2331. — — —.]—**PROVINCIAL INSURANCE CO. OF CANADA *v.* LEDUC, No. 1435, *ante*.

**2332. — Taking possession of ship & repairing—By agents of insurers.]—**PROVINCIAL INSURANCE CO. OF CANADA *v.* LEDUC, No. 1435, *ante*.

**2333. — — — After rejection of notice.]—**A. raised an action in the Sheriff's Ct. against B. for £50 the sum payable by him as underwriter on a policy of insurance on A.'s vessel the *Krishna*. On May 23 the vessel was driven on a sandy beach on the West Coast of India during a violent storm. Soon afterwards the usual monsoon commenced and lasted till Oct. On June 7 A., on hearing from the master that it was impossible to save the ship, gave notice of abandonment to the underwriters; which they refused to accept. On Oct. 1 A. raised this action averring that the vessel had become a wreck, & in his amended pleadings he set out that the underwriters had taken possession of the vessel on Oct. 15 & had floated her on Nov. 16, & taken her to Bombay & had docked her & executed certain repairs & that thus the underwriters had accepted the abandonment. The underwriters alleged that they only took possession of the vessel as salvors, that no repairs were done except for the safety of the ship & that A. was informed of all they were doing & to the last it was intimated to A. that the vessel was lying at Bombay at his risk. The Ct. of Session found (*inter alia*), "that the underwriters did not accept the abandonment; that there was on June 7 & continued thereafter to be a reasonable prospect of the ship being got off the sandy shore on which she lay without greater expense than a prudent uninsured owner would reasonably incur"; therefore that there was not at the date a constructive total loss of the ship. A. contended on the question of the competency of his appeal (a) that the finding that the underwriters did not accept the abandonment was a matter of mixed law & fact; (b) that the findings of fact were incomplete & ought to be rectified on remit:—*Held*: the ct. had decided the issue submitted to them, an issue of fact & not of law, namely that the underwriters did not accept the abandonment, & accordingly their finding was not open to impeachment under Court of Session Act, 1825 (c. 120), &, looking at the controversy raised by the record, the findings in fact were reasonably complete.

In the law of England where notice of abandonment is given & the circumstances are such that the man may reasonably give it, but the underwriter refuses to take it & afterwards an action commences, if in the interim that which the man who gave the notice of abandonment reasonably & properly believed to be a total loss turns out to be not a total loss, it cannot be held that it is (LORD BLACKBURN).

The question whether the underwriters accepted the abandonment or not is a question of fact to begin with, but the circumstances of the case may be such that a jury may be told as a matter of law, & properly told, that if they think the underwriters have done certain acts which are consistent only with their having accepted the abandonment, then they ought to find that the abandonment has been accepted (LORD PENZANCE).—*SHEPHERD v. HENDERSON* (1881), 7 App. Cas. 49, H. L.

*Annotations*:—*Refd.* *Blairmore Sailing Ship Co. v. Macredie*, [1898] A. C. 593. *Mentd.* *Langham S.S. Co. v. Gallagher* (1911), 12 Asp. M. L. C. 109; *Moore v. Evans*, [1918] A. C. 185; *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.*, [1924] A. C. 406.

**2334. Effect of acceptance—Cannot be withdrawn—Though ship subsequently restored.]—***BAINBRIDGE v. NEILSON*, No. 2140, *ante*.

**2335. — — —.]—**Insurance on ship *Ruby*, at & from Halifax to Plymouth, captured on the voyage: intelligence of the capture & immediate abandonment, & some steps taken by the underwriters to settle the loss; intelligence then of her being recaptured, & refusal by the underwriters to settle, except for a partial loss:—*Held*: upon notice of abandonment, given on intelligence of the capture, the transaction was closed, & not subject to be disturbed by any event appearing on subsequent intelligence, on the ground of the acceptance of the abandonment by the underwriters.—*SMITH v. ROBERTSON* (1814), 2 Dow, 474; 3 E. R. 936, H. L.

*Annotations*:—*Consd.* *Patterson v. Ritchie* (1815), 4 M. & S. 393; *Hudson v. Harrison* (1821), 3 Brod. & Bing. 97. *Apld.* *Provincial Insco. of Canada v. Leduc* (1874), L. R. 6 P. C. 224. *Consd.* *Ruys v. Royal Exchange Assce. Corp.*, [1897] 2 Q. B. 135; *Blairmore Sailing Ship Co. v. Macredie*, [1898] A. C. 593. *Refd.* *Naylor v. Taylor* (1829), 9 B. & C. 718.

**2336. — Title to cargo abandoned—As from time of loss.]—**The title of the underwriters to the cargo of an abandoned vessel does not date from the acceptance of the abandonment, but has relation back to the time of the loss.

A foreign vessel sailing with a cargo of timber, consigned from a foreign port to Hull, went ashore on the coast of Norway. The captain, without waiting for instructions from the consignee, & without any absolute necessity, made sale by auction of the timber, in the manner prescribed by the law of Norway, & the purchaser consigned the timber to the defendants for sale on his behalf. The agents of pl'tfs.' underwriters, who had received notice of abandonment before, but had accepted

**PART II. SECT. 24, SUB-SECT. 6.**

**2332 i. What amounts to acceptance—Taking possession of ship & repairing—By agents of insurers.]—**Notice of abandonment was given to insurers, all of whom declined to accept. By direction of the agent for insurers, the cargo was taken out & stored, & the vessel repaired:—*Held*: what was done constituted an acceptance.—*MCLEOD v. INSURANCE CO. OF NORTH AMERICA* (1901), 34 N. S. R. 88.—CAN.

**2333 i. — — — After rejection of notice.]—**If insurers refuse to accept an abandonment, & take possession of the ship for the purpose of repairing & then restoring her to her owners, such

taking possession is strong evidence of acceptance of abandonment.—*CORR v. STANDARD FIRE & MARINE INSURANCE CO. OF NEW ZEALAND* (1881), 7 V. L. R. 504.—AUS.

**2333 ii. — — —.]—***BAKER v. BROWN* (1872), 9 N. S. R. 100.—CAN.

**2333 iii. — — —.]—***ROBERTSON v. ROYAL EXCHANGE ASSURANCE CORPN.*, [1925] S. C. 1.—SCOT.

**2334 i. Effect of acceptance—Cannot be withdrawn—Though ship subsequently restored.]—**After regular notification of capture & abandonment, it is incompetent for insurers to reject the abandonment & insist upon settling for a partial loss, although intelligence of

recapture be received a few days after that of capture, before the loss is paid, & although the vessel has actually performed her voyage.—*ROBERTSON & Co. v. STEWART* (1809), 15 Fac. Coll. 165; *affd.* (1814), 2 Dow. 474.—SCOT.

**2336 i. — Title to cargo abandoned—As from time of loss.]—***Held*: the cargo was abandoned & accepted by the underwriters; the original owner ceased *ipso facto* to have any concern in it.—*RENDALL & Co. v. DUDER* (1872), 6 Nfld. L. R. 488.—NFLD.

**i. Must be definite.]—**Acceptance of notice of abandonment must be by some unequivocal act.—*O'LEARY v.*



it after the sale, in the mean time instituted a suit in the Superior Diocesan Ct. of Drontheim, against the captain & the purchaser, to set aside the sale, & to compel the purchaser to deliver up the cargo to the underwriters. That ct. confirmed the sale. In an action of trover, subsequently brought, by plffs., against the London consignee of the purchaser for the recovery of the cargo:—*Held*: the title of plffs. had relation back to the alleged loss, & therefore, they were entitled to maintain trover for the conversion occurring before the acceptance of the abandonment.—*CAMMELL v. SEWELL* (1858), 3 H. & N. 617; 27 L. J. Ex. 447; 32 L. T. O. S. 196; 4 Jur. N. S. 978; 157 E. R. 615; *affd.* on other grounds (1860), 5 H. & N. 728, Ex. Ch.

*Annotations*:—*Mentd.* *Simpson v. Fogo* (1860), 1 John. & H. 18; *The Justyn* (1862), 6 L. T. 553; *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Lloyd v. Guilbert* (1865), L. R. 1 Q. B. 115; *The Empire of Peace* (1869), 39 L. J. Adm. 12; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Meyer v. Ralli* (1876), 45 L. J. Q. B. 741; *Eglinton v. Norman* (1877), 46 L. J. Q. B. 557; *Vadala v. Lawes* (1890), 25 Q. B. D. 310; *Alcock v. Smith*, [1892] 1 Ch. 238; *Dulaney v. Merry*, [1901] 1 K. B. 536.

**2337. Effect of constructive acceptance—Same as actual acceptance.**—*PROVINCIAL INSURANCE CO. OF CANADA v. LEDUC*, No. 1435, *ante*.

#### SUB-SECT. 7.—EFFECT OF NOTICE OF ABANDONMENT.

##### A. In General.

*See* Marine Insurance Act, 1906 (c. 41), s. 63.

**2338. What amount recoverable—Whole sum insured.**—The ship *Success* being insured from London to Carolina was taken by a Spanish privateer & afterwards retaken by an English one, & carried to Boston, where, no person appearing to give security, she was condemned, & sold in the ct. of admty. there; & after the recaptors had their moiety, the overplus remained with the officers of that ct. Deft. brought an action on the policy, & had a verdict; plff. by his bill, prayed an injunction, insisting deft. ought to recover no more on the policy than a moiety of the loss. The ct. denied the injunction, for as deft. had offered to relinquish the salvage, he was entitled to recover the whole money insured.—*PRINGLE v. HARTLEY* (1744), 3 Atk. 195; 26 F. R. 914, L. C.

*Annotations*:—*Consd.* *Roux v. Salvador* (1835), 1 Bing. N. C. 526. *Refd.* *Lucena v. Crauford* (1806), 2 Bos. & P. N. R. 269.

##### B. Liability of Insured.

**2339. Abandonment releases owner from liability—Expenses incurred after abandonment—Removal of wreck.**—A ship belonging to applts. came into collision with another vessel & sank near the approach to a harbour where it was an obstruction to the navigation. There was no evidence of negligence on applts.' part. Applts. gave their underwriters notice of abandonment as a total loss & were paid on that footing, & also gave the harbour authority notice of the abandonment. The harbour authority, acting under Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), & Removal of Wrecks Act, 1877 (c. 16), took possession of the wreck, raised part of the cargo & sold it, dispersed the wreck by explosives, & after deduct-

ing the proceeds of the cargo from the expenses sued applts. for the balance under sect. 56 of the Act of 1847:—*Held*: applts. were not liable; because although owners of the ship when she became an obstruction, yet having abandoned her before the expenses were incurred, they were not the owners within sect. 56 of the Act of 1847 & were therefore not personally liable for the repayment.—*ARROW SHIPPING CO. v. TYNE IMPROVEMENT COMRS., THE CRYSTAL*, [1894] A. C. 508; 63 L. J. P. 146; 71 L. T. 346; 10 T. L. R. 551; 7 Asp. M. L. C. 513; 6 R. 258, H. L.

*Annotations*:—*Foll.* *Barraclough v. Brown* (1896), 65 L. J. Q. B. 333. *Distd.* *Smith v. Wilson*, [1896] A. C. 579. *Consd.* *Boston Corpn. v. Fenwick* (1923), 129 L. T. 766. *Refd.* *Barraclough v. Brown* (1897), 66 L. J. Q. B. 672; *The Wallsend*, [1907] P. 302; *The Ella*, [1915] P. 111. *Mentd.* *Postmaster-General v. Beck & Pollitzer* (1924), 93 L. J. K. B. 1017.

**2340.** — — — — —.]—A local Act which incorporated Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), provided that, if any vessel should be sunk in any part of the navigation, & the owner, or person in charge, should not remove it, it should be lawful for the undertakers to remove it, & recover the expenses of such removal from the "owner" in a ct. of summary jurisdiction:—*Held*: the remedy being prescribed by the sect. which gave the right to recover the expenses, it was not competent for the undertakers to recover them by action in the High Ct., & in any case, an owner of a sunken ship who had abandoned it to the underwriters as a total loss before any expenses had been incurred was not "the owner" within the sect.—*BARRACLOUGH v. BROWN*, [1897] A. C. 615; 66 L. J. Q. B. 672; 76 L. T. 797; 62 J. P. 275; 13 T. L. R. 527; 8 Asp. M. L. C. 290; 2 Com. Cas. 249, H. L.; *affg.* (1896), 65 L. J. Q. B. 333, C. A.

*Annotations*:—*Foll.* *Boston Corpn. v. Fenwick* (1923), 129 L. T. 766. *Refd.* *Smith v. Wilson*, [1896] A. C. 579; *The Wallsend*, [1907] P. 302. *Mentd.* *A.-G. v. Merthyr Tydfil Union*, [1900] 1 Ch. 516; *The Veritas*, [1901] P. 304; *Devonport Corpn. v. Tozer*, [1902] 2 Ch. 182; *Lucy v. Dorling* (1905), 49 Sol. Jo. 582; *R. v. Philbrick*, *Ex p. Edwards* (1905), 53 W. R. 527; *De Gasquet James v. Mocklenburg Schwerin*, [1914] P. 53; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Barwick v. S. E. & C. Ry.*, [1921] 1 K. B. 187; *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K. B. 616; *Everett v. Griffiths*, [1924] 1 K. B. 941; *Whitney v. I. R. Comrs.* (1925), 42 T. L. R. 58.

**2341.** — — — — —.]—The expense of removing a wreck can only be recovered from the owners at the time the expense is incurred. Where the owners of a vessel that has become a wreck treat it as a constructive total loss & give a notice of abandonment to their underwriters they divest themselves of their property in the vessel abandoned & cease to be its owners. *Qu.*: whether the property in the wreck is automatically transferred to the underwriter when they have refused to accept the notice, or whether the wreck becomes a *res nullius*.—*BOSTON CORPN. v. FENWICK & Co., LTD.* (1923), 129 L. T. 766; 39 T. L. R. 441; 16 Asp. M. L. C. 239; 28 Com. Cas. 367.

##### C. Rights of Insurers.

*See* Marine Insurance Act, 1906 (c. 41), s. 63.

**2342. Separate insurances on ship & freight—Freight earned after abandonment—Which underwriter entitled.**—A. having effected one policy

*PELICAN INSURANCE CO.* (1890), 20 N. B. R. 510.—CAN.

**PART II. SECT. 24, SUB-SECT. 7.—A.**  
g. Notice of abandonment by owners  
—Subsequent instruction to master  
—To proceed under best advice.—*MILLVILLE MUTUAL MARINE &*

*INSURANCE CO. v. DRISCOLL* (1884), 11 S. C. R. 183.—CAN.

**PART II. SECT. 24, SUB-SECT. 7.—C.**  
h. Rights of underwriter on freight.]  
—*Held*: insurers by abandonment would be entitled to receive a portion of freight earned after the

damage to the ship, if there had been evidence of the amount received by assured.—*BARRS v. MERCHANTS MARINE INSURANCE CO.* (1887), 26 N. B. R. 339; *affd.* 15 S. C. R. 185.—CAN.

k. Rights of underwriter on goods.]  
—The owners of a cargo which had been shipwrecked abandoned it to the

**Sect. 24.—Notice of abandonment: Sub-sect. 7, C.]**

on ship & another on freight, & the ship having been detained by embargo in Russia, he abandoned the ship to the underwriters on ship, & the freight to the underwriters on freight, at the same time receiving an authority from the underwriters on the ship, to act for them, & endeavour to recover it. The ship having afterwards brought home the cargo which was on board at the time of the detention, & earned freight accordingly which A. received:—*Held*: in an action by the underwriters on freight against A. they were entitled to recover the freight so received by him.—*LEATHAM v. TERRY* (1803), 3 Bos. & P. 479; 127 E. R. 260.

*Annotations*:—*Distd.* *Sharp v. Gladstone* (1805), 3 Smith, K. B. 39. *Mentd.* *Beale v. Thompson* (1803), 3 Bos. & P. 405.

**2343. ———— What expenses deducted.]**

—A shipowner having first insured his ship with A., etc., & his freight with B., etc., for a certain voyage, & having notice of an embargo laid on the ship in a foreign port, abandoned the ship & freight to the respective underwriters, & received from them the whole amount of their subscriptions as for a total loss of both; first undertaking, by a memorandum on the ship policy, to assign to the underwriters thereon his interest in the ship, & to account to them for it, & afterwards undertaking, by a similar memorandum on the freight policy, to assign to those underwriters all right of recovery, compensation, etc. The ship being afterwards liberated, & earning freight, which was received by the assured:—*Held*: however the question of priority as to the title to the freight might have been as between the different sets of underwriters litigating out of the same fund, & however the weight of argument might preponderate more in favour of the underwriters on the ship, yet the assured, who had received the freight from the shippers of goods, was at all events liable on his express undertaking to pay it over to the underwriters on freight; & that without deducting the expenses of provisions, wages, etc., which were charges on the owner before the abandonment, & on the underwriters on ship afterwards.—*THOMPSON v. ROWCROFT* (1803), 4 East, 34; 102 E. R. 742.

*Annotations*:—*Folld.* *Leatham v. Terry* (1803), 3 Bos. & P. 479. *Refd.* *Sharp v. Gladstone* (1805), 7 East, 24; *Davidson v. Case* (1820), 8 Price, 542; *Scottish Marine Insee. v. Turner* (1853), 21 L. T. O. S. 10. *Mentd.* *Horlock v. Beal*, [1916] 1 A. C. 486.

**2344. ———— ]**—While a ship was forcibly detained in a foreign port, the owner abandoned first the ship & then the freight to the different sets of underwriters thereon, who paid as for a total loss; after which the ship was liberated, reshipped her cargo which had been taken out, & returned home, earning freight, which was received by the assured. *Qu.*: whether the assured after an abandonment of the ship, which was a seeking & not a chartered ship; on which a distinction may arise; could abandon the freight to another set of underwriters. Assuming that he might, the ship & freight are salvage to the different underwriters, after deducting the following expenses, which must be apportioned between them according to their several interests: (a) the expenses of ship & crew in the foreign port, including port charges, besides the expense of shipping the cargo which exclusively belongs to the underwriters on freight; (b) insurance there-

on; (c) wages & provisions of crew from their liberation in the foreign port till their discharge here; (d) wages, provisions were supplied by the foreign Govt., to the crew during their detention. But the assured was not entitled to deduct out of the freight received payable to the underwriter on freight: (a) charges paid at the port of discharge on ship and cargo; (b) insurance on ship; (c) diminution in value of ship & tackle by wear & tear on the voyage home.—*SHARP v. GLADSTONE* (1805), 7 East, 24; 3 Smith, K. B. 39; 103 E. R. 10.

*Annotations*:—*Apld.* *Morrison v. Parsons* (1810), 2 Taunt. 407. *Refd.* *Case v. Davidson* (1816), 5 M. & S. 79.

**2345. ———— ]**—A policy on freight, at & from the ship's port of loading at J. to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading, as aforesaid, with leave to discharge, exchange, & take on board goods at any port she may call at, without being deemed a deviation, covers the freight of goods loaded at an intermediate port; & therefore where the ship having sailed with a cargo loaded at J. was during the voyage cast on shore at an intermediate port, & lost a part of her cargo, & took on board other goods at that port to complete her cargo, & arrived at her port of discharge, & earned freight:—*Held*: the assured, who had abandoned to the underwriter upon intelligence of the loss, & had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expenses attendant upon procuring the said freight.—*BARCLAY v. STIRLING* (1816), 5 M. & S. 6; 105 E. R. 954.

*Annotations*:—*Distd.* *Barber v. Fleming* (1869), L. R. 5 Q. B. 59. *Refd.* *Case v. Davidson* (1816), 5 M. & S. 79. *Mentd.* *Leathly v. Hunter* (1831), 7 Bing. 517.

**2346. ———— ]**—Ship & freight were insured by separate sets of underwriters. The ship, a general seeking ship, was captured; & ship & freight were abandoned to the respective underwriters, who each paid a total loss. The ship, being recaptured, performed her voyage & earned freight:—*Held*: the underwriter on ship was entitled to the freight. Abandonment of ship to the underwriter on ship includes freight, & transfers freight earned subsequently to the abandonment to such underwriter, as incident to the ship.—*DAVIDSON v. CASE* (1820), 2 Brod. & Bing. 379; 8 Price, 542; 5 Moore, C. P. 116; 129 E. R. 1013, Ex. Ch.; *affg.* *S. C. sub nom. CASE v. DAVIDSON* (1816), 5 M. & S. 79.

*Annotations*:—*Folld.* *Stewart v. Greenock Marine Insee.* (1848), 2 H. L. Cas. 159. *Apld.* *Keith v. Burrows* (1877), 2 App. Cas. 636; *The Red Sea*, [1896] P. 20. *Refd.* *Kerswill v. Bishop* (1832), 2 Cr. & J. 529; *Knight v. Faith* (1850), 15 Q. B. 649; *Scottish Marine Insee. v. Turner* (1853), 21 L. T. O. S. 10; *Wills v. Palmer* (1859), 7 C. B. N. S. 340; *Midland Insee. v. Smith* (1881), 6 Q. B. D. 561. *Mentd.* *Green v. Briggs* (1848), 6 Hare, 395.

**2347. ———— ]**—In all cases of insurance on ship, in which the subject is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all benefit or advantage incident to it, or rather, such property vests in the underwriters.

Freight, while the ship is in the course of earning it, is a benefit or advantage incident to the ship, & therefore, becomes the property of the underwriters, paying for a total loss.

A vessel, in the course of a voyage, struck upon

underwriters, who took no effectual steps for seven years to raise the cargo. Resps. then began operations for

salvaging the cargo:—*Held*: they could not do so against the will of the underwriters who had acquired the rights of

the owners.—*SALVAGE ASSOCN. OF LONDON v. S. A. SALVAGE SYNDICATE, LTD.* (1906), 23 S. C. 169.—*S. AF.*



an iceberg on July 27 & was considerably injured, but reached Liverpool, & while in the river there, grounded outside the docks on Aug. 11, was afterwards taken into dock, the cargo discharged, & was then surveyed, & after the survey, namely, on Sept. 1, the owner abandoned to the underwriters on ship, & claimed as for a total loss:—*Held*: the underwriter on ship was entitled, on settling as for a total loss, to have the benefit, in account, of the freight which had been received by the owner on the discharge of the cargo.

To constitute a total loss the actual annihilation of the subject of the insurance is not necessary; it is sufficient if the expenses of repairs would exceed the value of the ship when repaired (LORD COTTENHAM, C.).—*STEWART v. GREENOCK MARINE INSURANCE CO.* (1848), 2 H. L. Cas. 159; 9 E. R. 1052; *sub nom.* THE LAUREL, *STEWART v. GREENOCK MARINE INSURANCE CO.*, 2 L. T. 809, H. L.

*Annotations*:—*Consd.* Knight v. Faith (1850), 15 Q. B. 649; Scottish Marine Insce. v. Turner (1853), 21 L. T. O. S. 10; Hickie v. Rodocanachi (1859), 4 H. & N. 455. *Distd.* Potter v. Rankin (1870), L. R. 5 C. P. 341. *Appld.* Keith v. Burrows (1877), 2 App. Cas. 636; The Red Sea, [1896] P. 20. *Refd.* Miller v. Woodfall (1857), 8 E. & B. 493; Jardine v. Leathley (1863), 3 B. & S. 700; Kemp v. Halliday (1866), 6 B. & S. 723; Barker v. Janson, Potter v. Campbell (1868), 16 W. R. 399; Rankin v. Potter (1873), L. R. 6 H. L. 83; Midland Insce. v. Smith (1881) 6 Q. B. D. 561; Sea Insce. v. Hadden (1884), 13 Q. B. D. 706. *Mentd.* Dahl v. Nelson, Donkin (1881), 50 L. J. Ch 411.

**2348. — Clause in ship policy excluding claim for freight.**—The words “in full” in the clause of the Institute Time Clauses—Freight—1910, which provides that “In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded, or in ballast, chartered or not chartered,” do not mean “without benefit of salvage.”

Pltf. insured the hull of his ship under a time policy by which in the event of a constructive total loss the underwriters were to make no claim for freight whether notice of abandonment was given or not. He also insured the freight of the ship with other underwriters under a time policy containing the clause of the Institute Time Clauses—Freight—above set out. The ship while on a voyage during the currency of the policies stranded & became a constructive total loss. She was, however, towed in her damaged condition to her destination, where her cargo was discharged, & the freight, being less than the amount at which the freight was valued in the policy, was paid to pltf. In an action on the policy on freight:—*Held*: the provision in the hull policy prevented the ordinary rule of law, by which in the event of a constructive total loss the right to the freight earned subsequently to the loss passes to the underwriters on hull, from applying, & defts. were entitled to a deduction in respect of the freight received by pltf.—*COKER v. BOLTON*, [1912] 3 K. B. 315; 82 L. J. K. B. 91; 107 L. T. 54; 50 Sol. Jo. 751; 12 Asp. M. L. C. 231; 17 Com. Cas. 313.

*See, now*, Marine Insurance Act, 1906 (c. 41), s. 63 (2).

**2349. — Freight to place of casualty—Rights of underwriter on ship.**—A shipowner loaded his ship, which was bound for Liverpool, with goods on his own account; & he insured the ship & the freight of the goods by distinct insurances. The ship was stranded at S., on the English coast, 20 miles from Liverpool. The shipowner abandoned the ship to the insurers on the ship. After

veyed by lighters to Liverpool; & he, at his own expense, procured assistance by which the ship, with the remainder of his goods on board, was brought to Liverpool. Afterwards, the assurers accepted the abandonment. On the assured claiming for the loss of the ship from the assurer, the assurer claimed credit for the freight of the goods of the shipowner:—*Held*: nothing in the nature of freight for the carriage of the shipowner's goods to S. passed to the abandonees; but they were entitled to an allowance for the carriage of the part of the goods from S. to Liverpool in the ship after the abandonment, to be estimated at the current rate of freight as if brought from S. to Liverpool by another ship.—*MILLER v. WOODFALL* (1857), 8 E. & B. 493; 27 L. J. Q. B. 120; 30 L. T. O. S. 240; 4 Jur. N. S. 302; 120 E. R. 184.

*Annotations*:—*Appld.* Keith v. Burrows (1877), 2 App. Cas. 636. *Refd.* Hickie v. Rodocanachi (1859), 4 H. & N. 455. *Mentd.* Arrow S.S. Co. v. Tyne Comrs., The Crystal (1894), 6 R. 258.

**2350. — Unearned freight.**—SEA INSURANCE CO. v. HADDEN, No. 2356, *post*.

**2351. Rights of underwriter on ship—Freight earned by subsequent ship.**—A ship having been chartered to carry troops to Calcutta, by a charterparty, under which a portion of the freight was made payable on the completion of the voyage, when about 700 miles beyond the Mauritius caught fire. The ship put back to the Mauritius, where, being found to be greatly damaged, she was abandoned to the underwriters as totally lost, & the abandonment was accepted. The captain having chartered another ship & forwarded the troops to Calcutta, the freight was received by the shipowner's agents:—*Held*: in forwarding the troops the captain acted as agent for the owner, & not for the underwriters; & the underwriters, to whom the ship had been abandoned, were not entitled to any benefit from the freight so received.—*HICKIE v. RODOCANACHI* (1859), 4 H. & N. 455; 28 L. J. Ex. 273; 33 L. T. O. S. 150; 5 Jur. N. S. 550; 7 W. R. 545; 157 E. R. 917.

*Annotations*:—*Consd.* Do Cuadra v. Swann (1864), 16 C. B. N. S. 772; Sea Insce. v. Hadden (1884), 13 Q. B. D. 706. *Mentd.* Cammell v. Sewell (1860), 6 Jur. N. S. 918.

**2352. — Prepaid freight.**—Pltfs. were insurers of the hull & machinery of defts.' steamship whilst on a voyage from Pensacola to West Hartlepool. The vessel stranded at the entrance to the latter harbour, & was abandoned by defts. to pltfs. as a constructive total loss, but the cargo of timber was subsequently delivered. At Pensacola the sum of £1,677 19s. 10d. had been advanced to the master by the charterers, under a clause in the charterparty, by which “Sufficient cash for ship's ordinary disbursements at port of loading to be advanced the master by the charterers or their agents at the agreed exchange, ship paying 2½ per cent. commission, including insurance. Master to give his draft, on owners or consignees, as required & customary to cover same, which shall be paid out of the first freight collected.” Defts. accepted from the consignees of the cargo, who held the master's draft for value, the freight less the above sum; but pltfs. claimed the gross freight as a benefit incident to the ship:—*Held*: defts. in accounting to pltfs. for the freight, were entitled to deduct the sum of £1,677 19s. 10d. as, by the terms of the charterparty, the cash advanced at Pensacola was equivalent to prepaid freight, & as such, did not pass to pltfs., on the abandonment of the vessel & subsequent delivery of the cargo.



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The shipowner here, according to the true construction of this charterparty, as between him & the charterer, was entitled to part of that freight by way of advance at the commencement of the voyage & before the ship started. That was to be treated, as between him & the charterer, as pre-paid freight—that is, freight paid & not to be got back again. To insure that freight is a perfectly well-known practice on the part of the person who would lose if the ship was lost. That is not the shipowner. That freight is safe in his pocket whatever happens to the ship (LORD ESHER, M.R.).—*THE RED SEA*, [1896] P. 20; 65 L. J. P. 9; 73 L. T. 462; 44 W. R. 306; 12 T. L. R. 40; 40 Sol. Jo. 64; 8 Asp. M. L. C. 102, C. A.

*Annotation:—Apld. Barraclough v. Brown* (1896), 65 L. J. Q. B. 333.

**2353. Rights of underwriter on freight—Freight earned pro rata to place of casualty.]—**Underwriters who have paid a total loss on chartered freight are entitled to the benefit of any *pro rata* freight earned & received by the ship.—*LONDON ASSURANCE CORPN. v. WILLIAMS* (1893), 9 T. L. R. 257, C. A.

**2354. Rights of underwriter on goods—Freight payable to ship owner.]—***BAILLIE v. MOUNDIGLIANI* (1785), cited in 6 Term Rep. 421; 1 Park on Marine Insurances, 8th ed. p. 116; 101 E. R. 627.  
*Annotations:—Consd. Hunter v. Prinsep* (1808), 10 East. 378; *Metcalf v. Britannia Ironworks Co.* (1876), 1 Q. B. D. 613. *Refd. Tamvaco v. Lucas* (1861), 1 B. & S. 185; *Hopper v. Burness* (1876), 1 C. P. D. 137.

## SECT. 25.—SUBROGATION.

### SUB-SECT. 1.—IN GENERAL.

See Marine Insurance Act, 1906 (c. 41), s. 79, &, generally, Part I., Sect. 11, *ante*.

**2355. Nature of right—Distinguished from rights on abandonment—Rights incident to property in ship—Freight & damages.]—**(1) There is no independent right in underwriters to maintain in their own name, & without reference to the persons insured, an action for damage to the thing insured.

(2) Although the underwriters have paid for a total loss, & are entitled to all the rights in the injured ship which belong to its owner, yet if that owner cannot assert a right for damages against the wrongdoer, neither can the underwriters.

Two ships, the property of the same owner, collided; the underwriters paid the insurance effected on the lost ship, & then claimed to rank *pari passu*, with the owners of cargo destroyed, in the distribution of the fund lodged in ct. by the owner as proprietor of the ship which did the damage:—*Held*: the underwriters had no such right under the circumstances of the case.

(3) The right of the assured to recover damages from third person is not one of those rights which are incident to the property in the ship; it does pass to the underwriters in case of payment for a total loss, but on a different principle; & on this same principle it does pass to the underwriters who have satisfied a claim for a partial loss, though no property in the ship passes (LORD BLACKBURN).—*SIMPSON v. THOMSON* (1877), 3 App. Cas. 279; 38 L. T. 1; 3 Asp. M. L. C. 567, H. L.

*Annotations:—As to* (1) *Refd. King v. Victoria Insee.*, [1896] A. C. 250. *As to* (2) *Folld. Midland Insee. v. Smith* (1881), 6 Q. B. D. 561. *Refd. Burnand v. Rodocanachi* (1881), 6 Q. B. D. 638. *Generally, Refd. Castellain v. Preston* (1883), 11 Q. B. D. 380; *Sea Insee. v. Hadden* (1884), 13 Q. B. D. 706; *Dufourcet v. Bishop* (1886), 18 Q. B. D. 373; *Edwards v. Motor Union Insee.*, [1922] 2 K. B. 249.

*Mentd. Sir John Jackson, Ltd. v. S.S. Blanche*, [1908] A. C. 126; *Remorquage & Hélice (Soc. Anon. de) v. Bennetta*, [1911] 1 K. B. 243; *The Amerika*, [1914] P. 167; *The Coaster* (1922), 91 L. J. P. 145; *Elliott Steam Tug Co. v. Shipping Controller*, [1922] 1 K. B. 127; *McColl v. Canadian Pacific Ry.*, [1923] A. C. 126.

**2356. ———.]—**Freight to be earned under a charterparty is not an incident to the ownership of the vessel; & therefore although an underwriter of a policy of insurance upon the vessel herself becomes, by abandonment to him upon a constructive total loss happening through the fault of another vessel, entitled after payment of the sum secured by the policy to every benefit accruing from the ownership of the insured vessel, he cannot claim any part of the damages recovered from the owners of the wrongdoing vessel on account of loss of freight intended to be earned by the insured vessel. Defts. being owners of a ship chartered her upon a voyage, & insured her with plths., & they insured the freight intended to be earned with other underwriters. Defts.' ship became a constructive total loss through a collision with the C. occasioned by negligence in navigating the latter vessel. Plths. settled with defts. for a total loss of the insured ship. No freight was earned under the charterparty. Afterwards defts. recovered from the owners of the C. damages for the loss of their ship & of her freight:—*Held*: plths. were not entitled to any part of the damages recovered from the owners of the C. on account of the loss of the freight intended to be earned by defts.' ship.

He [the insurer] is entitled to every benefit to which the assured is entitled in respect of the thing to which the contract of insurance relates, but to nothing more (LINDLEY, L.J.).—*SEA INSURANCE CO. v. HADDEN* (1884), 13 Q. B. D. 706; 53 L. J. Q. B. 252; 50 L. T. 657; 32 W. R. 841; 5 Asp. M. L. C. 230, C. A.

*Annotation:—Consd. The Red Sea* (1895), 65 L. J. P. 9.

**2357. Extent of right—All remedies open to assured.]—***SIMPSON v. THOMSON*, No. 2355, *ante*.

**2358. ———.]—***SEA INSURANCE CO. v. HADDEN*, No. 2356, *ante*.

**2359. ———.]—***KING v. VICTORIA INSURANCE CO.*, No. 159, *ante*.

**2360. Limitation or exclusion of right—Assured no interest in subject-matter.]—**An insurance having been effected by deft. J. with plths. on a ship & cargo from Ostend to Canton, was seized by the East India co. at Bencoolen, as an illicit trader; J. recovered in an action on the policy against the insurers & obtained judgment; upon a bill by the insurers against defts. to be relieved against the verdict & judgment, or that the insurers might stand in the place of J. to receive satisfaction against the East India co. for any unlawful capture made by them:—*Held*: they could not be relieved against the verdict & judgment; for if the seizure were lawful that would have been a good defence to the action; & the insurers could not stand in the place of J. to receive satisfaction against the East India Co., as there was no proof in the cause against the co. that J. had any interest or property in the ship or goods.—*LONDON ASSURANCE CO. v. JOHNSON* (1737), West temp. Hard. 260; 25 E. R. 930.

**2361. ——— Collision between ships of same owner—Owner not liable in damages to himself.]—***SIMPSON v. THOMSON*, No. 2355, *ante*.

**2362. ——— Only remedies open to assured.]—***SEA INSURANCE CO. v. HADDEN*, No. 2356, *ante*.

**2363. ——— Expressly excluded—Recourse against lightermen.]—***TATE v. HYSLOP*, No. 1293, *ante*.

**2364. ——— Payment not within terms of policy.]—***KING v. VICTORIA INSURANCE CO.*, No. 159, *ante*.

**2365. — Policy void.]—**A policy of marine insurance which contains a p.p.i. or the like clause is made void by Marine Insurance Act, 1906 (c. 41), s. 4 (2) (b), whether it is a wagering contract in fact or not. Such a policy is not a contract of indemnity & gives no scope for the operation of the principle of subrogation. The assured under an honour policy does not by asking for & receiving payment thereunder from the insurer elect to treat the policy as a valid & binding contract. Under such a policy the insurance is made irrespective of interest & payment is made irrespective of indemnity.—**EDWARDS (JOHN) & Co. v. MOTOR UNION INSURANCE Co.**, [1922] 2 K. B. 249; 91 L. J. K. B. 921; 128 L. T. 276; 38 T. L. R. 690; 16 Asp. M. L. C. 89; 27 Com. Cas. 367.

**2366. In whose name right enforceable—Assured—Not insurers.]—****DUFOURCET v. BISHOP**, No. 2370, *post*.

**2367. — — — — —.]—****SIMPSON v. THOMSON**, No. 2355, *ante*.

**2368. — — — — — Unless by assignment by assured.]—****KING v. VICTORIA INSURANCE Co.**, No. 159, *ante*.

**2369. — — — — — Goods under contract for sale—Cheque passed for payment at time of loss.]—**In pursuance of a contract note, providing for cost, insurance, & freight of a parcel of wood goods, the sellers in Christiania shipped the goods under a bill of lading to the order of their London agents, who forwarded it to the buyers at Exeter, & authorised them to retain it against their acceptance at four months, or cash less discount. The buyers elected to pay in cash; but their country cheque posted to London was not credited as paid until three days after the carrying vessel had been in collision with another vessel & the goods had been damaged. The carrying vessel put into a port of distress, where the goods were sold on behalf of underwriters, with whom the sellers' agents had effected a policy for the benefit of whom it might concern. The underwriters subsequently paid the buyers as for a total loss, & the sellers retained the proceeds of the cheque representing the invoice price of the goods. In an action of damage by collision brought against the other vessel by the owners of the goods in the carrying ship, the names of the buyers were given as pltf's., but the ct. held that the buyers had no right of action as the property in the goods was not vested in them at the time of the collision. By leave the names of the sellers were added as pltf's., & the other vessel having been found alone to blame, the amount of the damage was referred to the registrar, who rejected the claim of the sellers suing on behalf of the underwriters on the ground that, as the sellers had been paid by the buyers the sound value of the goods, they had not sustained any loss in respect of which subrogation could arise. This report was confirmed by the judge sitting in Admlty.:—**Held**: the passing of the cheque from the buyers to sellers did not deprive the underwriters of their right to recover the loss from the wrongdoer in the name of the sellers who were the owners of the goods at the time of the collision.—**THE CHARLOTTE**, [1908] P. 206; 77 L. J. P. 132; 99 L. T. 380; 24 T. L. R. 416; 11 Asp. M. L. C. 87, C. A.

#### SUB-SECT. 2.—COMPENSATION PAID TO ASSURED BY THIRD PARTIES.

*See* Marine Insurance Act, 1906 (c. 41), s. 79, *generally*, Part I., Sect. 11, *ante*.

**2370. Liability of insurer discharged.]—****WHITE v. DOBBINSON**, No. 2374, *post*.

**2371. After payment by insurer—Insurer's right to reimbursement.]—**Insurer after satisfaction stands in place of the assured as to the goods, salvage, & restitution in proportion for what he paid.—**RANDAL v. COCKRAN** (1748), 1 Ves. Sen. 98; 27 E. R. 916, L. C.

*Annotations*:—**Consd.** *Yates v. Whyte* (1838), 4 Bing. N. C. 272. **Folld.** *White v. Dobinson* (1844), 14 Sim. 273. **Consd.** *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639. **Distd.** *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333. **Folld.** *Stearns v. Village Main Reef Gold Mining Co.* (1905), 21 T. L. R. 236. **Consd.** *Edwards v. Motor Union Insce.*, [1922] 2 K. B. 249. **Refd.** *Morgan v. Price* (1849), 4 Exch. 615; *Kemp v. Halliday* (1866), 6 B. & S. 723; *Stringer v. English & Scottish Marine Insce.* (1870), 10 B. & S. 770; *Rankin v. Potter* (1873), L. R. 6 H. L. 83; *Simpson v. Thomson* (1877), 3 App. Cas. 279; *Midland Insce. v. Smith* (1881), 6 Q. B. D. 561; *Castellain v. Preston* (1883), 11 Q. B. D. 380. **Mentd.** *Arrow Shipping Co. v. Tyne Improvement Comrs.*, *The Crystal*, [1894] A. C. 508.

**2372. — — — — — Unless right compounded.]—**Satisfaction having been made, under a royal commission for distribution of prizes to the insured:—**Held**: such of the insurers as had paid entitled to restitution though foreigners; but not those who had compounded & renounced salvage.—**BLAAUWPOT v. DA COSTA** (1758), 1 Eden, 130; 28 E. R. 633.

*Annotations*:—**Folld.** *White v. Dobinson* (1844), 14 Sim. 273. **Distd.** *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333. **Refd.** *Castellain v. Preston* (1883), 49 L. T. 29.

**2373. — — — — — Liability of assured to account.]—**Where an action against deft. for injury done to pltf.'s vessel by collision, was referred, & the underwriters, after the commencement of the action, which was brought by the direction of pltf. himself, & for his own benefit & advantage, paid pltf. the amount of the injury, against which an insurance had been effected, & the arbitrator allowed deft. the sum thus paid by the insurers, & awarded pltf. nominal damages:—**Held**: such allowance was wrong; & the damages should be increased to the amount of the sum paid by the underwriters, inasmuch as the recovery of damages to such extent by pltf. did not amount to a double satisfaction, he being only a trustee for the insurers.—**YATES v. WHYTE** (1838), 4 Bing. N. C. 272; 1 Arn. 85; 5 Scott, 640; 7 L. J. C. P. 116; 132 E. R. 793.

*Annotations*:—**Consd.** *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639. **Folld.** *Simpson v. Thomson* (1877), 3 App. Cas. 279. **Refd.** *Morgan v. Price* (1849), 4 Exch. 615; *Kemp v. Halliday* (1866), 6 B. & S. 723; *Stringer v. English & Scottish Marine Insce.* (1870), 10 B. & S. 770; *Midland Insce. v. Smith* (1881), 6 Q. B. D. 561. **Mentd.** *Jebson v. East & West India Dock Co.* (1875), L. R. 10 C. P. 300; *Jamal v. Moolla Dawood*, [1916] 1 A. C. 175; *Hill v. Showell* (1918), 87 L. J. K. B. 1106.

**2374. — — — — —.]—**An insurance on shipping is merely a contract to indemnify the insured against loss, & therefore when compensation for loss or damage has been received from other parties, the underwriters are discharged from all claim by the insured & where the underwriters have paid the loss, & the assured party afterwards obtains compensation from other persons, the underwriters will have a claim to be repaid what they have paid under the policy, which claim they can enforce in equity. Persons under such circumstances will be restrained by injunction from receiving double compensations without providing for the underwriters' lien.—**WHITE v. DOBBINSON** (1845), 5 L. T. O. S. 233, L. C.

**2375. — — — — —.]—**Resps. effected with underwriters valued policies of insurance, including war risks on a cargo, which was afterwards destroyed by the *Alabama*, a Confederate cruiser, & the underwriters paid to resps. as on an actual total loss the valued amounts, which were less than



**Sect. 25.—Subrogation: Sub-sects. 2 & 3. Sect. 26: Sub-sect. 1, A.]**

the real value. The United States, out of a compensation fund created after the loss & distributed under an Act of Congress passed subsequently to the loss, paid to resps. the difference between their real total loss & the sum received from the underwriters. Under the Act of Congress no claim was allowed for any loss for which the party injured should have received compensation from any insurer, but if such compensation should not have been equal to the loss actually suffered, allowance might be made for the difference; & no claim was allowed by or on behalf of any insurer either in his own right or in that of the party insured:—*Held*: the underwriters were not entitled to recover the compensation from resps.

The general rule of law . . . is that where there is a contract of indemnity, it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity, & a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; & if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back (LORD BLACKBURN).—*BURNAND v. RODOCANACHI* (1882), 7 App. Cas. 333; 51 L. J. Q. B. 548; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. L. C. 576, H. L.

*Annotations*:—*Consd.* *Castellain v. Preston* (1883), 11 Q. B. D. 380; *British Dominions General Insee. v. Duder*, [1915] 2 K. B. 394; *Edwards v. Motor Union Insee.*, [1922] 2 K. B. 249. *Reid*, *Stearns v. Village Main Reef Gold Mining Co.* (1905), 21 T. L. R. 236; *The Commonwealth*, [1907] P. 216; *City Tailors v. Evans* (1921), 91 L. J. K. B. 379. *Mentd.* *Elgood v. Harris*, [1896] 2 Q. B. 491.

**2376.** ———.]—Goods were shipped on defts.' ship under a charterparty, which provided that if required, the whole freight should be advanced subject to a deduction for interest & insurance. The freight was paid in advance, & the amount was insured. The charterers sold the goods to pltf. at a price covering cost, freight, & insurance. The cargo was lost by the negligence of defts. In action for the loss of the goods:—*Held*: pltf. were entitled to recover as part of the damages sustained by them the amount of the advanced freight, which was included in the price paid by them for the goods, for the insurers of the freight who had indemnified pltf. were entitled to be subrogated to the rights of pltf. in respect of the advanced freight, & to have the action maintained for their benefit to the amount insured, as it would but for the insurance, have formed part of the damages to which the pltf. would have been entitled.—*DUFORCET v. BISHOP* (1886), 18 Q. B. D. 373; 56 L. J. Q. B. 497; 56 L. T. 633; 6 Asp. M. L. C. 109.

**2377.** ——— Less costs of recovering compensation.]—Pltf. gave defts. an open cover slip by which they undertook to reinsure defts. to the extent of one-half their interest up to £1,000 on certain shipments of lumber. Pursuant to the cover slip, pltf. reinsured defts. by two policies respectively on interests by two vessels. Under the policies defts. claimed & were paid by pltf. sums amounting to £1,354 4s. 10d. Defts. sub-

sequently recovered from the shipowners damages by reason of having been induced to pay losses on the two vessels by fraudulent misrepresentations of an official in their employment. The measure of the damages so recovered by defts., was the sum which upon inquiry appeared to flow from the liability of defts. as insurers in respect of the two vessels, & included the £1,354 4s. 10d. Pltf. then sued defts. for the repayment of the £1,354 4s. 10d. as money received by them to the use of pltf.:—*Held*: pltf. were entitled, upon the principles laid down in *Castellain v. Preston*, No. 156, *ante*, to recover the £1,354 4s. 10d. upon the ground that the money was obtained by defts. by enforcing a right which diminished defts.' loss, & therefore the doctrine of subrogation applied.—*ASSICURAZIONI GENERALI DE TRIESTE v. EMPRESS ASSURANCE CORPN., LTD.*, [1907] 2 K. B. 814; 76 L. J. K. B. 980; 97 L. T. 785; 23 T. L. R. 700; 51 Sol. Jo. 703; 10 Asp. M. L. C. 577; 13 Com. Cas. 37.

**SUB-SECT. 3.—AMOUNT RECOVERABLE.**

**2378. Valued policy—Valuation in policy less than actual value.]—***NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCN. v. ARMSTRONG*, No. 748, *ante*.

**2379.** ———.]—A ship was insured for £45,000 on an agreed value of £45,000. As the result of a collision with another ship she was sunk, & the underwriters paid the amount insured as for a total loss. In an action of collision in the Admlty. Div. both ships were held to blame, & the owners of the insured ship were held entitled to recover from the owners of the other ship five-twelfths only of their loss. For the purposes of that judgment the value of the ship was taken at its actual value, which was £65,000, & the assured were paid five-twelfths of that sum. The underwriters claimed to be subrogated to the rights of the assured in respect of the amount so recovered:—*Held*: as the amount so recovered by the assured did not exceed the amount paid by the underwriters on the policy, the underwriters were entitled to recover from the assured the whole of the amount recovered by them in the admlty. action notwithstanding that it was based upon a value which was higher than that agreed in the policy.—*THAMES & MERSEY MARINE INSURANCE CO. v. BRITISH & CHILIAN S.S. Co.*, [1916] 1 K. B. 30; 85 L. J. K. B. 384; 114 L. T. 34; 32 T. L. R. 89; 13 Asp. M. L. C. 221; 21 Com. Cas. 150, C. A.

**2380.** ——— Sum insured less than value stated.]—*THE COMMONWEALTH*, No. 1987, *ante*.

**SECT. 26.—RECOVERY OF LOSSES BY ASSURED.**

**SUB-SECT. 1.—SETTLEMENT OF LOSSES.**

**A. In General.**

**2381. Authority of broker—To adjust & settle losses.]—***XENOS v. WICKHAM*, No. 410, *ante*.

**2382.** ——— Payment on behalf of underwriter.]—An insurance broker has no implied authority to pay to the assured losses, either total or partial, for the underwriter who employs him.—*BELL v. AULDJO* (1784), 4 Doug. K. B. 48; 99 E. R. 761.

**PART II. SECT. 26, SUB-SECT. 1.—A.**

**1. Vessel owned by person other than assured—Right of assured to recover.]—**Where pltf. procures an insurance on a vessel belonging to M., & by the terms of the policy the loss

is to be paid to pltf., he may maintain an action thereon in his own name.—*DIMOCK v. NEW BRUNSWICK MARINE* 6 N. B. R. (1

—CAN.

**m. Insurance by several owners—**

*due to acts of some—Right of other to recover.]—*The policy was on behalf of four part-owners & insured the sum *in solido* on an entire ship for on premium:—*Held*: the contract of insurance was several, & the innocen



**2383. — Only money payment receivable.]—**An insurance broker is only entitled to receive payment for the assured from the underwriter in money; & therefore, a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal.—*TODD v. REID* (1821), 4 B. & Ald. 210; 106 E. R. 915; *previous proceedings*, 3 Stark. 16, N. P.

*Annotations:—***Apld.** *Scott v. Irving* (1830), 1 B. & Ad. 605. **Consd.** *Barker v. Greenwood* (1837), 2 Y. & C. Ex. 414. **Expld.** *Stewart v. Aberdein* (1838), 4 M. & W. 211. **Apld.** *Sweeting v. Pearce* (1861), 9 C. B. N. S. 534. **Refd.** *Bayley v. Wilkins* (1849), 7 C. B. 886; *Muttyloll Seal v. Dent* (1853), 5 Moo. Ind. App. 328; *Catterall v. Hindle* (1866), L. R. 1 C. P. 186; *Pearson v. Scott* (1878), 9 Ch. D. 198.

**2384. — —.]—***SCOTT v. IRVING*, No. 2417, *post*.

**2385. — —.]—***BARTLETT v. PENTLAND*, No. 2392, *post*.

**2386. — — Memorandum on credit note.]—***STEWART v. ABERDEIN*, No. 2414, *post*.

**2387. — Settlement in account—Authority from assured.]—***BARTLETT v. PENTLAND*, No. 2392, *post*.

**2388. — — —.]—***STEWART v. ABERDEIN*, No. 2414, *post*.

**2389. — — Contract between parties.]—***Re LAW CAR & GENERAL INSURANCE CORPN., LTD.* (1911), 55 Sol. Jo. 407; *affd.*, [1911] W. N. 101, C. A.

**Usage of trade.]—***See* Sect. 26, subsect. 1, C., *post*.

**2390. Liability of underwriter—Name struck off policy—No actual payment to broker.]—**After a total loss & adjustment within a month, & whilst the policy remains in the hands of the broker, the initials of the insurer are struck out of the adjustment to indicate payment, & the broker debits the insurer with the loss. The insurer is still liable to the assured.—*JELL v. PRATT* (1817), 2 Stark. 67, N. P.

**2391. — — Adjustment not recognised by assured.]—**Insurance brokers after a total loss & adjustment, & whilst the policy remained in their hands, erased the name of an underwriter from the policy, debited him with the loss, & gave the assured credit for it. The assured however, not having recognised the adjustment, the underwriter was held still liable to him for the loss.—*BENSON v. MAITLAND* (1820), Gow. 205, N. P.

**2392. — — Without consent of assured.]—**An assured who resided at Plymouth employed an insurance broker in London to recover a loss from the underwriters; & the latter adjusted the loss by setting off in account against it a debt due to them from the broker for premiums. The name of the underwriter was then struck off the policy. It was proved to be the custom at Lloyd's Coffee House in London to consider such set-off as payment between the broker & underwriter. The broker became bkpt., & never paid the money to the assured:—*Held*: the set-off in account between the underwriter & the broker was not payment to the assured, inasmuch as the broker had only authority to receive payment for the assured in money; the custom which prevailed at Lloyd's

Coffee House was not binding on the assured, who were not shown to be cognisant of it, or to have assented to it; & the erasure of the name of the underwriter from the policy, that not having been done with the assent of the assured, did not discharge the former.

As to the supposed usage at Lloyd's, the usage in a particular place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage & adopt it (*LORD TENTERDEN, C.J.*).—*BARTLETT v. PENTLAND* (1830), 10 B. & C. 760; L. & Welsb. 235; 8 L. J. O. S. K. B. 264; 109 E. R. 632.

*Annotations:—***Consd.** *Pearson v. Scott* (1878), 9 Ch. D. 198. **Refd.** *Scott v. Irving* (1830), 1 B. & Ad. 605; *Barker v. Greenwood* (1837), 2 Y. & C. Ex. 414; *Robertson v. Jackson* (1845), 2 C. B. 412; *Partridge v. Bank of England* (1846), 9 Q. B. 396; *Sweeting v. Pearce* (1859), 7 C. B. N. S. 449. **Mentd.** *Baylife v. Butterworth* (1847), 1 Exch. 425; *Muttyloll Seal v. Dent* (1853), 5 Moo. Ind. App. 328.

—.]—*Compare* No. 2397, *post*.

**2393. — Name not struck off policy—Settlement between broker & underwriter—Failure of broker to pay.]—**A policy delivered to an insurance broker for the purpose of settling a loss, was adjusted by the underwriter, payable at a month. The broker charged the underwriter in account for the loss, & transmitted to the assured an account, in which he stated himself to be debtor for the amount of the loss: & for the balance of that account the assured drew a bill upon the broker, which the latter accepted but did not pay. The underwriter's name never having been struck off the policy:—*Held*: he was not discharged.—*RUSSELL v. BANGLEY* (1821), 4 B. & Ald. 395; 106 E. R. 982.

*Annotations:—***Expld.** *Bartlett v. Pentland* (1830), 10 B. & C. 760. **Consd.** *Scott v. Irving* (1830), 1 B. & Ad. 605; *Barker v. Greenwood* (1837), 2 Y. & C. Ex. 414. **Refd.** *Bayley v. Wilkins* (1849), 7 C. B. 886; *Sweeting v. Pearce* (1861), 9 C. B. N. S. 534; *Catterall v. Hindle* (1866), L. R. 1 C. P. 186; *Bridges v. Garrett* (1869), L. R. 4 C. P. 580.

**2394. — Insolvency of broker—Settlement between broker & assured—Credit note.]—**Where a party who has dealt with an agent, has by his conduct led the principal to believe that he looked to the agent alone for payment, & thereby induced the principal, after the debt has become due, either to pay the agent the amount or allow him to retain it out of the principal's money in his hands, the party so acting cannot afterwards resort to the principal.

*Pltf.*, the owner of a ship, applied to a broker to effect an insurance on it; the broker signed a policy, on behalf of deft., an underwriter. The ship was lost, & *pltf.* having applied to the broker for payment received from him a credit note. It was usual to pay credit notes at a month from their date. Both at the time of signing the policy & of the adjustment, the broker had money of deft. sufficient to pay the loss. Nearly three months after the credit note was given the broker stopped payment, when *pltf.* applied to deft. for the amount of the loss:—*Held*: there was no injury to deft. by the conduct of *pltf.* which rendered it unjust to call on him for payment, & therefore the case did not fall within the above rule, of law.—*MACFARLANE v. GIANNACOPULO* (1858), 3 H. & N.

owners could recover, notwithstanding the barratry of the other owners.—*CROWELL v. JONES* (1884), 17 N. S. R. (5 R. & G.) 513.—CAN.

**n. Prosecution of claim—Condition limiting time for.]—***DICKIE v. WESTERN ASSURANCE CO.* (1882), 21 N. B. R. 544.—CAN.

**o. — —.]—**A condition in a marine policy that all claims under

such a policy shall be void unless prosecuted within one year from date of loss, is a valid condition, & all claims under such a policy will be barred if not sued on within one year from the date of the loss.—*ALLEN v. MERCHANTS MARINE INSURANCE CO.* (1888), 15 S. C. R. 488.—CAN.

**p. Proof of loss—Notice of defect—By underwriter within reasonable time.]**

—If, when preliminary proof of loss, etc., is given to an underwriter, he is told by the assured that if any further proof is required he will furnish it, it is the duty of the underwriter to notify the insured of any defect in the proof within a reasonable time; & if he does not do so, but retains the proof supplied, it is evidence of a waiver of all defects.—*GEROW v. PROVIDENCE WASHINGTON INSURANCE*

**Sect. 26.—Recovery of losses by assured: Sub-sect. 1, A., B. & C.]**

860; 28 L. J. Ex. 72; 32 L. T. O. S. 133; 157 E. R. 716.

**2395. — Settlement between broker & underwriter—Bill of exchange.]—**Policies of insurance upon certain of pltfs.' ships were effected with defts. by a firm of insurance brokers on behalf of pltfs. Pltfs. subsequently authorised the brokers to settle their claim against defts. under these policies, & to receive payment in cash in accordance with the recognised custom. Instead of cash the brokers took a bill of exchange at three months in payment of a general account including pltfs.' This bill they afterwards discounted, & it was eventually paid by defts. The brokers failed without having paid pltfs. In an action by pltfs. to recover the amount due to them from defts.:—*Held*: the taking of the bill was not within the authority conferred upon the brokers by pltfs., it was contrary to the recognised business custom, & even when discounted it did not constitute a payment to the insured.—*HINE BROTHERS v. STEAMSHIP INSURANCE SYNDICATE, LTD., THE NETHERHOLME, GLEN HOLME & RYDAL HOLME* (1895), 72 L. T. 79; 11 T. L. R. 224; 7 Asp. M. L. C. 558; 11 R. 777, C. A.

*Annotation*:—*Reid*. Bradford v. Price (1923), 92 L. J. K. B. 871.

**2396. Liability of broker to assured—Money received from underwriter—Contract between assured & insurer illegal.]—**A. having received money to the use of B. on an illegal contract between B. & C. shall not be allowed to set up the illegality of the contract as a defence in an action brought by B. for money had & received.—*TENANT v. ELLIOTT* (1797), 1 Bos. & P. 3; 126 E. R. 744.

*Annotations*:—*Consd.* Farmer v. Russell (1798), 1 Bos. & P. 296; Nicholson v. Gooch (1856), 5 E. & B. 999. *Expld.* Sykes v. Beadon (1879), 11 Ch. D. 170; Rawlings v. General Trading Co., [1921] 1 K. B. 635. *Reid*. Thomson v. Thomson (1802), 7 Ves. 470; Bousfield v. Wilson (1846), 16 M. & W. 185. *Mentd.* Hastelow v. Jackson (1828), 8 B. & C. 221; Sharp v. Taylor (1849), 2 Ph. 801; Grell v. Levy (1864), 16 C. B. N. S. 73; Beeston v. Beeston (1875), 45 L. J. Q. B. 230; Davies v. London & Provincial Marine Insco. (1878), 38 L. T. 478; Bridger v. Savage (1885), 15 Q. B. D. 363; R. v. Tankard (1893), 63 L. J. M. C. 61; Gordon v. Metropolitan Police Chief Comr., [1910] 2 K. B. 1080.

**2397. — When credit received from underwriter—Erasure of underwriter's name from policy.]—**As soon as an insurance broker has received credit in account with an underwriter for a loss upon a policy, his principal may maintain money had & received against him to recover the amount; & in such action if the underwriter's name is erased from the policy, deft. can neither dispute the liability of the underwriter for the loss, nor his own receipt of the sum subscribed.—*ANDREW v. ROBINSON* (1812), 3 Camp. 199, N. P.

*Annotations*:—*Distd.* Ovington v. Bell (1812), 3 Camp. 237. *Folld.* Wilkinson v. Clay (1815), 6 Taunt. 110. *Distd.* Benson v. Maitland (1820), Gow, 205. *Expld.* Atkins v. [1822] 4 Ad. & El. 819. *Reid.* Holland v. Russell (1863), 8 L. T. 468. *Mentd.* Story v. Story (1843), 2 L. T. O. S. 227.

**2398. — Acceptance taken.]—**If an insurance broker debit the underwriter with a loss,

& take his acceptance for the balance of account between broker & underwriter, payable at a later date than the time when the loss would be payable in cash, the assured may maintain an action against the broker for money had & received; though the acceptance was dishonoured, & the broker never received any money.—*WILKINSON v. CLAY* (1815), 6 Taunt. 110; 128 E. R. 974; *previous proceedings*, 4 Camp. 171, N. P.

*Annotation*:—*Expld.* Atkins v. Owen (1836), 4 Ad. & El. 819.

**2399. — Bankruptcy of insurer—Settlement between broker & assured—Without reference to share of insurer.]—**Insurance brokers holding a policy for the purpose of adjusting a loss, suffered an underwriter's name to be struck out, upon his signing the adjustment. He gave them credit in his books for the loss, & became bkpt., but they never took credit for the amount in their books. On the contrary they gave the assured notice of the bkpcy., & there was afterwards a settlement of accounts between the brokers & the assured comprehending the policy in question, in which no demand was made upon them in respect of bkpt.'s subscription:—*Held*: they were not liable to the assured for the sum due from the bkpt. on the policy.—*OVINGTON v. BELL* (1812), 3 Camp. 237, N. P.

**2400. Title of assured—Assured acting through agent—Knowledge of agency.]—**If a person employed by shipowners, as their agent, effect a policy of insurance, & represent himself as the principal to the brokers, who cause such insurance to be effected:—*Held*: if the brokers receive the amount of the loss from the underwriters & pay it over to the agent, they are not liable to the owners, in an action for money had & received, although part of the money was paid to the agent after they were informed of his having acted in that capacity.—*BELL v. JUTTING* (1817), 1 Moore, C. P. 155.

**2401. — Partnership—Property in goods in one partner only.]—**An agent cannot dispute the title of his principal; & therefore where a ship originally belonged to one of two partners, & had been conveyed to B. for securing a debt, & B. became the sole registered owner of the ship, & afterwards, as agent for both partners, insured the ship & freight, & charged them with the premiums, etc. & on a loss happening, received the money from the underwriters:—*Held*: he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, & not to the exors. of the deceased partner, to whom the ship originally belonged.—*DIXON v. HAMOND* (1819), 2 B. & Ald. 310; 106 E. R. 380.

*Annotations*:—*Folld.* Roberts v. Ogilby (1821), 9 Price, 269. *Consd.* Phillips v. Robinson (1827), 4 Bing. 106. *Reid.* Hardman v. Willcock (1832), 9 Bing. 382; Zulueta v. Vinet (1852), 1 De G. M. & G. 315.

**2402. — Joint owners—Action by one.]—***ROBERTS v. OGILBY*, No. 371, *ante*.

**2403. — — — — —.]—***BRAIK v. DOUGLAS* (1828), 4 My. & Cr. 320, n.; 41 E. R. 125; *sub nom.* *BREAK v. DOUGLAS*, cited in 2 Cr. & M. at p. 681.

*Annotations*:—*Reid.* Hatsell v. Griffith (1834), 2 Cr. & M. 679; Stuart v. Welch (1839), 4 My. & Cr. 305.

Co. (1889), 28 N. B. R. 435; *affd.* on appeal, 14 S. C. R. 731.—CAN.

**q. Loss payable after proof — Failure to furnish proof.]—**A clause, "In case of loss, such loss to be paid in sixty days after proof of loss & adjustment, & proof of interest in the said assured," has the operation of a condition precedent; & judgment was arrested in an action by assured against insurer where such preliminary proof had not been furnished to or dispensed

with by deft.—*WATSON v. SUMMERS* (1843), 4 N. B. R. (2 Kerr) 101.—CAN.

**r. — — — — —.]—***ROBERTSON v. NEW BRUNSWICK MARINE ASSURANCE CO.* (1856), 8 N. B. R. (3 All.) 333.—CAN.

**t. — — — — —.]—***DRISCOLL v. MILLVILLE MARINE INSURANCE CO.* (1883), 23 N. B. R. 160; on appeal, 2 S. C. R. 183.—CAN.

**a. — Waiver of proof by underwriter.]—**An underwriter may waive the production of preliminary proof of interest in the assured by objecting to pay the loss on a different ground.—*DIMOCK v. NEW BRUNSWICK MARINE ASSURANCE CO.* (1848), 5 N. B. R. (3 Kerr) 654; *subsequent proceedings*, 6 N. B. R. (1 All.) 398.—CAN.

**b. — Settlement subject to arbitration—Where matters in dispute—Condition in policy.]—***LANTALUM v.*



**2404.** ————.]—A. is registered owner of certain shares of a ship, the remaining shares belonging to O. & D., his partners in trade, according to their interests in the general property of the partnership:—*Held*: A. alone could not maintain an action for money had & received against deft., an insurance broker, to recover his proportion of the proceeds of a policy of insurance effected by deft. on the ship.—*BROWN v. BRADFORD* (1842), 2 Mood. & R. 413, N. P.

———.]—*See, also*, AGENCY, Vol. I., pp. 560, 561, Nos. 2087–2089.

**2405. Costs of action against third party—By assured with consent of insurers.**—Certain goods which were partly insured were damaged whilst in a lighterman's barge. On the ground that the barge was unfit, it was suggested that the lighterman should be sued. The underwriters assenting, an action was brought by the assured against the lighterman which failed. The costs in the unsuccessful action were £481. The insured value of the goods was £184. The average statement gave the sound arrived value as £220, the damage to the goods as £46, & certain charges in the nature of suing & labouring expenses at about £30. In an action to recover the whole of the costs of the unsuccessful action:—*Held*: (1) the action was brought in the interests of both the assured & underwriters; (2) there was no rule of law which settled the question as to who should pay the costs, nor was there any custom suggested or proved; (3) the rights of the parties depended on what the agreement was; & there being no express agreement as to the costs, the inference to be drawn from the circumstances of the case was that to the extent of their respective interests in the litigation the parties agreed tacitly to bear each their share of the costs. The underwriters interest was one hundred & eighty-four two hundred & twentieths of the loss, £46, plus the sue & labour charges.—*DUUS, BROWN & CO. v. BINNING* (1906), 22 T. L. R. 529; 11 Com. Cas. 190.

**2406. Settlement in English or foreign currency—Provision in policy.**—A marine insurance policy on goods & freight, valued at £26,025, contained the clause "Claims, if any, to pay at the rate of \$4.15 to £1 sterling." The policy provided in terms for the payment of a total loss claim in sterling. In an action claiming for a total loss:—*Held*: the above clause only applied to claims which from their nature might require to be translated from dollars into sterling, such as general average claims, & had no application to a claim for a total loss.—*HOWARD, HOULDER & PARTNERS v. UNION MARINE INSURANCE CO., LTD.* (1922), 38 T. L. R. 515, H. L.

**Settlement according to usage.**—*See* Sect. 26, sub-sect. 1, B., *post*.

**Claims under policies—Set-off of premiums & losses.**—*See* Sect. 4, sub-sect. 4, A., *ante*.

#### B. Nature of Claim—Unliquidated Damages.

**2407. General rule.**—In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment: for the claim under a policy for a loss is for unliquidated damages to which no set-off

could be pleaded at law under Statutes of Set-off in an action by the assured, nor in equity in a suit by the assignee, & therefore the debt incurred by the assured is not a "defence" open to the insurers under Policies of Marine Insurance Act, 1868 (c. 86), s. 1, that statute being intended merely to amend procedure & not to alter the rights of the parties to the policy; nor is the debt incurred by the assured the subject of "set-off" or "counterclaim" within R. S. C., Ord. 19, r. 3.—*PELLAS v. NEPTUNE MARINE INSURANCE CO.* (1879), 5 C. P. D. 34; 49 L. J. Q. B. 153; 42 L. T. 35; 28 W. R. 405; 4 Asp. M. L. C. 213, C. A.

*Annotations*:—*Fold*. *Baker v. Adam* (1910), 102 L. T. 248. *Reid*. *Pickersgill v. London & Provincial Marine & General Insce.*, [1912] 3 K. B. 614. *Mentd.* *Gray v. Webb* (1882), 21 Ch. D. 802; *Ellis v. Torrington* (1919), 89 L. J. K. B. 369.

**2408. Partial loss—Before adjustment.**—Deft. cannot be held to bail in an action on a policy of insurance where there has been no adjustment because it is an action to recover unliquidated damages, although pltf. swear to a total loss.—*LEAR v. HEATH* (1813), 5 Taunt. 201; 1 Marsh. 19; 128 E. R. 664.

*Annotations*:—*Distd.* *Luckie v. Bushby* (1853), 13 C. B. 864. *Mentd.* *Cope v. Joseph* (1821), 9 Price, 155.

**2409. — After adjustment.**—*LUCKIE v. BUSHBY*, No. 353, *ante*.

**2410. Valued policy.**—*Assumpsit* to recover a partial loss on a valued policy of insurance of goods on a voyage to a market, premium 60s. per cent. to retain 23s. 9d. if landed in the United Kingdom. Plea set-off for premiums. Demurrer:—*Held*: a bad plea as the action was for unliquidated damages.—*BODDINGTON v. CASTELLI* (1853), 1 E. & B. 879; 1 C. L. R. 281; 23 L. J. Q. B. 31; 21 L. T. O. S. 197; 17 Jur. 781; 1 W. R. 359; 118 E. R. 665, Ex. Ch.; *affg.* S. C. *sub nom.* *CASTELLI v. BODDINGTON* (1852), 1 E. & B. 66.

*Annotations*:—*Mentd.* *Westoby v. Day* (1853), 2 E. & B. 605; *Johnson v. Diamond* (1855), 11 Exch. 73; *Rose v. Buckett* (1901), 84 L. T. 670.

**2411. Total loss.**—*BAKER v. ADAM*, No. 356, *ante*.

**Right of set-off.**—*See* Sect. 4, sub-sect. 4, *ante*.

#### C. Usage in Settlements.

**2412. Loss settled in account—Validity.**—*TODD v. REID*, No. 2383, *ante*.

**2413. — Assured cognisant of usage.**—*BARTLETT v. PENTLAND*, No. 2392, *ante*.

**2414. — — — — —**—In an action on a policy of insurance on ship, effected by D. & co., brokers in London, as agents for pltf., who were merchants in Liverpool, deft. pleaded, that after the loss had accrued, D. & co., by & with the authority & assent of pltf., settled & adjusted with deft. the amount of the loss, according to the usage & custom of merchants in that behalf, at £97 per cent., of which pltf. had notice, & assented to & acquiesced in the adjustment; that D. & co. at the time of the payment & satisfaction of the loss as after mentioned, were indebted to deft. in an amount exceeding the sum of £97; & thereupon deft., by & with the privity, knowledge, & consent of pltf., paid & satisfied the sum of £97 by giving credit to D. & co. for that amount in their account with him; & deft. then wholly discharged D. & co. from all claims in respect of that sum in his account with them; which payment & satisfaction D. &

*ANCHOR MARINE INSURANCE CO.* (1882), 22 N. B. R. 14.—*CAN.*

**c. Promise by underwriter to pay.**—*Effect of—Where evidence to a policy.*—Where an underwriter had promised to inquire as to the par-

ticulars of the loss, & if correct, pay it, & after several days he did promise to pay, the ct. refused to disturb a verdict for pltf., although there was evidence which otherwise would have avoided the policy.—*REED v. McLAUGHLIN* (1870), 13 N. B. R. (2 Han.) 128.—*CAN.*

**d. Delay of underwriters—Interest on sum due.**—Where the underwriters are in mora, interest is due *ex lege* upon the sums underwritten.—*CRAWFORD & STARK v. BERTRAM* (1812), 16 Fac. Coll. 558.—*SCOT.*



## INSURANCE.

### *Sect. 26.—Recovery of losses by assured: Sub-sect. 1, C. & D.]*

CO. HAD THE AUTHORITY TO SETTLE THE LOSS ON THEIR BEHALF, AS & FOR PAYMENT & SATISFACTION BY DEFT.; & PLTFS. THEN ACCEPTED SUCH SETTLEMENT & PAYMENT IN FULL SATISFACTION & DISCHARGE OF THE CAUSE OF ACTION AS TO THE SUM OF £97. It appeared in evidence that pltfs. had for several years effected insurances in London through D. & CO. & HAD THEIR INSURANCE ACCOUNTS CURRENT WITH THEM. The policy in question in Sept. 1835; the loss appeared on Lloyd's books in May, 1836. D. & CO. were then indebted to DEFT. to the amount of £217, on their underwriting account of the previous year. In June, 1836, they agreed this account with DEFT., & paid him £100 leaving the remainder on the account to meet the loss in question. In Sept., it was adjusted by DEFT. & all the other underwriters, except two, at £97 per cent. A memorandum was written on the policy, stating the loss to be payable in one month & DEFT.'S subscription was struck through; & the loss was then passed into the accounts between D. & CO. & DEFT. In Nov., the loss being then about to be adjusted by the other two underwriters D. & CO. advised PLTFS. thereof, & PLTFS. drew bills on them for the amount of the loss. On Nov. 19, D. & CO. inclosed them a credit note of the settlement of the whole loss, & carried the amount of it to the credit of their insurance account with PLTFS., of which they sent them an extract; & they debited PLTFS. with premiums to the end of Sept., leaving a balance due to PLTFS., which they transferred to the credit of the general account. At the foot of the credit note was written, "Above is the credit note of the loss per *Vrow Elizabeth* £1,155 3s. 10d., but without our prejudice until in cash from the underwriters." The usage at Lloyd's was proved by several insurance brokers to be to settle losses, as between the broker & the underwriter, in the manner above stated, & some of them stated that the usage was well known in Liverpool:—*Held*: there was sufficient evidence of a custom between the brokers & underwriters to make settlements in accounts by taking credits as payments & of such a settlement having been made in the present case & of PLTFS. having authorised the brokers to make such settlement as in substance to prove the plea & to discharge the underwriters.—*STEWART v. ABERDEIN* (1838), 4 M. & W. 211; 1 Horn & H. 284; 7 L. J. Ex. 292; 7 L. T. 46; 150 E. R. 1406.

*Annotations*:—*Expld.* Sweeting v. Pearce (1859), 7 C. B. N. S. 449. *Refd.* Partridge v. Bank of England (1846), 9 Q. B. 396; Luckie v. Bushby (1853), 22 L. T. O. S. 89; Catterall v. Hindle (1867), L. R. 2 C. P. 368; Elgood v. Harris (1896), 2 Q. B. 491. *Mentd.* Ireland v. Thomson B. 149; Pattison v. Belford Union Grdns. & N. 523.

**2415.** — — —.]—Pltf., a shipbuilder in London, employed one W., an insurance broker, to effect a policy upon a ship at Lloyd's, & after the happening of a loss, gave W. the ship's papers for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, & he retained possession of it. An adjustment having taken place, the loss was settled, in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants & shipowners, but which the jury found was not known to pltf., who had merely left the policy in W.'s hands for safe custody, by the underwriter setting off the amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him:—*Held*: assuming that pltf.

was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy in money, he was not bound by the usage, & consequently, he was entitled to recover the amount of the policy against the underwriter, notwithstanding such

If a man who knows of this usage of Lloyd's gives his policy to a broker, with instructions to do the needful, a jury might well find that he authorises the broker to do the needful according to the custom (*BRAMWELL, B.*).—*SWEETING v. PEARCE* (1861), 9 C. B. N. S. 534; 30 L. J. C. P. 109; 5 L. T. 79; 7 Jur. N. S. 800; 9 W. R. 343; 1 Mar. L. C. 134; 142 E. R. 210, Ex. Ch.

*Annotations*:—*Apld.* Matvelev v. Crossfield (1903), 51 W. R. 365. *Refd.* Catterall v. Hindle (1867), L. R. 2 C. P. 368; Grissell v. Bristowe (1868), L. R. 3 C. P. 112; Pearson v. Scott (1878), 9 Ch. D. 198; Blackburn v. Mason (1893), 37 Sol. Jo. 283. *Mentd.* Emanuel v. Roberts (1868), 9 B. & S. 121; Bridges v. Garrett (1869), L. R. 4 C. P. 580; Gibson v. Hillstrom (1869), 21 L. T. 302; Pape v. Westacott, [1894] 1 Q. B. 272; Legge v. Byas, Mosley (1901), 18 T. L. R. 137; Bradford v. Price (1923), 92 L. J. K. B. 871.

**2416.** — — —.]—*XENOS v. WICKHAM*, No. 410, *ante*.

**2417.** — — — *Assured ignorant of usage.*]—An assured residing at Glasgow, employed an insurance broker in London to recover a loss from the underwriter. The loss was settled in part by the underwriter setting off in account against it a debt due to him from the broker for premiums, & as to the residue, by his paying the broker in cash, & the underwriter then erased his name from the policy. The broker became bkpt., & never paid the loss to the assured. Evidence was given of a usage, that on adjustment payment was generally in a month, & that the practice between the broker & the underwriter was to set off in account between them the amount of premiums due to the underwriter, against the loss:—*Held*: (1) the underwriter was not entitled to treat the set-off in account between him & the broker as payment to the assured, the latter not being bound by a usage, of which he was not shown to be cognisant; (2) the assured was not entitled to recover the sum which the underwriter had paid in money to the broker within the month, that being a payment made to the broker pursuant to the general authority given to him by the assured.—*SCOTT v. IRVING* (1830), 1 B. & Ad. 605; 9 L. J. O. S. K. B. 89; 109 E. R. 912.

*Annotations*:—*As to* (1) *Apld.* Sweeting v. Pearce (1861), 9 C. B. N. S. 534. *Refd.* Barker v. Greenwood (1837), 2 Y. & C. Ex. 414; Stewart v. Aberdeen (1838), 7 L. J. Ex. 292; Bayley v. Wilkins (1849), 7 C. B. 886; Pearson v. Scott (1878), 9 Ch. D. 198; Elgood v. Harris, [1896] 2 Q. B. 491. *Generally, Mentd.* Robertson v. Jackson (1845), 2 C. B. 412.

**2418.** — — —.]—*BARTLETT v. PENTLAND*, No. 2392, *ante*.

**2419.** — — —.]—*SWEETING v. PEARCE*, No. 2415, *ante*.

**2420.** — — —.]—*MATVEIEFF & Co. v. CROSSFIELD*, No. 307, *ante*.

**2421.** — — —.]—A marine insurance policy contained the clause: "This policy being issued in England all losses & claims arising hereon are to be recoverable only according to the custom & usages of Lloyd's unless otherwise stipulated by the terms of the policy":—*Held*: a custom of Lloyd's, whereby the insurers were entitled to settle the amount of a claim in account with the brokers of the assured, did not bind the assured unless the assured knew of the custom.—*MCCOWIN LUMBER & EXPORT CO. INCORPORATED v. PACIFIC MARINE INSURANCE CO., LTD.* (1922), 38 T. L. R. 901.

**D. Adjustment.**

**2422. How far conclusive—Necessity for proof of loss.]—**HOG v. GOULDNEY (1745), 1 Beawes, Lex Mercatoria, 6th ed. p. 460; *sub nom.* HOGG v. GOULDNEY, 1 Park on Marine Insurances, 8th ed. p. 266.

**2423. ———.]—**An adjustment of a policy does not admit the loss.—GARRON v. GALBRAITH (1795), Peake, Add. Cas. 37, N. P.

**2424. ——— Effect of mistake.]—**ROGERS v. MAYLOR (1790), 1 Park on Marine Insurances, 8th ed. pp. 267, 269.

**2425. ———.]—**CHRISTIAN v. COOMBE, No. 2429, *post*.

**2426. ———.]—**STEEL v. LACY, No. 1497, *ante*.

**2427. ———.]—**A ship was insured, warranted free of capture in port. A letter announcing her capture stated it to be in port, on which the underwriter & assured adjusted, the former returned, & the latter received back, the premium. It afterwards appeared the capture was not in port:—*Held*: the assured was not precluded by the adjustment & repayment from recovering on the policy.—REYNER v. HAIL (1813), 4 Taunt. 725; 128 E. R. 516.

*Annotation*:—*Refd.* Luckie v. Bushby (1853), 13 C. B. 864.

**2428. ——— Effect of fraud.]—**ROGERS v. MAYLOR (1790), 1 Park on Marine Insurances, 8th ed. pp. 267, 269.

**2429. ———.]—**Where a policy has been adjusted with a full & fair disclosure of all the circumstances, it is conclusive on the parties, & the insurer is bound. *Aliter* where there has been fraud, mistake of the law, or in a material fact.—CHRISTIAN v. COOMBE (1796), 2 Esp. 487; Peake, Add. Cas. 38, n., N. P.

*Annotation*:—*Refd.* Luckie v. Bushby (1853), 13 C. B. 864.

**2430. ——— Circumstances in knowledge of insurer—Before adjustment.]—**An underwriter who, upon a full disclosure of facts, has signed his initials, to an adjustment on the policy, without paying the loss, is not precluded afterwards, in an action against him, from taking advantage of circumstances, with which he had been made acquainted, before signing the adjustment. *Qu.*: as to the effect of an adjustment when declared on specially.—HERBERT v. CHAMPION (1807), 1 Camp. 134, N. P.

*Annotations*:—*Refd.* Luckie v. Bushby (1853), 13 C. B. 864. *Mentd.* Brisbane v. Dacres (1813), 5 Taunt. 143.

**2431. ——— After adjustment—Means of knowledge before.]—**An adjustment is not binding on an underwriter although at the time of signing it he had the means of rendering himself acquainted with the history of the voyage & the manner of the loss, if his attention was not then drawn to circumstances he afterwards learns, by which the underwriters were discharged.—SHEPHERD v. CHEWTER (1808), 1 Camp. 274, N. P.

*Annotation*:—*Refd.* Luckie v. Buskby (1853), 13 C. B. 864.

**2432. ——— Against subsequent contingency.]—**Where the assured claims & receives the return premium due upon the arrival of the vessel, & the policy is adjusted upon that footing, he cannot, without an express stipulation, resort again to the underwriter in any contingency of the adventure.—MAY v. CHRISTIE (1815), Holt, N. P. 67, N. P.

**2433. ——— Conditional adjustment.]—**Deft. B., with other underwriters, subscribed, in Aug. 1814,

a policy on hides. The ship was captured, & pl'ts. abandoned to the underwriters, & claimed a total loss. Shortly afterwards the ship was recaptured, & all the underwriters, in Oct. 1814, adjusted a salvage loss, deducting short interest, to £64 18s. 3d. per cent., save deft., who, in Feb. 1815, indorsed on the policy as follows: "Adjusted £33 per cent. on account, upon my subscription to this policy, until the account of the proceeds of the goods insured can be made up, when a final loss is to be paid to the same amount as by the other underwriters; & if the same exceed 33 per cent., Mr. B. to pay the excess; if short, Mr. H., the insured, to return the difference":—*Held*: in *assumpsit* on this policy, this was a conditional, not an absolute adjustment; & pl'ts. not having proved their compliance with the conditions, were not entitled to recover.—GAMMON v. BEVERLEY (1817), 8 Taunt. 119; 1 Moore, C. P. 563; 129 E. R. 328.

**2434. ——— Prior collateral agreement—Admissibility of oral evidence to prove.]—**By a memorandum of adjustment indorsed on the back of a policy, it was stated, that a particular average loss of 54 per cent. had been settled between pl'tf., an underwriter, & deft.:—*Held*: parol evidence was admissible to show, that by a previous arrangement, it was agreed that if the other underwriters paid a less sum, the surplus should be repaid.—RUSSELL v. DUNSKEY (1821), 6 Moore, C. P. 233.

**2435. ——— As to sufficiency of sums allowed.]—**ADAMS v. SAUNDARS, No. 2439, *post*.

**2436. Alteration of adjustment—Protest from assured.]—**HEWIT v. FLEXNEY (1746), 1 Beawes, Lex Mercatoria, 6th ed. p. 458.

**2437. Adjustment after notice—Express stipulation in policy—Necessity for direct notice.]—**ABEL v. POTTS, No. 2304, *ante*.

**2438. Whether condition precedent to action—Refusal to adjust under terms of policy.]—**Where, by the terms of a policy, losses were to be paid in three months after an adjustment by a committee of the insurers, & the committee refused to adjust upon the request of the insured:—*Held*: he might sue on the policy, notwithstanding there had been no adjustment.—STRONG v. HARVEY (1825), 3 Bing. 304; 11 Moore, C. P. 72; 4 L. J. O. S. C. P. 57; 130 E. R. 530.

*Annotations*:—*Refd.* Harvey v. Beckwith (1864), 2 Hem. & M. 429; Wright v. Ward (1871), 24 L. T. 439. *Mentd.* Bromley v. Williams (1863), 32 Beav. 177; Central Wales & Carmarthen Junction Ry. v. L. & N. W. Ry. (1881), 4 Ry. & Can. Tr. Cas. 101.

**2439. Not proof of payment.]—**If a policy of insurance be produced by the agent of pl'tf., through whom it was effected, & deft.'s name be struck out, & have written against it, "adjusted the general & particular averages at £30 9s. per cent.;" this is proof that the policy has been adjusted, but not that it has been satisfied; but pl'tf. will not be allowed to go into evidence to show that some of the sums allowed at the time of the adjustment were too small. If pl'tf. could show that the loss was settled without his authority, or perhaps if he could show that some sum was entirely omitted, he might go beyond the amount of the adjustment.—ADAMS v. SAUNDARS (1829), 4 C. & P. 25; Mood. & M. 373, N. P.

*Annotation*:—*Consd.* Luckie v. Bushby (1853), 13 C. B. 864.

**PART II. SECT. 26, SUB-SECT. 1.—D.**

**e. Whether condition precedent.]—**Where the condition of payment was that all claims should be reported as soon as the loss was known, to be

adjusted according to usages at L., & the special condition of the contract of insurance:—*Held*: the adjustment was not a condition precedent to pl'tfs.' right to recover. All that was required

to be done by insured was duly to report the claim to be adjusted.—BANK OF BRITISH NORTH AMERICA v. WESTERN ASSURANCE CO. (1884), 7 O. R. 166.—CAN.



**Sect. 26.—Recovery of losses by assured: Sub-sect. 1, E.; sub-sect. 2, A. (a) & (b), B. & C.]**

*E. Effect of Payments.*

**2440. Payment to bare trustee—Insurer requested not to pay.]—FELL v. LUTWIDGE (1740), Barn. Ch. 319; 2 Atk. 120; 27 E. R. 662, L. C.**

**SUB-SECT. 2.—PRACTICE AND EVIDENCE.**

*A. Practice.*

*(a) In General.*

*See, generally, PRACTICE.*

**2441. Payment into court of partial loss—Not admission of total loss.]—Payment of money into ct. to the amount of a partial loss upon a valued policy is not an admission of a total loss.—RUCKER v. PALSGRAVE (1809), 1 Taunt. 419; 1 Camp. 557; 127 E. R. 896.**

*Annotation:—Refd. Lechmere v. Fletcher (1883), 3 Tyr. 450.*

**2442. "Necessary or proper" parties—Service out of jurisdiction.]—In an action against underwriters, two of whom lived in Scotland, the ct. gave leave to serve the writ on the two in Scotland as "necessary or proper" parties to the action.—STEAMSHIP THANEMORE, LTD. v. THOMPSON (1885), 52 L. T. 552; 5 Asp. M. L. C. 398; *sub nom.* SHIP SHANAMERE CO. v. THOMPSON, 1 T. L. R. 399, D. C. *Annotations:—Consd. The Elton, [1891] P. 265; Oesterreichische Export A. G. v. British Indemnity Inso., [1914] 2 K. B. 747.***

**2443. ———.]—Pltfs., who were export merchants carrying on business in Vienna, brought an action against two insurance cos. upon certain policies of marine insurance on goods. One of the cos. was registered as a limited co. in England & the other in Scotland. The policies were in identical form, & were drawn up at Antwerp in the French language & were signed by a common agent for both cos. Each policy was for a certain amount upon goods carried in a named ship, & it stated that the undersigned insured respectively the amounts stated by each of them at the foot thereof. At the foot each co. was stated to insure in halves for the total sum insured, & against the name of each co., who were described as of London, was placed a figure representing one-half of the total amount insured. The cos. had a common office & a common secretary in London, & in all letters written by them to pltfs.' solrs. relating to the matter the London office was described as the head office of the cos. Pltfs. served the writ upon the English co. within the jurisdiction, & obtained an order giving them leave to issue & serve a concurrent writ on the Scottish co. in Scotland under R. S. C., Ord. XI., r. 1 (g). The Scottish co. applied to set the order aside upon the ground that they were not "proper parties" to the action, the cause of action against each co. being different:—*Held*: under R. S. C., Ord. XVI., r. 4, the Scottish co. could be joined as defts. in the action, & therefore they were proper parties to the action within R. S. C., Ord. XI., r. 1 (g), & the order was rightly made.—OESTERREICHISCHE EXPORT A. G. v. BRITISH INDEMNITY INSURANCE CO., LTD., [1914] 2 K. B. 747; 83 L. J. K. B. 971; 110 L. T. 955, C. A.**

*Annotations:—Refd. Re Beck, Attia v. Seed (1918), 87 L. J. Ch. 335. Mentd. Thomas v. Moore, [1918] 1 K. B. 555; Payne v. British Time Recorder Co., [1921] 2 K. B. 1.*

**2444. ——— Action for work under suing & labouring clause—Underwriters as third parties—R.S.C. Ord. 16, r. 48.]—Deft. insured his ship under a policy containing the usual suing & labouring clause. In an action to recover for work alleged to have been done & expenses incurred by pltfs. for deft. at his request, in respect of attempting to save the ship during the continuance of the policy:—*Held*: deft. was no entitled to bring in the underwriters as third parties under above Ord. because they did not, by the suing & labouring clause, contract to indemnify deft. in respect of any contract made by him with pltfs.—JOHNSTON v. SALVAGE ASSOCN. (1887), 19 Q. B. D. 458; 57 L. T. 218; 36 W. R. 56; 3 T. L. R. 744; 6 Asp. M. L. C. 167, C. A.**

*Annotations:—Apld. Clover Clayton v. Hessler, [1925] 1 K. B. 1. Refd. Marten v. Whale, [1917] 1 K. B. 544.*

**2445. ———.]—Ship repairers brought an action against the managers of a steamer to recover a disputed balance of an account for work & labour done by them at the request & on the order of the managers in repairing damage done to the steamer. The managers served a third party notice under R. S. C., Ord. 16, r. 48, upon the owners of the steamer on whose behalf they had given the order for the work. The damage to the steamer was caused by a marine risk against which owners were insured by a policy of insurance. The owners applied for leave to serve a third party notice on the underwriters alleging that they were entitled to indemnity from them:—*Held*: the owners were not entitled to indemnity within the meaning of R. S. C., Ord. 16, r. 48, against the underwriters, & they could not invoke the third party procedure, because a contract to insure a person against damage to a subject matter is not a contract to indemnify him against claims that may be made upon him in relation thereto.—CLOVER CLAYTON & Co. v. HESSLER & Co., [1925] 1 K. B. 1; 94 L. J. K. B. 42; 132 L. T. 33; 69 Sol. Jo. 776, C. A.**

**2446. ——— Defendant underwriter re-insuring—Re-insuring underwriter as third party.]—NELSON v. EMPRESS ASSURANCE CORPN., LTD., No. 105, ante.**

**2447. Jurisdiction to order ship to be brought to England—Claim for constructive total loss—Preservation & inspection of ship.]—In an action by shipowners claiming under a policy of marine insurance in respect of an alleged constructive total loss of their ship, defts. applied at chambers for an order that the ship, which was lying unrepaid in Singapore harbour, be brought to England before the trial of the action at defts.' risk & expense, on the ground that it was necessary for the preservation & inspection of the ship:—*Held*: the ct. had power under R. S. C. Ord. 50, r. 3, to make the order & in the circumstances it was right that the order should be made.—NEW ORLEANS S.S. CO. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., [1909] 1 K. B. 943; 78 L. J. K. B. 473; 100 L. T. 595; 53 Sol. Jo. 286; 11 Asp. M. L. C. 225; 14 Com. Cas. 111, C. A.**

**Consolidation of actions.]—See R. S. C., Ord. 49, r. 8; PRACTICE.**

**PART II. SECT. 26, SUB-SECT. 2.—A. (a).**

**1. What must be pleaded.]—MITTLEBERGER v. BRITISH AMERICA FIRE & LIFE INSURANCE CO. (1836), 2 U. C. R. 439.—CAN.**

**g. Action on policy—Where policy**

*varied without assured's consent—Contrary to insurer's practice—Amendment of pleadings.]—ROBERTSON v. DUDMAN (1875), 10 N. S. R. (1 R. & Q.) 50.—CAN.*

**h. Recovery as for total loss—Facts showing only partial loss—New**

*trial.]—Where pltf. recovered as for a total loss, the facts showing only a partial loss, which were not so distinctly left to the jury, the ct. granted a new trial without costs.—DAVIS v. ST. LAWRENCE INLAND MARINE INSURANCE CO. (1836), 3 U. C. R. 18.—CAN.*



(b) *What can be Recovered.*

See Marine Insurance Act, 1906 (c. 41), s. 56 (4).

**2448. Action for total loss—Recovery for partial loss.]**—On an action against insurers for a total loss of ship, pltf. may recover for a partial loss.—*GARDINER v. CROASDALE* (1760), 2 Burr. 904; 1 Wm. Bl. 198; 97 E. R. 625.

*Annotations:—***Apld.** *Devaux v. Astell* (1840), Drinkwater, 116. **Refd.** *Martin v. Gilham* (1837), 7 Ad. & El. 540.

**2449. ——— Extent of loss.]—TANNER v. BENNETT**, No. 2119, *ante*.

**2450. ———.]—(1)** Upon a declaration for a total loss of a vessel insured against perils of the sea, pltf. may recover for a partial loss.

(2) The declaration set forth, that the vessel, "by stormy winds & tempestuous weather, became & was leaky, & was greatly broken & damaged, insomuch that by means thereof it became expedient & necessary to sail to the nearest safe port," & then set out certain facts, among others, inability of the captain to procure moneys sufficient for the necessary repairs of the vessel, & proceeded to aver that it thereupon became expedient & necessary for the benefit of all parties interested in the ship, to sell same, & same was sold accordingly, by means of which the ship became wholly lost to the insurers. Pleas, as to the cause of action in respect of so much of the loss as was occasioned by the captain's inability to procure moneys, etc., that the same was occasioned by the default & negligence of the plaintiff:—*Held*: ill on general demurrer, as not answering the cause of action stated in the declaration.

(3) *Qu.*: what circumstances are necessary to justify the captain of an insured ship in selling her, so as to make the underwriters liable.—*DEVAUX v. ASTELL* (1840), Drinkwater, 116; 10 L. J. C. P. 46; 4 Jur. 1135.

**2451. ——— Loss on freight.]—BENSON v. CHAPMAN**, No. 2094, *ante*.

**2452. ———.]—KING v. WALKER**, No. 2300, *ante*.

**2453. ——— By capture—Subsequent recapture—Subject of proceedings in Admiralty Court.]**—If an insured declare upon a total loss by capture, & after proving a capture show a re-capture, upon which proceedings were had in an admty. ct., he cannot recover without proving the proceedings in the admty. ct. under seal, though he only claim the amount of the loss sustained by the salvage, proceedings, & sale.—*THELLUSSON v. SHEDDEN* (1806), 2 Bos. & P. N. R. 228; 127 E. R. 612.

*Annotation:—***Consd.** *Bainbridge v. Neilson* (1808), 10 East, 329.

**2454. Action for average loss—Accounts incapable of adjustment by court.]**—In an action on a policy of insurance for an average loss, if the account is so complicated that it cannot be adjusted in ct., the jury, by consent of the parties, may find for a total loss, pltf. entering into a rule to account upon oath for what part of the insured property he may recover.—*BARBER v. FRENCH* (1779), 1 Doug. K. B. 294; 90 E. R. 190.

**2455. General averment of interest—Proof of part interest.]—PAGE v. ROGERS** (1785), Marshall on Marine Insurances, 4th ed. p. 570.

**2456. ———.]—RISING v. BURNETT** (1798), Marshall on Marine Insurances, 4th ed. p. 570.

**2457. Effect of payment into court—Premiums.]**—Pltfs. having declared on a policy of insurance with a count for money had & received, defts. paid the amount of the premiums into ct. on that count, pleading to the count on the policy so as to raise, amongst other defences, that of unseaworthiness. Pltfs. took the money out of ct. in satisfaction of the claim under the count for money had & received. At the trial, the defence of unseaworthiness having been given up, a special case was stated for the opinion of this ct., which was afterwards taken into the Exchequer Chamber, & in both cts. it was held that pltfs. were entitled to recover as for an average loss. The amount of the average loss was referred to & ascertained by average staters, but this not being done before the argument of the case, a nominal judgment for £3,500 was entered up for the purpose of taking the case into error:—*Held*: pltfs. were not entitled to enter judgment & take out execution for the entire amount of the average loss without giving credit to defts. for the amount paid into ct. & taken out by them.—*CARR v. ROYAL EXCHANGE ASSURANCE CORPN.* (1864), 5 B. & S. 941; 5 New Rep. 216; 34 L. J. Q. B. 21; 11 L. T. 595; 11 Jur. N. S. 265; 13 W. R. 204; 2 Mar. L. C. 160; 122 E. R. 1080.

*B. Discovery.*

**By & against what parties obtained.]—**See *DISCOVERY*, Vol. XVIII., pp. 56, 57, Nos. 133, 141–143.

**Discovery of ship's papers.]—**See *DISCOVERY*, Vol. XVIII., pp. 93–95, 101, Nos. 442–468, 526; R. S. C. (No. 1), 1925, r. 11, Appendix K., No. 19.

*C. Evidence.*

See Marine Insurance Act, 1906 (c. 41), s. 18 (4); s. 88, & generally, *EVIDENCE*, Vol. XXII., pp. 19 *et seq.*

**2458. What may be given in evidence—Expense of salvage.]**—Although it be not particularly laid in the declaration, the expense of salvage may be given in evidence in an action on the policy. Pltf. may give in evidence any loss immediately proceeding from the cause alleged.—*CARY v. KING* (1736), Lee temp Hard. 304; 95 E. R. 197.

*Annotation:—***Refd.** *Aitchison v. Lohre* (1879), 4 App. Cas. 755.

**2459. ——— Captain's protest.]**—Pltf.'s agent showed to deft. an underwriter, the captain's protest containing an account of the loss of the ship insured, demanding payment:—*Held*: this did not entitle deft. to read the protest in evidence in an action on the policy.—*SENAT v. PORTER* (1797), 7 Term Rep. 158; 101 E. R. 908.

**Evidence of ship's officers.]—**See *EVIDENCE*, Vol. XXII., p. 94, Nos. 635–642.

**Log-books.]—**See *EVIDENCE*, Vol. XXII., p. 317, Nos. 3105, 3117.

**2460. Proof of insurable interest—Carrier's receipt.]**—To prove a property in the cargo on an action upon a policy of insurance, pltf. produced

PART II. SECT. 26, SUB-SECT. 2.—  
A. (b).

**k. Action for total loss—Recovery for average loss.]**—Where the suit is for a total loss, the judgment may be as for an average loss.—*SEEDICK DHOOSAL v. APCAR* (1865), Bourke, 391.—*IND.*

## PART II. SECT. 26, SUB-SECT. 2.—C.

1. *What may be given in evidence*

**—Custom house entries.]—LAZARE v. PHENIX INSURANCE CO.** (1858), 8 C. P. 136.—*CAN.*

**m. Proof of insurable interest—Evidence varying preliminary proof.]**—The vessel was owned by three partners, but was registered in the name of one of them. The preliminary proof of interest gave only the name of the registered owner; but on the trial it was proved that the vessel was owned

by the three partners:—*Held*: the variance was immaterial.—*MCGHRE v. PHENIX INSURANCE CO.* (1859), 28 N. B. R. 45; on appeal, 18 S. C. R. 61.—*CAN.*

**n. Protest admitting breach of warranty—Inadmissible.]—ROBERTSON v. PUGH** (1888), 20 N. S. R. (8 R. & G.) 15; 15 S. C. R. 706; 9 C. L. T. 17.—*CAN.*

assured: Sub-sect.  
1 & 2. Sect. 28:

Sub-sects. 1 & 2.]

a bill of parcels of one Gardiner at Petersburg with his receipt to it, & proved his hand. Deft. objected, that this was no evidence against the insurers; but the Chief Justice allowed it.—*PROBERT v. ROHEME* (1740). 2 Stra. 1127; 93 E. R. 1078.

**Concealment or non-disclosure—Evidence of underwriters.]—**See Sect. 16, sub-sect. 3, D., *ante*.

**Materiality question for jury.]—**See Sect. 16, sub-sect. 3, P. (a), *ante*.

**Sentence of foreign prize court—Conclusiveness as evidence.]—**See Part II., Sect. 18, sub-sect. 3, F. (b), *ante*.

**SECT. 27.—RECOVERY OF PAYMENTS BY INSURER.**

**SUB-SECT. 1.—IN GENERAL.**

**2461. Settlement as for total loss—Subsequent recovery of part.]—**The adjustment in this case makes an end of the question. Here is a solemn abandonment, & a solemn agreement that the insurers shall be content with salvage in such proportion as the sum insured bears to the whole interest. There was a total loss at the time of the adjustment; which is the same as if the damages had been then recovered on an action. Here is no sort of fraud; nor anything that is against any law; & to refund more than in that proportion would be contrary to the underwriters' own agreement (*per CUR.*).—*DA COSTA v. FIRTH* (1766), 4 Burr. 1966; 98 E. R. 24.

**2462. ———.]—**Goods insured upon a valued policy having been seized, confiscated, & sold by order of the enemy's Govt., on their own account, but the necessary documents to verify the loss not having arrived here; the underwriters on application to pay their subscriptions agreed to adjust & pay immediately 50 per cent. on account, but no abandonment was made by the assured; & in the mean time the foreign consignees of the goods, in consequence of remonstrances to the enemy's Govt., obtained a restoration of half the proceeds of the goods which had been so seized & sold, which half amounted to more than the whole sum at which they were valued in the policy:—*Held*: the underwriters were not entitled to recover back the 50 per cent. they had paid on account; the assured having in fact sustained a loss of half his goods, for which he was no more than indemnified by the 50 per cent. he had received; & there having been no abandonment to the underwriters; & the superior value of the other half of the proceeds arising from the benefit of the market, in which the underwriters had no concern.—*TUNNO v. EDWARDS* (1810), 12 East, 488; 104 E. R. 190.

*Annotations:—Reid. Stringer v. English & Scottish Marine Insce.* (1870), 10 B. & S. 770; *Roura & Forgas v. Townend*, [1919] 1 K. B. 189.

**2463. ———.]—**An insurance was effected on goods on board a ship consigned to Buenos Ayres. The ship, with the cargo, was captured by the Brazilian Govt., & condemned for an attempted breach of blockade. Notice of the capture was given by the insured to the underwriters, & an offer was made by the insured to abandon. The

underwriters declined the offer of abandonment; & after ——— it was ——— on payment by the underwriters of 35 per cent. on the sum insured, the policy should be delivered up to be cancelled. This percentage was accordingly paid, & the policy cancelled. Some years afterwards, in pursuance of a convention between Great Britain & the Brazilian Govt., the goods were ordered by the latter Govt. to be restored to the owners, & compensation made. A claim was made by the underwriters to the whole or a part of the sum awarded for compensation:—*Held*: the underwriters having declined the offer of abandonment, the payment of the 35 per cent., was a compromise of their liability under the policy, & they were not entitled to any portion of the sum awarded for compensation.—*BROOKS v. MACDONNELL* (1835), 1 Y. & C. Ex. 500; 4 L. J. Ex. Eq. 60; 160 E. R. 204.

**Ademption of total loss.]—**See Sect. 23, sub-sect. 3, *ante*.

**2464. Payment in ignorance of facts—To agent of assured—Money paid to principal—Insurer's knowledge of agency.]—***HOLLAND v. RUSSELL*, No. 2469, *post*.

**2465. ——— Lien as between agent & assured.]—***SCOTTISH METROPOLITAN ASSURANCE Co. v. SAMUEL (P.) & Co.*, No. 2470, *post*.

**2466. ——— Innocent non-disclosure.]—***HOLLAND v. RUSSELL*, No. 2469, *post*.

**2467. ——— Misrepresentation.]—**In an action on a policy of marine insurance the underwriters resisted payment on the ground of misrepresentation & concealment on the part of the assured, & recovered back moneys paid by them to the assured in ignorance of the true facts.—*TYNEDALE S.S. Co. v. NEWCASTLE-ON-TYNE HOME TRADE INSURANCE ASSOCN.* (1890), 17 T. L. R. 81; *on appeal* (1891), 7 T. L. R. 544, C. A.

**2468. ——— Payment "on account without prejudice."—***THE DORA FORSTER*, No. 2031, *ante*.

**Payment with full knowledge of facts—In ignorance of law.]—**See, generally, *MISTAKE*.

**Agent's liability in respect of money received.]—**See, generally, *AGENCY*, Vol. I., pp. 667 *et seq.*

**SUB-SECT. 2.—LOSSES PAID BY MISTAKE.**

**2469. Liability of broker to insurer—Credit to account of assured—Not paid over.]—**A., as agent for a foreign owner, entered into a policy of insurance on a ship in the usual form. At the time of effecting the insurance, A. was in possession of a letter from the captain, informing him that the ship had received injury, which fact he, without fraudulent intention to deceive, omitted to disclose to the underwriters. The ship was lost, & B., one of the underwriters, paid to A. his amount of the insurance; but, having subsequently become acquainted with the above circumstance, brought an action for money had & received against him to recover it back. A. before he was aware of B.'s intention to dispute the policy, & acting *bond fide* throughout, transmitted to his principal the money he had received from the various underwriters; with the exception of a certain amount for which he had allowed the principal credit in a settled account, & of another which, with the

**PART II. SECT. 27, SUB-SECT. 1.**

**2464 i. Payment in ignorance of facts—To agent of assured—Money paid to principal—Insurer's knowledge of agency.]—***UNION MARINE INSURANCE Co. v. METZLER* (1873), 9 N. S. R.

**331.—CAN.**

**o. Payment as for total loss—Loss subsequently found partial.]—***WHITWORTH BROTHERS v. SHEPHERD* (1884), 12 R. (Ct. of Sess.) 204; 22 Sc. L. R. 157.—*SCOT.*

**PART II. SECT. 27, SUB-SECT. 2.**

**p. Money paid under mistaken liability—But on distinct separate agreement.]—***MONTREAL ASSURANCE Co. v. MCCORMICK* (1866), 25 U. C. R. 440.—*AN.*

authority of the principal, he had expended in a suit brought by him on behalf of the principal against C., another underwriter on the policy:—

*Held*: (1) in consequence of the concealment from the underwriters of the fact stated in the captain's letter, the policy was voidable at the election of the underwriters; (2) A. being only an agent, of which B. was aware, & having, without notice of B.'s intention to repudiate the contract, paid over to his principal the amount received from the underwriters, B. was not entitled to recover back from A. his amount of the insurance; (3) there was no difference in this respect between the money actually paid over by A. to his principal, & the moneys which had either been allowed in account between them or expended in the suit against C.—*HOLLAND v. RUSSELL* (1863), 4 B. & S. 14; 2 New Rep. 188; 32 L. J. Q. B. 297; 8 L. T. 468; 11 W. R. 757; 122 E. R. 865, Ex. Ch.

*Annotations*:—*As to* (2) *Distd.* *Newall v. Tomlinson* (1871), L. R. 6 C. P. 405. *Consd.* *Kleinwort v. Dunlop Rubber Co.* (1907), 97 L. T. 263. *Refd.* *Pollard v. Bank of England* (1871), L. R. 6 Q. B. 623; *Bavins & Sims v. London & South Western Bank*, [1900] 1 Q. B. 270; *Continental Caoutchouc & Gutta Percha Co. v. Kleinwort* (1904), 90 L. T. 474; *Baylis v. London (Bp.)*, [1913] 1 Ch. 127; *Morrison v. London County & Westminster Bank*, [1914] 3 K. B. 356.

**2470.** — — — — —.]—A policy of marine insurance, effected by defts. as brokers on behalf of shipowners, was subscribed by pltf's. who, on a claim being made in respect of an alleged loss, paid the brokers their share of the loss. Shortly afterwards pltf's., having ascertained that some of the underwriters had refused to pay on the ground that the loss was not a fair loss, claimed the return from the brokers of the money paid to them. The brokers refused to return the money, alleging that the money had been credited in their books to the assured & that they had a lien upon it for premiums which were overdue & unpaid to them by the assured:—*Held*: on the assumption that the money was paid under a mistake of fact, the money was not the money of the assured, & in consequence the brokers had no lien upon it, & therefore the brokers were liable to refund the money to pltf's.—*SCOTTISH METROPOLITAN ASSURANCE CO. v. SAMUEL (P.) & CO.*, [1923] 1 K. B. 348; 92 L. J. K. B. 218; 128 L. T. 445; 38 T. L. R. 847; 16 Asp. M. L. C. 105.

— — — — —.]—*See, generally*, AGENCY, Vol. I., pp. 669 *et seq.*

**2471.** — Money paid to assured—By authority of underwriter.]—Three underwriters, on a representation of a loss, pay their subscriptions, amounting to £600, into the hands of the broker, who, by their joint authority, pays over £300. The loss turns out to be fraudulent, & one of the underwriters brings an action against the broker, to recover back his £200:—*Held*: the broker was entitled to set off the £300 paid over, against this demand, & the ct. could not enter into the account to see what each party was entitled to, respectively: & therefore, either the other underwriters should have joined in the action, or pltf. should have resorted to a ct. of equity.—*SILVA v. LINDER* (1816), 2 Marsh. 437.

**2472.** — — — — —.]—*HOLLAND v. RUSSELL*, No. 2469, *ante*.

## SECT. 28.—RETURN OF PREMIUMS.

### SUB-SECT. 1.—IN GENERAL.

*See Marine Insurance Act, 1906 (c. 41), ss. 82–84, generally, Part I., Sect. 6, sub-sect. 2, ante.*

**2473.** Action for return—Maintainable by assured

—Premium paid by agent.]—An action to recover back the premium as a void policy may be brought by the person in whose name the policy was opened although the premium was paid to the underwriter by the agent who opened the policy.—*MARTIN v. SITWELL* (1691), 1 Show. 156; 1 Holt. K. B. 25; 89 E. R. 509.

*Annotations*:—*Refd.* *A.-G. v. Perry* (1735), 2 Com. 481; *Lucena v. Craufurd* (1802), 3 Bos. & P. 75.

### SUB-SECT. 2.—EXPRESS STIPULATIONS.

*See Marine Insurance Act, 1906 (c. 41), s. 83.*

**2474.** If ship sails with convoy & arrives—Meaning of clause.]—On an insurance on goods, to be shipped on board a certain ship, to return part of the premium, "if sails with convoy & arrives," the arrival of the ship is what is meant, & the full return is to be made on the whole sum insured, although there should be an average loss on the goods.—*SIMOND v. BOYDELL* (1779), 1 Doug. K. B. 268; 99 E. R. 175.

*Annotation*:—*Folld.* *Aguilar v. Rodgers* (1797), 7 Term Rep. 421.

**2475.** — Whether full return when average loss on goods.]—*SIMOND v. BOYDELL*, No. 2474, *ante*.

**2476.** — Capture & re-capture—Salvage expenses incurred.]—The insurer on freight agreed to return part of the premium "if the ship sailed with convoy & arrived":—*Held*: the assured were entitled to that return, the ship having sailed with convoy & arrived, though she had been captured & recaptured & the assured had been obliged to pay for salvage.—*AGUILAR v. RODGERS* (1797), 7 Term Rep. 421; 101 E. R. 1054.

**2477.** — Arrival without convoy.]—Policy on the "Ceres" "at & from Oporto to Lynn, with liberty to touch at any ports on the coast of Portugal to join convoy particularly at Lisbon; at 12 guineas per cent. to return £6 if she sail with convoy from the Coast of Portugal & arrive." The "Ceres" sailed from Oporto with a sloop & cutter appointed to protect the trade of that place to Lisbon, from whence it was to proceed with the Lisbon trade under a larger convoy for England. In the way from Oporto to Lisbon the fleet was dispersed by a storm, & the "Ceres" judging for the best, ran for England & arrived:—*Held*: the assured was entitled to a return of premium.—*AUDLEY v. DUFF* (1800), 2 Bos. & P. 111; 126 E. R. 1185.

**2478.** — Arrival at final not intermediate port of destination.]—*KELLNER v. LE MESURIER*, No. 1722, *ante*.

**2479.** — Arrival at destination—Capture whilst unloading.]—*HORNCastle v. HAWORTH* (1806), Marshall on Marine Insurances, 4th ed. p. 539.

**2480.** — At intermediate port—Further stipulation as to arrival at port of delivery.]—A voyage legalised in its commencement by a licence for four months which expires during the voyage, may be legally finished, if special circumstances, not in the power of the licensed person to control, clear of fraud & laches on his part, have protracted the voyage. But it is incumbent on the assured to prove the special circumstances. It is not necessary that the ultimate port of discharge of a licensed ship should be specified in her clearance from Great Britain. *Qu.*: Whether upon a stipulation to return five per cent., if sails with convoy for Gottenburgh, & arrives, & five per cent. more, if sails for her port of delivery, & arrives, a return of premium be due for her arrival at Gottenburgh, though she never arrives at her port



*Sect. 28.—Return of premiums: Sub-sects. 2 & 3,*

of delivery.—*LEEVIN v. CORMAC* (1811), 4 Taunt. 483, n. ; 128 E. R. 416.

2481. — Where total loss recovered.]—*LANGHORN v. ALLNUTT*, No. 1023, *ante*.

*See, also*, No. 2503, *post*.

2482. If ship arrives—Arrival at outer bar.]—*DALGLEISH v. BROOKE*, No. 1382, *ante*.

2483. — Extent of risk.]—*IONIDES v. HARTFORD*, No. 491, *ante*.

2484. Repayment for short interest—Policy on profits—Assured proving interest on cargo.]—An insurance may be effected on profits generally without more description, & engrafted upon a policy on ship & goods in the common printed form for a certain voyage; with a return of premium for short interest: the assured proving an interest in the cargo.

Expected profits may be insured by an open policy.

The circumstances of the policy in this case being open does not seem to me to make any further difference than to throw upon the assured the burthen of showing the amount of the profit they would have made had the goods arrived (*LORD ELLENBOROUGH*).—*EYRE v. GLOVER* (1812), 16 East, 218; 3 Camp. 276; 104 E. R. 1071.

2485. If ship not continuously employed—"Laid up"—"Or sold."—Policy of insurance on a ship for a year, with a stipulation for a proportionate return of premium, "for every uncommenced month if the ship should be sold or laid up." The ship was laid up for several months during the year, but was afterwards employed within the year:—*Held*: the words "laid up" meant a permanent laying up, such as would put a final end to the policy, & therefore the assured was not within the stipulation, nor entitled to any return of premium.

The words "laid up" being in company with the word "sold" must mean a permanent laying up, similar to that which would take place if the ship were sold, in other words, such a laying up as would put a final end to the policy (*LORD TENTERDEN, C.J.*).—*HUNTER v. WRIGHT* (1830), 10 B. & C. 714; L. & Welsb. 138; 5 Man. & Ry. K. B. 611; 8 L. J. O. S. K. B. 259; 109 E. R. 615.

2486. — Application of customary usage.]—Pltfs. insured their steamship by a marine insurance policy, subscribed by defts. which provided that a proportion of the premiums was to be returned for each period of thirty consecutive days during which the vessel might be "laid up in port." The vessel received orders to proceed to Portland & was there employed for two months in bunkering warships. In an action by the owners against the subscribers to recover a portion of the premiums on the ground that the vessel had been "laid up":—*Held*: though the words "laid up" had a customary meaning which covered ordinary discharge, pltfs. had not proved that they had a customary meaning which would cover the case of the vessel in question, & therefore the action failed.—*NORTH SHIPPING CO., LTD. v. UNION MARINE INSURANCE CO., LTD.* (1919), 35 T. L. R. 292; 24 Com. Cas. 161, C. A.

2487. If ship employed in certain trade—"During currency of policy."—A policy on pltfs.' ship from Mar. 13, 1899, to Mar. 13, 1900, provided for the return of a part of the premium, "should the vessel be employed in the Eastern trade during the whole currency of this policy." The ship was employed in the Eastern trade from Mar. 13, 1899, until July 23, 1899, when she was lost

the ship had been employed in the Eastern trade during the whole currency of the policy, & pltfs. were entitled to have the part of the premium returned to them. The risk no longer exists after the ship is lost; the amount insured is immediately payable, &, being paid, the policy, & all obligations created by it, are at an end; the policy is no longer in any sense current (*BIGHAM, J.*).—*GORSEDD S.S. CO., LTD. v. FORBES* (1900), 16 T. L. R. 566; 5 Com. Cas. 413.

2488. If ship sold or transferred—Capture.]—A time policy contained the clause, "Should the vessel be sold or transferred to new management then, unless the underwriters agree in writing to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer. . . . A *pro rata* daily return of premiums to be made." The policy also contained the usual clause, "free of capture & seizure," etc. While on a voyage from Port Talbot to Vladivostok, with a cargo of coal, the vessel was captured by the Japanese, taken to Yokosuka, & subsequently condemned by a prize ct. In an action by the shipowner for a *pro rata* return of premiums:—*Held*: the ship was not transferred to new management within the meaning of the policy, & therefore the shipowner was not entitled to a *pro rata* return of premiums. *Semble*: ship was lost by capture, & the "free of capture," etc., warranty applied.—*PYMAN v. MARTEN* (1906), 24 T. L. R. 10; 13 Com. Cas. 64, C. A.

—.]—*See, also*, No. 2485, *ante*.

2489. Repayment for war risks undertaken—Stipulation in charter-party—Right of owners to claim from charterers.]—*DOMINION COAL CO., LTD. v. MASKINONGE S.S. CO., LTD.*, No. 1836, *ante*.

### SUB-SECT. 3.—FAILURE OF CONSIDERATION.

#### A. In General.

*See* Marine Insurance Act, 1906 (c. 41), s. 84.

2490. Non-attachment of risk.]—*HENKLE v. ROYAL EXCHANGE ASSURANCE CO.*, No. 155, *ante*.

2491. —.]—*COLBY v. HUNTER*, No. 1331, *ante*.

2492. Policy void for want of insurable interest—Action after completion of voyage.]—An insurance being made without interest, & the premium paid, the insured shall not recover back the premium after the ship has arrived safe.

If pltfs. in the present case had brought their action before the risk was over, & the voyage finished, they might have had a ground for their demand; but they waited till the risk, such as it was, not indeed founded in law, but resting on the honour of deft., had been completely run. It makes no difference whether the premium was paid before the voyage, or after it (*BULLER, J.*).—*LOWRY v. BOURDIEU* (1780), 2 Doug. K. B. 468; 99 E. R. 299.

*Annotations*:—*Folld.* *Andree v. Fletcher* (1789), 3 Term Rep. 266. *Consd.* *Aubert v. Walsh* (1810), 3 Taunt. 277; *Brisbane v. Dacres* (1813), 5 Taunt. 143. *Refd.* *Munt v. Stokes* (1792), 4 Term Rep. 561; *Bilbie v. Lumley* (1802), 2 East, 469; *Feize v. Thompson* (1808), 1 Taunt. 121; *Hastelow v. Jackson* (1828), 8 B. & C. 221. *Mentd.* *Tappenden v. Randall* (1801), 2 Bos. & P. 467; *Martin v. Morgan* (1819), 1 Brod. & Bing. 289; *Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620.

2493. —.]—An action for money had & received will not lie to recover the premium of a reinsurance void by 19 Geo. 2, c. 37, after capture.—*ANDREE v. FLETCHER* (1789), 3 Term Rep. 266; 100 E. R. 567.

*Annotations*:—*Folld.* *Morok v. Abel* (1802), 3 Bos. & P. 35. *Refd.* *Hentig v. Stanforth* (1816), 5 M. & S. 122; *v. Bryan* (1827), 6 B. & C. 661.

**2494.** ———.]—Where there is an insurance on ship & freight, & the ship has arrived in safety & earned freight, the assured cannot afterwards claim a return of premium on the ground that he had no insurable interest, on account of a defect in his title to the ship.—*M'CULLOCH v. ROYAL EXCHANGE ASSURANCE CO.* (1813), 3 Camp. 406, N. P.

See, now, Marine Insurance Act, 1906 (c. 41), s. 84 (3) (c).

**2495.** ——— Absence of fraud or illegality.]—After a proclamation by the King in Council to detain & bring into port all Danish vessels, a hired armed ship of His Majesty took & carried into Lisbon a Danish vessel, & sold her cargo there towards defraying in part the expense of necessary repairs, but without the authority of a ct. of admty., & afterwards took in a cargo on freight for England, & sailed on Nov. 3, from Lisbon; on which day hostilities were declared against Denmark by another proclamation of the King in Council; after which an insurance was made on the ship & freight by order & on account of the captors:—*Held*: (1) a statement in a case reserved, that the insurance was on account of the captors, precluded the consideration whether a count in the declaration could be sustained averring the interest to be in the Crown, & the insurance to be made on account of His Majesty; & the captors had no insurable interest, as they could claim nothing of right, but only *ex gratia* of the Crown; the Dane having been seized & detained before any declaration of war against Denmark, & the captors having no claim to prize under Prize Acts. (2) But as there was no fraud in the captors in effecting the policy, nor anything illegal in the voyage or insurance, the assured were entitled to recover back the premium, which had not been paid into ct.—*ROUTH v. THOMPSON* (1809), 11 East, 428; 103 E. R. 1069; *subsequent proceedings* (1811), 13 East, 274.

*Annotations*:—*As to* (1) *Consd.* *McCulloch v. Royal Exchange Assce.* (1813), 3 Camp. 406. *Reid.* *Stirling v. Vaughan* (1809), 11 East, 619; *Devaux v. Steele* (1840), 6 Bing. N. C. 358; *Mackenzie v. Whitworth* (1875), 1 Ex. D. 36. *As to* (2) *Expld. & Distd.* *McCulloch v. Royal Exchange Assce.* (1813), 3 Camp. 406.

**2496.** ——— P.p.l. policy.]—*Re LONDON COUNTY COMMERCIAL REINSURANCE OFFICE*, No. 1324, *ante*.

**2497.** Policy void for innocent misrepresentation.]—*FEISE v. PARKINSON*, No. 81, *ante*.

**2498.** ———.]—*ANDERSON v. THORNTON*, No. 151, *ante*.

**2499.** Policy void for concealment.]—*ANDERSON v. THORNTON*, No. 151, *ante*.

Compare Nos. 2513–2515, *post*.

**2500.** Over insurance—Return in proportion to extent thereof.]—An insurance was effected on Apr. 12, on a cargo of cotton ther at sea, by five several policies, at the rate of 50 guineas per cent.; & on Apr. 13 news of the vessel's safety having arrived, a further insurance was *bonâ fide* effected by six different policies, at 10 & 5 guineas per cent. The latter insurance, added to the former, exceeded in amount the value of the subject-matter insured, but the former of itself did not:—*Held*: the assured were entitled to a return of premium on the amount of the over insurance, to which the underwriters who subscribed the policies of Apr. 13 were to contribute ratably, in proportion to the sums insured by them respectively, the amount of over insurance to be ascertained by taking into account all the policies; but no return of premium was to be made in respect of the policies effected on Apr. 12.—*v. MASTERMAN* (1841), 8 M. & W. 165; 10 L. Ex. 306; 7 L. T. 442; 151 E. R. 994.

### B. Where Risk has Attached.

See Marine Insurance Act, 1906 (c. 41), s. 84.

**2501.** Divisibility of risk—Policy at & from a port.]—Upon a policy "at & from such a port to any other port or place whatsoever for twelve months, at 9 per cent., warranted free from capture," the risk is entire; & therefore, if once begun, there shall be no return of premium.—*TYRRE v. FLETCHER* (1777), 2 Cowp. 666; cited in 2 Doug. K. B. at p. 784; 98 E. R. 1297.

*Annotations*:—*Foll.* *Bermon v. Woodbridge* (1781), 2 Doug. K. B. 781; *Loraine v. Thomlinson* (1781), 2 Doug. K. B. 585. *Distd.* *Bradford v. Symondson* (1881), 45 L. T. 364. *Mentd.* *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Assocn.*, [1921] 1 A. C. 99.

**2502.** ———.]—*BERMON v. WOODBRIDGE*, No. 72, *ante*.

**2503.** ———.]—Policy of insurance "at & from Jamaica to Liverpool, warranted to sail on or before Aug. 1," the vessel not sailing before Aug. 1:—*Held*: the risk was not divisible, & the assured was not entitled to a return of any part of the premium.—*MEYER v. GREGSON* (1784), 3 Doug. K. B. 402; 99 E. R. 718.

*Annotation*:—*Reid.* *Long v. Allan* (1785), 4 Doug. K. B. 276.

**2504.** ———.]—*HOGG v. HORNER* (1797), 2 Park on Marine Insurances, 8th ed. pp. 626, 782, n.

*Annotations*:—*Mentd.* *Gairdner v. Senhouse* (1810), 3 Taunt. 16; *Lambert v. Liddard* (1814), 1 Marsh. 149; *Leathly v. Hunter* (1831), 7 Bing. 517; *Margetson v. Glynn* (1892), 66 L. T. 142.

**2505.** ———.]—*ANNEN v. WOODMAN*, No. 1456, *ante*.

**2506.** ——— With convoy—Usage in contemplation of parties.]—In an action on a policy of a ship warranted to depart with convoy, if the ship sails without convoy, the assured is entitled to recover the premium. An usage in such case to return the premium, deducting a half per cent. is good.

The inclination of any opinion has been on principle, that where, in a certain event, the risk shall not be run, there ought to be a return of the premium. But where there is an usage it makes it clear, as it must then be understood to be ingrafted on the policy (*LORD MANSFIELD, C.J.*).

Evidence [of usage is admissible] to explain or control the policy (*BULLER, J.*).—*LONG v. ALLAN* (1785), 4 Doug. K. B. 276; *Marshall on Marine Insurances*, 4th ed. p. 529; 99 E. R. 879.

**2507.** ———.]—*GALE v. MACHELL* (1785), *Marshall on Marine Insurances*, 4th ed. p. 529.

**2508.** ———.]—In an insurance on a ship at & from Hull to Bilbao, warranted to depart from England with convoy, the voyages from Hull to Portsmouth where she meets with convoy, & from thence to Bilbao, may be considered as distinct, & in case of a loss between the two latter places, an apportionment & return of premium may be demanded.—*ROTHWELL v. COOKE* (1797), 1 Bos. & P. 172; 126 E. R. 842.

**2509.** ——— Time policy—At rate per month.]—When a ship is insured for twelve months, at the rate of so much per month, though the risk cease at the end of two months, there shall be no apportionment nor return of premium.—*LORRAINE v. THOMLINSON* (1781), 2 Doug. K. B. 585; 99 E. R. 369.

*Annotations*:—*Foll.* *Bermon v. Woodbridge* (1781), 2 Doug. K. B. 781. *Mentd.* *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Assocn.*, [1921] 1 A. C. 99.



*Sect. 28.—Return of premiums: Sub-sect. 3, B.; sub-sect. 4, A. & B. Part III. Sect. 1: Sub-sect. 1.]*

**2510. Termination of defeasible interest—Captured ship insured by captors—Subsequent release by prize court.]—**Captors of ships seized as prize may insure their interest therein, & are not entitled to a return of premium, although it be afterwards adjudged to be no prize, & restitution be awarded to the owners by the Ct. of Admty.—**BOEHM v. BELL** (1799), 8 Term Rep. 154; 101 E. R. 1318.

*Annotations:—Mentd. Lucena v. Craufurd* (1802), 3 Bos. & P. 75; *Robertson v. Hamilton* (1811), 14 East, 522; *Samuel v. Dumas*, [1924] A. C. 431.

**2511. Deviation of ship—Voyage policy.]—****TAIT v. LEVI**, No. 985, *ante*.

**2512. — Policy on freight—Deviation before loading.]—**Where there is an insurance on freight, if the ship be chartered for the voyage, & is guilty of a deviation after sailing upon it & before any goods are loaded, the assured are not entitled to any return of premium for short interest.—**MOSES v. PRATT** (1815), 4 Camp. 297, N. P.

*Annotation:—Expld. Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471.

#### SUB-SECT. 4.—EFFECT OF FRAUD AND ILLEGALITY. *A. Fraud.*

See Marine Insurance Act, 1906 (c. 41), s. 84 (1), (3) (a), & generally, Part I., Sect. 6, sub-sect. 2, B., *ante*.

**2513. General rule—Premium not returnable.]—****TYLER v. HORNE** (1785), Marshall on Marine Insurances, 4th ed. p. 525.

**2514. — — —.]—****CHAPMAN v. FRASER** (1793), Marshall on Marine Insurances, 4th ed. p. 525.

**2515. — — —.]—**In marine insurance, if the premium has been paid under a fraudulent representation, no return can be recovered.—**NUEL v. SMITH** (1840), 7 L. T. 46; 8 L. T. 93.

**2516. — — —.]—****RIVAZ v. GERUSSI**, No. 585, *ante*.

Compare Nos. 81, 151, *ante*.

#### *B. Illegality.*

See Marine Insurance Act, 1906 (c. 41), s. 84 (3), & Marine Insurance (Gambling Policies) Act, 1909 (c. 12), & generally, Part I., Sect. 6, sub-sect. 2, C., *ante*.

**2517. Whether premiums recoverable.]—**The premium paid on an illegal insurance to cover a trading with an enemy cannot be recovered back, though the underwriter cannot be compelled to make good the loss.—**VANDYCK v. HEWITT** (1800), 1 East, 96; 102 E. R. 39.

*Annotations:—Consd. Morck v. Abel* (1802), 3 Bos. & P. 35. **Apld. Lubbock v. Potts** (1806), 3 Smith, K. B. 401. **Refd. Aubert v. Walsh (1810), 3 Taunt. 277. **Mentd. Hastelow v. Jackson (1828), 8 B. & C. 221.****

**2518. — — —.]—**A foreigner cannot recover back the premium paid by him upon a policy of insurance, if the voyage be in contravention of the British laws. Therefore where a policy was effected upon a Danish ship at & from Bengal, in which there are Danish settlements, to Copenhagen, & the ship loaded at Calcutta contrary to 12 Car. 2, c. 18, s. 1:—**Held**: the assured was not entitled to recover back the premium, even though it appeared that the practice of loading foreign ships at Calcutta had prevailed for a length of time, & had been authorised by Act of Parliament soon after the shipment in question.—**MORCK v. ABEL** (1802), 3 Bos. & P. 35; 127 E. R. 20.

*Annotations:—Apld. Lubbock v. Potts* (1806), 3 Smith, K. B. 401. **Distd. Hentig v. Staniforth** (1816), 5 M. & S. 122.

**2519. — — —.]—**Colonial produce cannot legally be shipped from the British West Indies for Gibraltar, & therefore the same cannot be insured on such a voyage, & it matters not that part of the cargo was shipped at one of the West India islands, with liberty to exchange it at another, which would have been legal, if in fact it were not exchanged, & its ultimate destination was Gibraltar; & the ship & cargo being lost off Gibraltar, though the assured could not recover, yet the premium having been paid upon an illegal insurance cannot be recovered back.—**LUBBOCK v. POTTS** (1806), 7 East, 449; 3 Smith, K. B. 401; 103 E. R. 174.

*Annotations:—Distd. Hentig v. Staniforth* (1816), 5 M. & S. 122. **Refd. Glaser v. Cowie** (1813), 1 M. & S. 52. **Mentd. Hastelow v. Jackson (1828), 8 B. & C. 221; *Mann, MacNeil & Steeves v. Capital & Counties Insce., Same v. General Marine Underwriters* (1921), 124 L. T. 778.**

**2520. — — —.]—****WILSON v. ROYAL EXCHANGE ASSURANCE CO.**, No. 2219, *ante*.

Compare No. 2522, *post*.

**2521. — Illegality unintentional—Ignorance of fact rendering insurance illegal.]—**An insurance having been made on goods, at & from a port in Russia to London, by an agent residing here for a Russian subject abroad, which insurance was in fact made after the commencement of hostilities by Russia against this country, but before the knowledge of it here, & after the ship had sailed, & been seized & confiscated:—**Held**: the policy was void in its inception; but the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities.—**OOM v. BRUCE** (1810), 12 East, 225; 104 E. R. 87.

*Annotations:—Distd. Cowie v. Barber* (1815), 4 M. & S. 18. **Apld. Hentig v. Staniforth** (1816), 5 M. & S. 122. **Refd. Bradford v. Symondson (1881), 50 L. J. Q. B. 582. **Mentd. Holt v. Ely (1853), 1 E. & B. 795.****

**2522. — — — Completion of adventure delayed.]—**Where a licence was granted to pltf. on May 25, 1810, to take a cargo from London to Archangel, & to return from thence with a cargo of grain & other goods permitted by law to be imported to any port of the United Kingdom, & the licence was limited to Sept. 29, following, which time was afterwards extended to Jan. 1, 1811, & the ship after taking in a cargo of pitch & tar at Archangel, sailed on her homeward voyage on Oct. 3, 1810, but was driven back to Archangel, & there unloaded, & her cargo sold, & the ship laid up for the winter, & did not sail again from thence with a cargo of wheat, until Aug. 1, 1811:—**Held**: the licence was not exhausted by taking in the first cargo of pitch & tar, but would cover the cargo of wheat also, notwithstanding the time limited for its continuance had elapsed, provided it appeared that the voyage was prosecuted with all reasonable dispatch, which was a question for the jury; & therefore if it should so appear, an insurance effected by pltf. on Aug. 18, 1811, on wheat at & from Archangel to London would be valid, & would attach on the wheat cargo; but an insurance on money advanced to the captain at Archangel was void, & upon that pltf. might recover back the premium.—**SIFFKEN v. ALLNUTT** (1813), 1 M. & S. 39; 105 E. R. 15.

*Annotation:—Refd. Siffkin v. Glover* (1813), 4 Taunt. 717.

**2523. — — — Steps taken to ensure legality.]—**The assured were held not entitled to a return of premium upon a policy at & from a place within the limits of the South Sea co.'s charter, the ship being without a licence from the S. S. co. at the commencement of the risk, & up to the time of her loss, although the assured procured a licence as



soon as they could, & before they knew of her loss, & the licence was made to relate to a time antecedent to the loss. A ship which is sent to a place within the limits of the S. S. co.'s charter, in order to bring home part of a return cargo of another ship, is not protected by the licence granted by the S. S. co. to that other ship. A licence granted by the S. S. co. cannot operate retrospectively.—*COWIE v. BARBER* (1815), 4 M. & S. 16; 105 E. R. 741.

*Annotation* :—*Distd. Hentig v. Staniforth* (1816), 5 M. & S.

**2524. — Application for licence delayed.]**—Where a licence was obtained & insurance effected from Riga to Hull, on goods the produce of Russia, on board a Swedish ship, but the ship sailed three days before the letter directing the licence to be obtained reached the agent, the letter having been delayed by contrary winds beyond the usual time, & the licence was obtained two days afterwards, & the insurance effected subsequently to that :—*Held* : though the voyage was in its inception illegal, being contrary to 12 Car. 2, c. 18, s. 8, nevertheless the assured might recover back the premium.—*HENTIG v. STANIFORTH* (1816), 5 M. & S. 122; 1 Stark. 254; 105 E. R. 996; *sub nom. HENRY v. STANIFORTH*, 4 Camp. 270.

**2525. — Notice of intention to rescind—Necessity for.]**—An assured, upon a policy effected in terms sufficiently large to comprehend an illegal adventure, & who intends thereby to cover an illegal adventure, cannot recover back the premium without some formal renunciation of the contract made known to the underwriter before the bringing of the action, although the adventure is never entered upon therefore, on a policy on goods on board the *Audaz*, a Spanish ship, or any other ship or ships at & from New Orleans & Pensacola to a port in the United Kingdom, Pensacola, at the time of effecting the policy, belonging to Spain, & New Orleans to America; which latter country was at war with this country, but Spain was neutral, & the assured intending by the policy to cover an importation of cotton-wool from New Orleans to Liverpool :—*Held* : supposing this to be a case in which the assured was at liberty to rescind the contract, yet as he had not given any notice to the underwriter of his intention to do so, he could not maintain an action to recover back the premium, although no cargo was loaded on board the ship named, or any other ship covered by the policy.—*PALYART v. LECKIE* (1817), 6 M. & S. 290; 105 E. R. 1251.

**2526. — Illegal company.]**—The assocn. was not registered under Co.'s Acts. Persons became members by effecting mutual policies, members were empowered also to effect "special rate policies." Appcts. were not members, but had taken out a "special rate policy" signed per procuration by J. & S., the managers, who gave & accepted on their personal liability, a bill of exchange for the amount assured. In a similar case, the amount assured had been disallowed by the Appeal Ct. as a claim made on the assocn. J. & S. became insolvent, & their acceptance was dishonoured. De W. & Co. claimed that the amount of the premiums should be repaid them by the members of the assocn. :—*Held* : they were not entitled to have the premiums repaid, because, as they well knew, J. & S. had no power, as agents, to grant such a policy to non-members; & there was no failure of consideration as J. & S. had made themselves personally liable.—*Re ARTHUR AVERAGE ASSOCN., DE WINTON & Co.'s CASE* (1876), 34 L. T. 942; 3 Asp. M. L. C. 245.

*Annotation* :—*Mentd. Wigfield v. Potter* (1881), 45 L. T. 612.

**2527. — Both parties equally in fault.]**—Pltf. effected a policy "on commission & [or] profits" on goods "on ship & [or] ships, steamer & [or] steamers, warranted free from all average, & without benefit of salvage, but to pay loss on such part as does not arrive." The goods on which pltf. claimed the commission & profits intended to be insured by the policy, were shipped on board two British ships, which were lost by the perils of the seas; part of the goods were lost, & the remainder arrived in a damaged condition. Pltf. having sued deft. the underwriter of the policy, to recover the amount subscribed, or if the policy were void, to recover the premiums paid :—*Held* : the policy was void, by 19 Geo. 2, c. 37, for that the statute forbade the use of the clause "without benefit of salvage to the insurers," & though the policy omitted the words "to the insurers," yet it was sufficiently obvious the insurers were not to have the benefit of salvage to be within the prohibition of the statute.

The contract being wholly illegal, & both parties being equally in fault, the premium paid could not be recovered.—*ALLKINS v. JUPE* (1877), 2 C. P. D. 375; 46 L. J. Q. B. 824; 36 L. T. 851; 3 Asp. M. L. C. 449.

*Annotations* :—*Refd. Berridge v. Man On Insee.* (1886), 18 Q. B. D. 346; *Stanley, etc. Royal Liver Friendly Soc. Trustees v. White* (1892), 56 J. P. 264; *Gedge v. Royal Exchange Assce. Corpn.*, [1900] 2 Q. B. 214; *British Workman's & General Assce. v. Cunliffe* (1902), 18 T. L. R. 425.

## Part III.—Fire Insurance.

### SECT. 1.—NATURE AND FORM OF THE CONTRACT.

#### SUB-SECT. 1.—IN GENERAL.

**2528. Nature of contract—Indemnity.]**—(1) It is necessary the party injured should have an interest or property in the house insured, at the time the policy is made out, & at the time the fire happens; & therefore, after the lease of the house expired, the insured's assigning the policy does not oblige the insurers to make good the loss to the assignee.

(2) The term in books that treat of insuring is

*aversio periculi*, the intention being to avert any damages or loss the insured might sustain.

(3) Policies of assurance not assignable in their nature, nor intended to be assigned from one to another person without the consent of the office.—*SADLERS' CO. v. BADCOCK* (1743), 2 Atk. 554; 1 Wils. 10; 26 E. R. 733, L. C.

*Annotations* :—*As to* (1) *Refd. Vernon v. Smith* (1821), 5 B. & Ald. 1. *As to* (2) *Consd. Lucena v. Crauford* (1806), 2 Bos. & P. N. R. 269. *As to* (3) *Consd. Doxford v. King* (1846), 8 L. T. O. S. 190.

**2529. — ]**—*GOULSTONE v. ROYAL INSURANCE CO.*, No. 2571, *post*.

#### PART III. SECT. 1, SUB-SECT. 1.

**2528 i. Nature of contract—Indem-**  
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*nity.*—A contract of fire insurance is a personal contract of indemnity to the person insured.—*BANK OF NEW SOUTH*

*WALES v. NORTH BRITISH & MERCANTILE INSURANCE CO.* (1882), 3 N. S. W. L. R. 60 (L.).—*AUS.*

*Sect. 1.—Nature and form of the contract: Sub-sects. 1, 2 & 3.]*

**2530.** ———.]—A contract of fire insurance being a contract of indemnity, on which the assured is only entitled to recover the value of the property destroyed; & wilful misrepresentation of the value of the property destroyed will, under the usual condition against fraudulent claims, defeat & vitiate the whole claim. In an action on a fire insurance policy, containing the usual condition that it should become void in the event of a fraudulent claim: the co. setting up, in defence, both fraud & arson: the jury being advised by the judge that, as the case, as to arson, was only one of suspicion, they should decide rather upon the case as to fraud: they were also directed, that if they were satisfied that the claim was wilfully false & fraudulent, they should find for the co. upon the plea of fraud.—*BRITTON v. ROYAL INSURANCE CO.* (1866), 4 F. & F. 905; 15 L. T. 72, N. P.

**2531.** ———.]—A policy of insurance against fire is, in its nature, a contract of indemnity, & the insured is not entitled to recover more than such amount as will indemnify him against the actual loss or damage sustained according to the real quantity & value of the goods at the time of the fire. An honest claim is not, under the condition against fraud, invalidated on account of error, or even some degree of exaggeration or over estimate; & in such a case the insured will be entitled to recover according to the real value & the amount of actual loss sustained. But if the claim is wilfully & intentionally excessive that will amount to such fraud as will under the ordinary condition against fraudulent claims, invalidate the claim altogether, & disentitle him to recover at all.—*CHAPMAN v. POLE*, P. O. (1870), 22 L. T. 306, N. P.

**2532.** ———.]—*DARRELL v. TIBBITTS*, No. 2560, *post*.

**2533.** ———.]—*CASTELLAIN v. PRESTON*, No. 2562, *post*.

**2534.** ———.]—A policy of fire insurance being a contract of indemnity, the insurer is entitled to recover from the assured, not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the assured against third parties which have been renounced by him & to which, but for such renunciation, the insurer would have a right to be subrogated.—*WEST OF ENGLAND FIRE INSURANCE CO. v. ISAACS*, [1897] 1 Q. B. 226; 66 L. J. Q. B. 36; 75 L. T. 564, C. A.

*Annotation:—Reid. Pailin v. Northern Employers' Mutual Indemnity Co.*, [1925] 2 K. B. 73.

**2535.** ———.]—Deft. insured her buildings against fire with pltf. co. During the currency of the policy a corpn. gave deft. a notice to treat for the buildings under Lands Clauses Consolidation Act, 1845 (c. 18). Before anything had been done under that notice the buildings were destroyed by fire, & pltf. paid to deft. an agreed sum as the amount of her loss. Subsequently the amount to be paid by the corpn. on taking over the property pursuant to their notice to treat was agreed between deft. & the corpn. at a sum arrived at by taking into account the money paid by pltf. to deft. under the policy, the corpn. agreeing to indemnify deft. against any claim which might be made against her by pltf. :—

*Held*: the contract being one of mere indemnity, pltf. upon payment of the agreed amount of the loss became entitled to all the rights of deft. in respect of the destroyed property, & those rights included a right to be paid by the corpn. the value of the property as it existed at the date of the notice to treat; deft. could not by any agreement with the corpn. deprive pltf. of that right; & therefore pltf. were entitled to recover from deft. the amount paid by them to her in respect of the loss insured against.—*PHOENIX ASSURANCE CO. v. SPOONER*, [1905] 2 K. B. 753; 74 L. J. K. B. 792; 93 L. T. 306; 54 W. R. 313; 21 T. L. R. 577; 49 Sol. Jo. 553; 10 Com. Cas. 282; *on appeal* (1906), 22 T. L. R. 695, C. A.

*See, also*, Nos. 2618, 2622, 2725, *post*.

**Insurer's right of subrogation—Where insured indemnified aliunde.]—See Sect. 2, *post*.**

As to nature of insurance policies, generally, & their essentials, *see* Part I., *ante*.

#### SUB-SECT. 2.—FORM.

*See, generally*, as to form of policy, Part I., *ante*.

**2536. Incorporation of conditions by reference.]**

—A deed poll containing an insurance against fire may refer to conditions in a printed paper without stamp, seal or signature: & it may be a part of those conditions that the insured shall procure a certificate of his character, & that the loss happened without fraud.—*ROUTLEDGE v. BURRELL* (1789), 1 Hy. Bl. 254; 126 E. R. 148.

*Annotation:—Folld. Worsley v. Wood* (1796), 6 Term Rep. 710.

**2537. Special conditions—Required by statute to be printed in particular manner—Effect of non-compliance.]—(1)** An Act of a provincial legislature provided that certain conditions set out in the Act should be deemed to be part of every fire insurance policy, & should be printed on every policy, unless varied by other conditions to be indicated in conspicuous type & different coloured ink, & unless so indicated, no variation should be binding on the insured. Resp. affected an insurance with the first-named applts. The policy did not refer to the statutory conditions, but contained conditions not indicated by type or coloured ink:—*Held*: the policy was subject to the statutory conditions, but not to the expressed conditions. (2) Resp. applied to the second applts. for an insurance against fire, & paid the premium, & received an interim receipt "subject to all the usual terms & conditions of this co." Before a policy was issued the insurance became a claim:—*Held*: this receipt not being a policy of insurance was not subject to the statutory conditions, but was a contract to accept a policy containing the terms & conditions usually inserted by the co., so far as the same were just & reasonable.

These interim protection notes, given by fire insurance cos. bear an analogy to the "slips" commonly used in cases of marine insurance, preliminary to the issuing of policies. The slip contains the heads of the contract, & is in itself a contract of insurance (*SIR MONTAGUE SMITH*).—*CITIZENS INSURANCE CO. OF CANADA v. PARSONS*, *QUEEN INSURANCE CO. v. PARSONS* (1881), 7 App. Cas. 96; 51 L. J. P. C. 11; 45 L. T. 721, P. C. *Annotations:—As to* (2) *Reid. Re Coleman's Depositories & Life & Health Assce. Asscn.* (1907), 76 L. J. K. B. 805. *Generally*, *Mentd. Dobie v. Temporalities Board*

#### PART III. SECT. 1, SUB-SECT. 2.

**2537 i. Special conditions—Required by statute to be printed in particular**

*manner—Effect of non-compliance.]—W. MALCOLM MACKAY, LTD. v. ROYAL EXCHANGE ASSURANCE CO.* (1923), 50 N. B. R. 465.—CAN.

**2537 ii.** ———.]—*R. v. PROVINCIAL INSURANCE CO.* (1923), 33 B. C. R. 79.—CAN.



(1882), 7 App. Cas. 136; *Russell v. R.* (1882), 7 App. Cas. 829; *Colonial Building & Investment Assn. v. A.-G. of Quebec* (1883), 9 App. Cas. 157; *Hodge v. R.* (1883), 9 App. Cas. 117; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *A.-G. for Ontario v. A.-G. for the Dominion*, [1896] A. C. 348; *A.-G. for Manitoba v. Manitoba Licence Holders' Assn.* (1901), 71 L. J. P. C. 28; *Plow (John Deere) Co. v. Wharton*, [1915] A. C. 330; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91; *A.-G. for Ontario v. Reciprocal Insurers*, [1924] A. C. 328; *Caron v. R.*, [1924] A. C. 999; *Toronto Electric Comrs. v. Snider*, [1925] A. C. 396.

**2538. — Application of enactment—“Clear space” clause.]**—Fire insurance policies insuring lumber while located in a certain timber yard against loss or damage by fire issued by applt. cos. contained the following clause attached to the policy: “Warranted by the assured that a continuous clear space of 50 feet shall hereafter be maintained between the property hereby insured & any saw mill or wood-working establishment & 300 feet between any open refuse burner.” The clear space clause was not introduced by the heading prescribed by New Brunswick Fire Insurance Policies Act, 1913 (c. 26), s. 4, nor was it printed in conspicuous type or in ink of a different colour. There was at the date of the policies an open refuse burner distant 80 feet from the goods insured & this burner remained within that distance throughout the currency of the policies, & while the policies were still current sparks from this burner set fire to the insured property:—*Held*: the clear space clause was not a description of the

goods or of the risk insured, but was in the true sense a condition of the insurance, & was therefore invalid & not binding on the insured under sect. 5 of the Act of 1913.—*PALATINE INSURANCE CO. v. GREGORY*, [1926] A. C. 90; 95 L. J. P. C. 29; 134 L. T. 164; 42 T. L. R. 4, P. C.

**2539. Cover note—Effect of.]**—*CITIZENS INSURANCE CO. OF CANADA v. PARSONS, QUEEN INSURANCE CO. v. PARSONS*, No. 2537, *ante*.

**2540. Policy made out in wrong name—Knowledge of insurer's agent—Right of insured.]**—*HOUGH v. GUARDIAN FIRE & LIFE ASSURANCE CO., LTD.* (1902), 18 T. L. R. 273.

*Annotations:—Consd. Holdsworth v. Lancashire & Yorkshire Insce.* (1907), 23 T. L. R. 521; *Paxman v. Union Assce. Soc.* (1923), 39 T. L. R. 424.

### SUB-SECT. 3.—PERSONAL NATURE OF CONTRACT.

**2541. Whether assignable.]**—Policies of insurance against loss or damage by fire, are not in their nature assignable; nor can the interest in them be transferred from one person to another, without the express consent of the office.

A. purchased a house which was insured against fire, & an assignment was accordingly executed. The house was afterwards burnt down, & subsequent to that accident, A. assigned the policy of insurance:—*Held*: the purchaser was not entitled

### PART III. SECT. 1, SUB-SECT. 3.

**2541 i. Whether assignable.]**—*HUGHES v. MUTUAL FIRE INSURANCE CO. OF DISTRICT OF NEWCASTLE* (1852), 9 U. C. R. 387.—CAN.

**2541 ii. —.]**—*BURTON v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1857), 14 U. C. R. 342.—CAN.

**2541 iii. —.]**—*BEEMER v. ANCHOR INSURANCE CO.* (1858), 16 U. C. R. 485.—CAN.

**2541 iv. —.]**—The assignee of a policy of insurance, & of the property insured, does not by such assignment acquire any right against the insurer on the original contract, though the assignment is made with his consent, & in accordance with one of the conditions of the policy.—*DEMILL v. HARTFORD INSURANCE CO.* (1859), 9 N. B. R. (4 All.) 341.—CAN.

**2541 v. —.]**—Pltf. had assigned his interest to B., which assignment was approved by defts., insurers:—*Held*: pltf. was entitled to succeed on the issue.—*PARK v. PHOENIX INSURANCE CO.* (1859), 19 U. C. R. 110.—CAN.

**2541 vi. —.]**—*RICE v. WELLS* (1861), 20 U. C. R. 404.—CAN.

**2541 vii. —.]**—*WATT v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1861), 8 Gr. 523.—CAN.

**2541 viii. —.]**—*SMITH v. ROYAL INSURANCE CO.* (1867), 27 U. C. R. 54.—CAN.

**2541 ix. —.]**—*QUEEN INSURANCE CO. v. MACPHERSON* (1868), N. B. Dig. 307.—CAN.

**2541 x. —.]**—*CHISHOLM v. PROVINCIAL INSURANCE CO.* (1869), 20 C. P. 11.—CAN.

**2541 xi. —.]**—*HENDRICKSON v. QUEEN INSURANCE CO.* (1870), 30 U. C. R. 108; 31 U. C. R. 547.—CAN.

**2541 xii. —.]**—*FITZGERALD v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1870), 30 U. C. R. 97.—CAN.

**2541 xiii. —.]**—*CROZIER v. PHOENIX INSURANCE CO.* (1870), 13 N. B. R. (2 Han.) 200.—CAN.

**2541 xiv. —.]**—*FROST v. LIVERPOOL, LONDON & GLOBE INSURANCE CO.* (1871), N. B. Dig. 433.—CAN.

**2541 xv. —.]**—*REESOR v. PROVIN-*

*CIAL INSURANCE CO.* (1873), 33 U. C. R. 357.—CAN.

**2541 xvi. —.]**—*GUGGISBERG v. WATERLOO MUTUAL FIRE INSURANCE CO.* (1876), 24 Gr. 350.—CAN.

**2541 xvii. —.]**—*HAZZARD v. CANADA AGRICULTURAL INSURANCE CO.* (1876), 39 U. C. R. 419.—CAN.

**2541 xviii. —.]**—*HUTCHINSON v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO.* (1876), 39 U. C. R. 483.—CAN.

**2541 xix. —.]**—*MECHANICS BUILDING & SAVINGS SOCIETY v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1876), 40 U. C. R. 220; 3 A. R. 157.—CAN.

**2541 xx. —.]**—*DEAR v. WESTERN ASSURANCE CO.* (1877), 41 U. C. R. 553.—CAN.

**2541 xxi. —.]**—*KERR v. HASTINGS MUTUAL FIRE INSURANCE CO.* (1877), 41 U. C. R. 217.—CAN.

**2541 xxii. —.]**—*MECHANICS BUILDING & SAVINGS SOCIETY v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1878), 3 A. R. 151.—CAN.

**2541 xxiii. —.]**—*MARRIN v. STADACONA INSURANCE CO.* (1879), 43 U. C. R. 556; 4 A. R. 330.—CAN.

**2541 xxiv. —.]**—*GREET v. CITIZENS INSURANCE CO., GREET v. ROYAL INSURANCE CO.* (1880), 5 A. R. 596; 27 Gr. 121.—CAN.

**2541 xxv. —.]**—*SCHOFIELD v. NEW BRUNSWICK PATENT TANNING CO.* (1883), 22 N. B. R. 599.—CAN.

**2541 xxvi. —.]**—*WYMAN v. IMPERIAL INSURANCE CO.* (1888), 16 S. C. R. 715.—CAN.

**2541 xxvii. —.]**—*SALTERIO v. CITIZENS' INSURANCE CO.* (1893), 26 N. S. R. (14 R. & G.) 16; *affd.* (1894), 23 S. C. R. 155.—CAN.

**2541 xxviii. —.]**—*STEVENS v. QUEEN INSURANCE CO.* (1894), 32 N. B. R. 387.—CAN.

**2541 xxix. —.]**—*STEVENS v. PHOENIX INSURANCE CO.* (1894), 32 N. B. R. 394.—CAN.

**2541 xxx. —.]**—*BANK OF BRITISH NORTH AMERICA v. STURDEE* (1894), 32 N. B. R. 398.—CAN.

**2541 xxxi. —.]**—The interest of the insured in a policy of insurance upon

chattels may, before loss, be validly assigned by him to a person who has no interest in them at the time of the assignment, the insured remaining owner of the chattels.—*MCPHILLIPS v. LONDON MUTUAL FIRE INSURANCE CO.* (1896), 23 A. R. 524.—CAN.

**2541 xxxii. —.]**—*WESTERN BANK v. COURTEMANCHE* (1896), 27 O. R. 213.—CAN.

**2541 xxxiii. —.]**—*MORROW v. LANCASHIRE INSURANCE CO.* (1898), 26 A. R. 173.—CAN.

**2541 xxxiv. —.]**—*BROWNELL v. ATLAS ASSURANCE CO.* (1898), 31 N. S. R. 348.—CAN.

**2541 xxxv. —.]**—*WOOD v. JAGGER* (1908), 9 W. L. R. 120.—CAN.

**2541 xxxvi. —.]**—*TROTTER v. WESTERN CANADA FIRE INSURANCE CO.* (1909), 9 W. L. R. 664.—CAN.

**2541 xxxvii. —.]**—*BUNTING v. WESTERN ASSURANCE CO., BUNTING v. LAW UNION ASSURANCE CO.* (1911), 17 O. W. R. 322.—CAN.

**2541 xxxviii. —.]**—*Re LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD. & CANADIAN FIRE INSURANCE CO. & KADLAC*, [1918] 2 W. W. R. 727; 13 Alta. L. R. 498.—CAN.

**2541 xxxix. —.]**—*STADDON v. LIVERPOOL, MANITOBA INSURANCE CO.* (1919), 44 O. L. R. 355; 55 O. W. N. 240.—CAN.

**2541 xl. —.]**—*MILLER - MORSE HARDWARE CO. v. DOMINION FIRE INSURANCE CO.*, [1921] 1 W. W. R. 254; 56 D. L. R. 738; 14 Sask. L. R. 30.—CAN.

**2541 xli. —.]**—*Re BURCE*, [1923] 2 W. W. R. 872.—CAN.

**2541 xlii. —.]**—*KENNY v. HUTCHINGS, MCPHERSON v. QUEEN INSURANCE CO.* (1885), 7 Nfld. L. R. 84.—NFLD.

**2541 xliii. —.]**—*DE LAUNAY v. NORTHERN ASSURANCE CO.* (1883), 2 N. Z. L. R. 1 (S. C.).—N.Z.

**2541 xliv. —.]**—*RIDDLE v. GOVERNMENT INSURANCE COMR.* (1888), 7 N. Z. L. R. 79.—N.Z.

**2541 xlv. —.]**—*OCEAN ACCIDENT & GUARANTEE CORPN. v. WILLIAMS* (1915), 34 N. Z. L. R. 924.—N.Z.

**2541 xlvi. —.]**—*FORBES & CO. v. BORDER COUNTIES FIRE OFFICE* (1873),



*Sect. 1.—Nature and form of the contract: Sub-sects. 3, 4 & 5. Sect. 2: Sub-sects. 1 & 2.]*

to recover.—*LYNCH v. DALZELL* (1729), 4 Bro. Parl. Cas. 431; 2 E. R. 292, H. L.

*Annotations:—Folld. Sadlers' Co. v. Badcock* (1743), 2 Atk. 554. *Consd. Duxford v. King* (1846), 8 L. T. O. S. 190. *Refd. Vernon v. Smith* (1821), 5 B. & Ald. 1.

**2542.** ———.]—*SADLERS' CO. v. BADCOCK*, No. 2528, *ante*.

**2543. Effect of assignment of property insured—Loss before assignment of policy.]**—*LYNCH v. DALZELL*, No. 2541, *ante*.

**2544.** ———.]—**Loss after contract to assign but before completion.]**—A purchaser of property insured against fire does not by the mere fact of purchase acquire a right to the insurance moneys. A contract was entered into with a trustee for sale for the purchase of a house which was insured against fire in the trustee's name, after which, & before completion of the purchase, the house was burnt down. The insurance co. paid the insurance money to the trustee, who, without the concurrence of his *cestuis que trust*, allowed the purchaser to deduct the amount from the purchase-money upon completion of the sale. The trustee having become bkpt., & a bill having been filed by the *cestuis que trust* against the purchaser:—*Held*: in the absence of any provision in the contract the purchaser was not entitled to the benefit of the money received from the insurance co., & the *cestuis que trust* were entitled to a lien upon the property for the amount deducted, as being unpaid purchase-money.—*POOLE v. ADAMS* (1864), 4 New Rep. 9; 33 L. J. Ch. 639; 10 L. T. 287; 28 J. P. 295; 12 W. R. 683.

*Annotations:—Folld. Rayner v. Preston* (1881), 18 Ch. D. 1. *Refd. Sinnott v. Bowden*, [1912] 2 Ch. 414.

**2545.** ———.]—**Compulsory purchase.]**—*COLLINGRIDGE v. ROYAL EXCHANGE ASSURANCE CORPN.*, No. 2579, *post*.

**2546.** ———.]—A house insured by the vendor was, after the date of the contract for sale, but before completion, partly burnt down, & the vendor received the insurance moneys. There was no provision in the contract as to insurance:—*Held*: the purchaser as against the vendor could not recover the insurance moneys either as an abatement of his purchase-money or for the reinstatement of the premises. *Semble*: in such a case the insurance co. can compel the vendor to refund the money they had paid, if he receives the whole of his purchase-money, on the ground that the contract of fire insurance is merely a contract of indemnity.—*RAYNER v. PRESTON* (1881), 18 Ch. D. 1; 50 L. J. Ch. 472; 44 L. T. 787; 45 J. P. 829; 29 W. R. 547, C. A.

*Annotations:—Refd. Castellain v. Preston* (1883), 11 Q. B. D. 380; *Eccle. Comrs. for England v. Royal Exchange Assee.* [1909] 1 Ch. 55; *Sinnott v. Bowden*, [1912] Ch. 414. *Mentd. I. R. Comrs. v. Angus, The Same v.*

11 Macph. (Ct. of Sess.) 278; 45 Sc. Jur. 195.—*SCOT*.

**2541 xlvii.** ———.]—*TRAUTMAN v. IMPERIAL FIRE ASSURANCE CO.* (1895), 12 S. C. 38.—*S. AF.*

**2541 xlviii.** ———.]—*VASSEN v. GARRETT* (1911), E. D. L. 109.—*S. AF.*

**2543 i. Effect of assignment of property insured—Loss before assignment of policy.]**—*WILLIAMS (A. R.) MACHINERY CO. v. BRITISH CROWN ASSURANCE CORPN.* (1921), 29 B. C. R. 481.—*CAN.*

**2544 i.** ———.]—**Loss after contract to assign but before completion.]**—A. insured buildings & then sold them to B. After the purchase-money had been fully paid, but before conveyance, the buildings were burnt. A. executed a conveyance, & then brought an action against the insurance co.:—*Held*: A.

had no interest sufficient to sustain the action.—*BANK OF NEW SOUTH WALES v. NORTH BRITISH & MERCANTILE INSURANCE CO.* (1881), 2 N. S. W. L. R. 239 (L.).—*AUS.*

**2544 ii.** ———.]—*MURCHIE v. VICTORIA INSURANCE CO.* (1885), 4 N. Z. L. R. 114 (S. C.).—*N.Z.*

**q.** ———.]—**In breach of condition of policy.]**—*FERGUSON v. NATIONAL FIRE & MARINE INSURANCE CO. OF NEW ZEALAND* (1886), 7 N. S. W. L. R. 392 (L.).—*AUS.*

**r.** ———.]—*SOVEREIGN FIRE INSURANCE CO. OF CANADA v. PETERS* (1886), 12 S. C. R. 33.—*CAN.*

**t.** ———.]—*DUNLOP v. USBORNE & HIBBERT FARMERS MUTUAL FIRE INSURANCE CO.* (1895), 22 A. R. 364.—*CAN.*

*Lewis* (1889), 23 Q. B. D. 579; *Ridout v. Fowler*, [1904] 1 Ch. 658; *Re Elementary Education Acts*, 1870 & 1873, [1909] 1 Ch. 55; *Re Lyne-Stephens & Scott-Miller's Contract*, [1920] 1 Ch. 472.

**2547.** ———.]—**Loss after completion—Policy not assigned.]**—*ECCLESIASTICAL COMRS. FOR ENGLAND v. ROYAL EXCHANGE ASSURANCE CORPN.* (1895), 11 T. L. R. 476; 39 Sol. Jo. 623.

*See, now, Law of Property Act*, 1925 (c. 20), s. 47 (1), (2).

**2548.** ———.]—**Insurance under floating policy.]**—Pltfs., sugar refiners, were in the habit of selling to brokers the whole of each filling of sugar, consisting of from 200 to 300 loaves or "titlers" each, the terms always being "Prompt at one month; goods at seller's risk for two months," the "prompt" day being the Saturday next after the expiration of one month from the sale. The titlers in each filling were stored on pltfs.' premises, & were from time to time fetched away by the purchasers or their sub-vendees, being weighed on their removal, each titler weighing from 38 to 42 pounds. If the whole of the lots contained in one sale note had not (which was frequently the case) been taken away on the "prompt" day payment was made by the purchaser, by bill or cash, at an approximate sum calculated on the probable weight, the actual price being afterwards adjusted on the whole filling being cleared. Deft., who was an old customer of pltfs., had bought four fillings, consisting of specific titlers, each marked, on the above terms, & had paid the approximate price of the four lots, & had fetched some of each lot away. A fire occurred on pltfs.' premises after the expiration of the two months from the dates of sale to deft., destroying the whole contents of the warehouses. At the time of the fire pltfs. had floating policies of insurance which covered goods on the premises "sold & paid for, but not removed"; but they had no agreement or understanding with their customers as to any insurance; & the amount insured, which pltfs. received from the underwriters, was not sufficient to cover the loss of their own goods, exclusive of the titlers undelivered which they had sold to deft.:—*Held*: (*COCKBURN, C.J.*), on the ground that the property in the titlers undelivered had passed to deft. (*BLACKBURN, LUSH, & QUAIN, J.J.*), whether it had passed or not, (1) by the terms of the contract of sale, the risk, after the lapse of the two months, was in the buyer, & the loss was, therefore, his; (2) as there was no contract between pltfs. & their customers as to insurance, pltfs. were under no obligation in the matter, & were entitled to appropriate to their own losses the whole sum received from the insurance offices.

*Semble*: (*BLACKBURN & LUSH, J.J.*), the property in the titlers undelivered had passed to deft. —*MARTINEAU v. KITCHING* (1872), L. R. 7 Q. B.

**a.** ———.]—*PINHEY v. MERCANTILE FIRE INSURANCE CO.* (1901), 21 C. L. T. 526; 2 O. L. R. 296.—*CAN.*

**b.** ———.]—*ENRIGHT v. SUN INSURANCE OFFICE OF ENGLAND*, [1923] 4 D. L. R. 454; 3 W. W. R. 888.—*CAN.*

**c.** ———.]—*KONOWSKY v. PACIFIC MARINE INSURANCE CO.*, [1923] 2 D. L. R. 1198; 2 W. W. R. 71.—*CAN.*

**d. Effect of assignment of policy.]**—The assignee of a policy of insurance, who is not interested in the property insured, does not by such assignment & the assent of the insurers thereto become the insured under the policy, & the policy still remains liable to be defeated by a breach of the conditions

436; 41 L. J. Q. B. 227; 26 L. T. 836; 20 W. R. 769.

*Annotation*:—*Mentd. The Parchim*, [1918] A. C. 157.

**2549. Effect of descent of property insured.**—Under the constitution of the Hand in Hand Fire Office the heir, to whom upon the death of the insured the property, being freehold, descended, cannot have the benefit of the policy without assignment.

It is a personal contract, not connected with the real property, not affecting the real property (LORD LOUGHBOROUGH).—*MILDMAY v. FOLGHAM* (1797), 3 Ves. 471; 30 E. R. 1111, L. C.

**2550. Expiry of interest of assured—Subsequent assignment of policy.**—*SADLERS' CO. v. BADCOCK*, No. 2528, *ante*.

#### SUB-SECT. 4.—THE PROPOSAL.

**2551. Proposal form as basis of contract—Correction of misstatement before cover note issued—Notice given to agent of insurer—Whether ground for repudiating claim.**—*GOLDING v. ROYAL LONDON AUXILIARY INSURANCE CO., LTD.*, No. 2649, *post*.

**2552. — Warranty omitted from policy.**—*CURTIS'S & HARVEY (CANADA), LTD. v. NORTH BRITISH & MERCANTILE INSURANCE CO.*, No. 2591, *post*.

**2553. — Inadvertent misstatement—Whether material.**—A firm of contractors in Glasgow insured a motor lorry at Lloyd's against damage by fire & third party risks. The policy recited that the proposal should be the basis of the contract & be held as incorporated in the policy, & it was expressed to be granted subject to the conditions at the back thereof. By the fourth condition, "material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void." In reply to a question in the proposal form, "State full address at which the vehicle will usually be garaged," the answer given was "Above address," meaning thereby the firm's ordinary place of business in G. This was not true, as the lorry was usually garaged at a farm on the outskirts of G. The inaccurate answer in the proposal was given by inadvertence. The lorry having been destroyed by fire at the garage, the insured claimed payment under the policy:—*Held*: (1) the misstatement in the proposal was not material within the meaning of condition 4; (2) the recital in the policy that the proposal should be the basis of the

contract made the truth of the statements contained in the proposal, apart from the question of materiality, a condition of the liability of the insurers; the effect of this recital was not cut down by the special conditions on the back of the policy; & the claim failed.—*DAWSONS, LTD. v. BONNIN*, [1922] 2 A. C. 413; 91 L. J. P. C. 210; 128 L. T. 1; 38 T. L. R. 836, H. L.

*Annotations*:—*Consd. Paxman v. Union Assce. Soc.* (1923), 39 T. L. R. 424. *Distd. Mutual Life Insce. of New York v. Ontario Metal Products Co.*, [1925] A. C. 344.

**2554. — Effect of immaterial misstatement.**—*DAWSONS, LTD. v. BONNIN*, No. 2553, *ante*.

**2555. Effect of warranting truth of proposals.**—Where, in a proposal of insurance, the proposer warrants that the statements in the proposal are true & agrees that the warranty is to form the basis of the contract of insurance, & where statements in the proposal, inserted by the agent of the insurance co. on information supplied to him by the proposer, are in fact untrue, the policy issued on that basis is void, whether the statements were material or not & notwithstanding the *bona fides* of the proposer; & the insurance co. are not liable to the assured under the policy. Where the case of *Biggar v. Rock Life Assurance Co.*, No. 3139, *post*, is relied on by an insurer as a defence to a claim, the attention of the ct. should also be directed to the case of *Bawden v. London, Edinburgh & Glasgow Assurance Co.*, No. 200, *ante*.—*PAXMAN v. UNION ASSURANCE SOCIETY, LTD.* (1923), 39 T. L. R. 424.

**Acceptance of proposal—As commencement of risk—Before policy issued.**—*See Sect. 5, post*.

#### SUB-SECT. 5.—STAMP.

*See Stamp Act, 1891 (c. 39), s. 91.*

### SECT. 2.—SUBROGATION.

#### SUB-SECT. 1.—IN GENERAL.

*See Part I., ante.*

**2556. Conditions precedent—Admission of claim.**—*MIDLAND INSURANCE CO. v. SMITH*, No. 2644, *post*.

#### SUB-SECT. 2.—APPLICATION OF DOCTRINE.

**2557. Payment of loss by insurer—Rights of insurer to subrogation—Under Riot Act, 1714 (c. 5).**—Where insurers have paid the amount of

by the assignor.—*KANADY v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1879), 44 U. C. R. 261.—*CAN.*

**o. Effect of making third party entitled to payment.**—A fire policy, in favour of a mtgor., contained a clause providing that in the event of loss under the policy, the amount the assured might be entitled to receive should be paid to A. L., mtgee.:—*Held*: this clause did not make A. L. the assured.—*LIVINGSTONE v. WESTERN INSURANCE CO.* (1869), 16 Gr. 9; *reversg.* 14 Gr. 461.—*CAN.*

#### PART III. SECT. 1, SUB-SECT. 4.

**2552 i. Proposal form as basis of contract—Warranty omitted from policy.**—*STEVENS v. LONDON ASSURANCE CORPN.*, *STEVENS v. SCOTTISH UNION & NATIONAL INSURANCE CO.* (1899), 20 N. S. W. L. R. 153 (L.).—*AUS.*

**2553 i. — Inadvertent misstatement—Whether material.**—*KENNEDY v. AGRICULTURAL INSURANCE CO.* (1876),

10 N. S. R. (1 R. & C.) 433.—*CAN.*

**f. —.**—*MCLAUCHLAN v. STANDARD FIRE & MARINE INSURANCE CO. OF NEW ZEALAND* (1877), *KNOX*, 224.—*AUS.*

**g. —.**—*HAYER v. LIVERPOOL, LONDON & GLOBE INSURANCE CO.* (1878), 1 N. S. W. S. C. R. N. S. 182.—*AUS.*

**h. —.**—*FOURDRINIER v. HARTFORD FIRE INSURANCE CO.* (1865), 15 C. P. 403.—*CAN.*

**k. —.**—*ROWE v. LONDON & LANCASHIRE FIRE INSURANCE CO.* (1866), 12 Gr. 311.—*CAN.*

**l. —.**—*LIVERPOOL & LONDON & GLOBE INSURANCE CO. v. WYLD* (1877), 1 S. C. R. 604.—*CAN.*

**m. —.**—*DAVIDSON v. WATERLOO MUTUAL FIRE INSURANCE CO.* (1905), 5 O. W. R. 264; 9 O. L. R. 394.—*CAN.*

**n. —.**—*BEURY v. CANADA NATIONAL FIRE INSURANCE CO.* (1917), 38 O. L. R. 596.—*CAN.*

**o. —.**—*WYLIE & LOCHHEAD v. TIMES FIRE INSURANCE CO.* (1860), 22 Dunl. (Ct. of Sess.) 1498.—*SCOT.*

**p. Interim receipt—How far binding on insurers.**—Pltf. was insured by debts. under an interim receipt, which stated that it was "subject to approval at head office, & to the conditions of the policy. Unless previously cancelled this receipt binds the co. for thirty days from the date hereof, & no longer":—*Held*: the conditions of the policy applied to the insurance during the thirty days.—*COMPTON v. MERCANTILE INSURANCE CO.* (1880), 27 Gr. 334.—*CAN.*

#### PART III. SECT. 2, SUB-SECT. 2.

**q. Payment of loss by insurer—Right of insurer to subrogation.**—The insured, having a beneficial interest in the property covered by the policy, is entitled to insurance money, & the insurance co. will not be subrogated to the insured's right to claim from the purchaser the balance of the purchase



a. Where improvements made by third party.]—GOLDIE v. BANK OF HAMILTON (1899), 81 O. R. 142.—CAN.



*de Trieste v. Empress Assce. Corpn.*, [1907] 2 K. B. 814; *British Dominions General Insce. v. Duder*, [1915] 2 K. B. 394. **Consd.** *Edwards v. Motor Union Insce.*, [1922] 2 K. B. 249. **Refd.** *Law Fire Assce. v. Oakley* (1888), 4 T. L. R. 309; *Grover & Grover v. Mathews*, [1910] 2 K. B. 401; *Reliance Marine Insce. v. Duder*, [1913] 1 K. B. 265; *Liverpool Mortgage Insce. Case*, [1914] 2 Ch. 617; *Thames & Mersey Marine Insce. v. British & Chilian S.S. Co.*, [1915] 2 K. B. 214; *Wilson Shipping Co. v. British & Foreign Insce.*, [1920] 2 K. B. 25; *Matthey v. Curling*, [1922] 2 A. C. 180. **Mentd.** *Re Denton's Estate, Licenses Insce. Corpn. & Guarantee Fund v. Denton* (1904), 52 W. R. 484.

*See, now, Law of Property Act, 1925 (c. 20), s. 1.*

**2563.** ——— **Damages obtained from third party.]—LAW FIRE ASSURANCE CO. v. OAKLEY** (1888), 4 T. L. R. 309.

**2564.** ——— **Remedies of insured against third parties—Though renounced.]—WEST OF ENGLAND FIRE INSURANCE CO. v. ISAACS**, No. 2534, *ante*.

*See, also, No. 2767, post.*

**2565.** ——— **Purchase money on compulsory acquisition after fire—Notice to treat given before fire.]—PHENIX ASSURANCE CO. v. SPOONER**, No. 2535, *ante*.

### SECT. 3.—INSURABLE INTEREST.

#### SUB-SECT. 1.—NECESSITY FOR.

**2566. General rule.]—SADLERS' CO. v. BADCOCK**, No. 2528, *ante*.

*See, generally, Part I., Sect. 4, ante.*

**2567. Limited interest sufficient.]—CASTELLAIN v. PRESTON**, No. 2562, *ante*.

#### SUB-SECT. 2.—WHAT CONSTITUTES INSURABLE INTEREST.

##### A. In General.

*See Part I., Sect. 4, sub-sect. 2, ante.*

##### B. Particular Persons.

**2568. Ballee.]—(1) Warehousemen & wharfingers with whom goods are deposited have an insurable interest in such goods, although there has been no previous authority to insure given by the real**

owners, nor any notice given to them of such insurance. (2) Such goods are properly described in a policy as "goods in trust." (3) The insurers are entitled in such a case to recover from the insurance office the full value of the goods destroyed by fire, but are liable to account to the true owners for the excess of the money received beyond the amount of their own charges in respect of such goods.—**WATERS v. MONARCH LIFE ASSURANCE CO.** (1856), 5 E. & B. 870; 25 L. J. Q. B. 102; 26 L. T. O. S. 217; 2 Jur. N. S. 375; 4 W. R. 245; 119 E. R. 705.

**Annotations:—As to (1) Distd.** *North British Insce. v. Moffatt* (1871), L. R. 7 C. P. 25. **Appld.** *Ebsworth v. Alliance Marine Insce.* (1873), L. R. 8 C. P. 596; *Williams v. Baltic Insce. Assocn. of London*, [1924] 2 K. B. 282. **Refd.** *Seagrave v. Union Marine Insce.* (1866), L. R. 1 C. P. 305. **As to (3) Follid.** *L. & N. W. Ry. v. Glyn* (1859), 1 E. & E. 652. **Refd.** *Martineau v. Kitching* (1872), 41 L. J. Q. B. 227.

**2569. ——— Carriers or wharfingers.]—CASTELLAIN v. PRESTON**, No. 2562, *ante*.

*See, also, No. 609, ante, No. 2718, post.*

**2570. Bankrupt—Goods in possession.]—An insolvent debtor, who has in his possession goods which have vested in the provisional assignee, under Judgments Act, 1835 (c. 110), s. 37, has nevertheless an insurable interest in such goods.—MARKS v. HAMILTON** (1852), 7 Exch. 323; 21 L. J. Ex. 109; 18 L. T. O. S. 260; 16 Jur. 152; 155 E. R. 970.

**Annotation:—Refd.** *Seagrave v. Union Marine Insce.* (1866), L. R. 1 C. P. 305.

**2571. ——— Goods concealed from creditors.]—(1) An insolvent retains an insurable interest in goods concealed from his creditors.**

(2) To prove the value of furniture in the possession of the insured at the time of the loss, a former insurance of his furniture, renewed & kept up by him, was received in evidence. But it appearing that the furniture, etc., had been sold under an execution, except the articles included in the settlement, & the policy dropped; & that afterwards the insured, becoming insolvent, stated in his schedule that he had no furniture except those articles, which he declared to be of the value of £50, his claim in respect of the same articles being upwards of £200; this was left to the jury as evidence on a plea that the claim was fraudulent. Any evidence is admissible which shows that at

### PART III. SECT. 3, SUB-SECT. 1.

**2566 i. General rule.]—Pltf.'s mtgo. interest was extinguished by foreclosure & purchase:—Held:** he could not recover on a policy for a loss happening subsequently.—**GASKIN v. PHENIX INSURANCE CO.** (1866), 11 N. B. R. (6 All.) 429.—CAN.

**2566 ii. ———.]—Applt. having had no insurable interest when the insurance was effected:—Held:** the subsequent acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract.—**HOWARD v. LANCASHIRE INSURANCE CO.** (1885), 11 S. C. R. 92.—CAN.

**2566 iii. ———.]—TROTTER & DOUGLAS v. CALGARY FIRE INSURANCE CO.** (1909), 10 W. L. R. 267; *reversd.* (1910), 12 W. L. R. 672.—CAN.

**2566 iv. ———.]—COLE v. MERCHANTS FIRE INSURANCE CO.** (1921), 67 D. L. R. 300; 51 O. L. R. 340.—CAN.

**2567 i. Limited interest sufficient.]—Declaration on a policy on pltf.'s interest in a mill. Plea, that before the loss pltf. had sold & conveyed his interest to one B., without notice to defts. or their assent. Replication, on equitable grounds, that the conveyance to B. was only to secure him against loss as security for pltf., who always continued in possession, & no**

loss has accrued to B.; & that one F. was entitled to the benefit of pltf.'s covenant to insure, contained in a mtgo. of the property made to him by pltf. before the conveyance to B., & this action is brought on F.'s behalf as well as pltf.'s:—**Held:** a good replication, for it showed an insurable interest in pltf. cognisable in a ct. of law; & the unnecessary statement of F.'s interest could not affect it.—**SMITH v. ROYAL INSURANCE CO.** (1867), 27 U. C. R. 54.—CAN.

**2567 ii. ———.]—BANK OF HAMILTON v. WESTERN ASSURANCE CO.** (1876), 38 U. C. R. 609.—CAN.

### PART III. SECT. 3, SUB-SECT. 2.—B.

**b. Executor.]—LINGLEY v. QUEEN INSURANCE CO.** (1868), 12 N. B. R. (1 Han.) 280.—CAN.

**c. Mortgagee—Rights in insurance money.]—A mtgee. of goods has an insurable interest, though the mtgor. continues in actual possession of them.—OGDEN v. MONTREAL INSURANCE CO.** (1853), 3 C. P. 497.—CAN.

**d. ———.]—HAZZARD v. CANADA AGRICULTURAL INSURANCE CO.** (1876), 39 U. C. R. 419.—CAN.

**e. ———.]—CORMIER v. OTTAWA AGRICULTURAL INSURANCE CO.** (1881), 20 N. B. R. 526.—CAN.

**Mtgees. to whom**

by a policy the loss is made payable as their interest may appear, have a right of action upon the policy in their own name against the insurers, & are entitled to enforce payment to the extent of their interest.—**AGRICULTURAL SAVINGS & LOAN CO. v. LIVERPOOL & LONDON & GLOBE INSURANCE CO.** (1901), 21 C. L. T. 582; 32 O. R. 369; *affd.* 33 S. C. R. 94.—CAN.

**g. ———.]—HASLEM v. EQUITY FIRE INSURANCE CO.** (1904), 24 C. L. T. 340; 8 O. L. R. 248; 3 O. W. R. 614.—CAN.

**h. ———.]—PROVINCIAL INSURANCE CO. v. REESOR** (1874), 21 Gr. 296.—CAN.

**k. Purchaser.]—Where a purchaser of houses insures them & they are destroyed before the title is obtained, he, on the rescission of the contract by himself, is entitled to retain the insurance money, as the matter is between him & the insurance office, & the vendor has no interest.—BARTLETT v. LOONEY** (1876-7), 3 V. L. R. 14.—AUS.

**l. ———.]—MILLIGAN v. EQUITABLE INSURANCE CO.** (1858), 16 U. C. R. 314.—CAN.

**m. ——— On payment of instalment.]—Deft. had paid an instalment on an elevator:—Held:** he has an insurable interest in it & a right to receive the insurance money.—

**Sect. 3.—Insurable interest: Sub-sect. 2, B. Sects. 4 & 5.]**

any time pltf. was possessed of furniture to the value in question in the action.

The question is, whether the claim was fraudulent, i.e. whether it was wilfully false in any substantial respect (POLLOCK, C.B.).

(3) Even where there is no fraud, the insured on a fire policy can only recover the real amount of the loss.—GOULSTONE v. ROYAL INSURANCE CO. (1858), 1 F. & F. 276.

**2572. Creditor of company—As regards assets of company.]**—Neither a shareholder nor a simple creditor of a co. has any insurable interest in any particular asset of the co.

The owner of a timber estate sold the whole of the timber thereon to a timber co. in consideration of fully paid up shares in the co. Subsequently by policies effected in his own name with several insurance cos. he insured this timber against fire. The greater part of the timber having been destroyed by fire, he sued the insurance cos. to recover the loss, but the actions were stayed & the matter was referred to arbn. in pursuance of the conditions contained in the policies. Claimant was the sole shareholder in the co. & was also a creditor of the co. to a large extent. The arbitrator held that claimant had no insurable interest in the goods insured & disallowed the claim:—*Held*: (1) claimant had not either as shareholder or creditor any insurable interest in the goods; (2) claimant having allowed the point of want of insurable interest to be raised before the arbitrator without objection, it was not open to him to call in question the authority of the arbitrator to entertain it.—MACAURA v. NORTHERN ASSURANCE CO., [1925] A. C. 619; 94 L. J. P. C. 154; 133 L. T. 152; 41 T. L. R. 447; 69 Sol. Jo. 777, H. L.

**Executor—Rights in insurance money.]**—See EXECUTORS, Vol. XXIV., p. 692, No. 7175.

**Lessor & lessee—Respective rights in insurance money.]**—See LANDLORD & TENANT.

**Reinstatement.]**—See Sect. 13, sub-sect. 2, *post*.

**2573. Mortgagee—Right to add premiums to mortgage debt—No express contract.]**—A mtgee. of houses, who is not by express contract with the mtgor. entitled to insure the premises against

fire at the mtgor.'s expense, nor to require the mtgor. so to insure them, is not entitled to add to his mtge. debt, & charge upon the property, the premiums which he may pay for such an insurance effected by him without the privity of the mtgor.—DOBSON v. LAND (1850), 8 Hare, 216; 19 L. J. Ch. 484; 14 Jur. 288; 68 E. R. 337; *subsequent proceedings* (1851), 4 De G. & Sm. 575.

*Annotations:*—**Folld.** Bellamy v. Brickenden (1861), 2 John. & H. 137. **Consd.** Kirkwood v. Thompson (1865), 2 Hem. & M. 392. **Refd.** Banner v. Berridge (1881), 18 Ch. D. 254. **Mentd.** Charles v. Jones (1887), 56 L. J. Ch. 745; White v. City of London Brewery Co. (1888), 39 Ch. D. 559.

**2574. ——— Mortgagee in possession.]**—A mtgee. in possession is not entitled, in the absence of express contract, to charge in account premiums on a fire policy on the mortgaged property.—BELLAMY v. BRICKENDEN (1861), 2 John. & H. 137; 70 E. R. 1002.

—.] — A possession is entitled, under the usual directions for all just allowances, to be allowed moneys expended in insuring the premiums, in the absence of any express powers in the deed; also to an account of moneys properly expended in improving the property.—SCHOLEFIELD v. LOCKWOOD (1863), 33 L. J. Ch. 106; 8 L. T. 409; 9 Jur. N. S. 738; 11 W. R. 555; *on appeal*, 4 De G. J. & Sm. 22, L. C.

**2576. ——— As against subsequent incumbrancer.]**—In the absence of an express contract authorising him so to do, a mtgee. cannot, notwithstanding his mtgor. has covenanted to insure against fire & neglected so to do, as against a subsequent incumbrancer, himself insure the mortgaged premises, & add the sums so paid to his mtge. debt.—BROOKE v. STONE (1865), 34 L. J. Ch. 251; 13 W. R. 401.

*See, now, Law of Property Act, 1925 (c. 20), ss. 101 (1) (ii), 108.*

**2577. ———.]**—CASTELLAIN v. PRESTON, No. 2562, *ante*.

**Rights in insurance money.]**—See No. 2725, *post*: & generally, MORTGAGE.

**Purchaser—Whether purchase carries right to insurance policy.]**—See Nos. 2541-2546, *ante*.

**Receiver—Appointed by mortgagee.]**—See Law of Property Act, 1925 (c. 20), s. 109 (7); RECEIVERS.

FENSON v. BULMAN (1907), 7 W. L. R. 134; 17 Man. L. R. 309.—CAN.

**n. ———.]**—MENDELSON v. ESTATE MOROM (1912), C. P. D. 690.—S. AF.

**o. ——— Payment of purchase price—Wheat in possession of vendor.]**—INGLIS v. RICHARDSON & SONS, LTD. (1913), 29 O. L. R. 229; 4 O. W. N. 1519; 14 D. L. R. 137.—CAN.

**p. Trustee.]**—PARK v. PHENIX INSURANCE CO. (1859), 19 U. C. R. 110.—CAN.

**q. ———.]**—RICHARDS v. LIVERPOOL & LONDON FIRE & LIFE INSURANCE CO. (1866), 25 U. C. R. 400.—CAN.

**r. ———.]**—LAIDLAW v. HARTFORD (1915), 32 W. L. R. 697; (1916), 34 W. L. R. 993; 9 W. W. R. 385; 10 W. W. R. 1063; 24 D. L. R. 884.—CAN.

**t. ———.]**—GREEK CATHOLIC RUTHENIAN CHURCH OF EAST SELKIRK, TRUSTEES v. PORTAGE LA PRAIRIE FARMERS MUTUAL FIRE INSURANCE CO., [1917] 1 W. W. R. 249.—CAN.

**a. Yearly tenant.]**—CROCKFORD v. LONDON & LIVERPOOL FIRE INSURANCE CO. (1861), 10 N. B. R. (5 All.) 152.—CAN.

**b. Curtesy tenant.]**—CALDWELL v. STADACONA FIRE & LIFE INSURANCE CO. (1883), 11 S. C. R. 212.—CAN.

**c. Tenant for life.]**—The tenant for life of a house has an insurable interest therein to the extent of her rights in the property.—*Re CURRY'S ESTATE* (1900), 33 N. S. R. 392.—CAN.

**d. Owner of house—Having no title in land on which built.]**—STEVENSON v. LONDON & LANCASHIRE FIRE ASSURANCE CO. (1866), 26 U. C. R. 148.—CAN.

**e. Indorsees of warehouse receipts.]**—MCBRIDE v. GORE DISTRICT MUTUAL FIRE INSURANCE CO. (1870), 30 U. C. R. 451.—CAN.

**f. ———.]**—BOX v. PROVINCIAL INSURANCE CO. (1871), 18 Gr. 280.—CAN.

**— Receipts given as security.]**—PARSONS v. QUEEN INSURANCE CO. (1878), 29 C. P. 188.—CAN.

**h. Mortgagee.]**—KELLY v. LIVERPOOL, LONDON & GLOBE INSURANCE CO. (1871), N. B. Dig. 422.—CAN.

**k. Tenant in common—In sole possession.]**—MCINTOSH v. ONTARIO BANK (1873), 20 Gr. 24.—CAN.

**l. Debtor—After execution of deed of assignment—Deed ineffectual.]**—PARLEE v. AGRICULTURAL INSURANCE CO. (1876), 16 N. B. R. (3 Pug.) 476.—CAN.

**m. Owner—Title in nominee.]**—

PETTIGREW v. GRAND RIVER FARMERS' MUTUAL INSURANCE CO. (1877), 28 C. P. 70.—CAN.

**aa. Married woman—Business carried on by husband.]**—BUTLER v. STANDARD FIRE INSURANCE CO. (1879), 4 A. R. 391.—CAN.

**bb. Lender—Equitable interest in ship.]**—CLARK v. SCOTTISH IMPERIAL FIRE INSURANCE CO. (1879), 4 S. C. R. 192, 706.—CAN.

**cc. Vendor—With right of redemption.]**—OTTAWA AGRICULTURAL INSURANCE CO. v. SHERIDAN (1880), 5 S. C. R. 157.—CAN.

**dd. ——— Having partial interest.]**—KEEFER v. PHENIX INSURANCE CO. OF HARTFORD (1899), 26 A. R. 277.—CAN.

**ee. ———.]**—*Re MCCLOUD & LIQUIDATOR OF DOMINION FURNITURE CO., LTD.*, [1923] 1 W. W. R. 968.—CAN.

**ff. ——— Particular interest—Not specified in policy.]**—MOLLISON v. VICTORIA INSURANCE CO. (1883), 2 N. Z. L. R. 177 (S. C.).—N.Z.

**gg. Partner—Retired from partnership—Retaining liabilities under mortgage.]**—KLEIN v. UNION FIRE INSURANCE CO. (1883), 3 O. R. 234.—CAN.

**hh. Railway company.]**—CANADIAN

**2578. Shareholder in company—As regards assets of company.]—**MACAURA *v.* NORTHERN ASSURANCE CO., No. 2572, *ante*.

**Tenant for life—In respect of improvements.]—**See Settled Land Act, 1925 (c. 18), s. 88 (1); SETTLEMENTS.

**Trustees—During minority of tenant for life.]—**See Settled Land Act, 1925 (c. 18), s. 102 (2) (e); SETTLEMENTS; TRUSTS.

**2579. Vendor selling land compulsorily—Loss after contract but before completion—Vendor's title accepted by purchasers.]—**In May, 1868, pltf. insured certain houses, of which he was seised in fee, in defts.' office against loss or damage by fire. The insurance was continued up to Lady Day, 1876. In Dec. 1872, the Metropolitan Board of Works, unknown to defts., served pltf. with a notice to treat in respect of certain premises, in pursuance of statutory powers enabling them so to do; & in May, 1873, the amount of compensation to be paid was duly fixed by an arbitrator. In May, 1875, the said premises were injured by fire. At that time pltf.'s abstract of title had been accepted by the Board of Works, & a draft conveyance to them was in course of preparation, but no purchase-money had been paid:—*Held*: pltf. had an insurable interest in the houses at the time when the fire occurred, such as would entitle him to recover from defts.—COLLINGRIDGE *v.* ROYAL EXCHANGE ASSURANCE CORPN. (1877), 3 Q. B. D. 173; 47 L. J. Q. B. 32; 37 L. T. 525; 42 J. P. 118; 26 W. R. 112.

*Annotations*:—*Distd. Eccl. Comrs. for England v. Royal Exchange Assco. Corpn.* (1895), 11 T. L. R. 476. *Refd.* *Rayner v. Preston* (1881), 18 Ch. D. 1; *Castellain v. Preston* (1883), 11 Q. B. D. 380.

#### SECT. 4.—AGENCY.

See Part I., Sect. 14, *ante*.

#### SECT. 5.—COMMENCEMENT AND DURATION OF RISK.

**2580. Commencement of risk—Policy “from . . . until”—Whether first day included.]—**Certain goods insured against fire by a policy in which the insurance was expressed to be “from Feb. 14, 1868, until Aug. 14, 1868, & for so long after as the said assured should pay the sum of 225 dollars at the above time mentioned.” The goods were destroyed by fire on the night of Aug. 14, 1868, the insurance not having been renewed:—*Held*: the insurance continued during Aug. 14, & the loss was therefore covered by it. *Qu.*: whether the insurance covered Feb. 14.—ISAACS *v.* ROYAL INSURANCE CO. (1870), L. R. 5 Exch. 296; 39 L. J. Ex. 189; 22 L. T. 681; 18 W. R. 982.

*Annotations*:—*Mentd. Lett v. Osborne* (1882), 47 L. T. 40; *Re North, Ex p. Hasluck*, [1895] 2 Q. B. 264.

*PACIFIC RY. CO. v. OTTAWA FIRE INSURANCE CO.* (1906), 11 O. L. R. 465; 7 O. W. R. 353.—CAN.

*c. Bank—In goods pledged.]—*BRITISH COLUMBIA HOP CO. *v.* FIDELITY-PHOENIX FIRE INSURANCE CO. (1914), 29 W. L. R. 136; 6 W. W. R. 1539; 20 D. L. R. 102.—CAN.

*d. Part owner.]—*MALDOVER *v.* NORWICH UNION FIRE INSURANCE CO. (1917), 40 O. L. R. 532.—CAN.

*e. Assignee.]—*SMITH *v.* NIAGARA DISTRICT MUTUAL INSURANCE CO. (1876), 38 U. C. R. 570.—CAN.

*f. —.]—*LAMPERT *v.* WEBER &

DOYLE, [1923] 2 W. W. R. 1148.—CAN. *g. Bond holder.]—*MALCHER & MALCOMESS *v.* KING WILLIAM'S TOWN FIRE & MARINE INSURANCE & TRUST CO. (1883), 3 E. D. C. 271.—S. AF.

#### PART III. SECT. 5.

**2583 i. Commencement of risk—Acceptance of proposal.]—**HANLEY *v.* ROYAL EXCHANGE ASSURANCE CORPN., [1924] 3 D. L. R. 860; 2 W. W. R. 880; 34 B. C. R. 222; *revs.*, [1924] 1 D. L. R. 107; 1 W. W. R. 21; 33 B. C. R. 163.—CAN.

*h. —.]—*M'ELROY *v.* LONDON ASSURANCE CORPN. (1897), 24 R. (Ct.

**2581. — Interim protection note—Analogous to marine broker's slip.]—**CITIZENS INSURANCE CO. OF CANADA *v.* PARSONS, QUEEN INSURANCE CO. *v.* PARSONS, No. 2537, *ante*.

*Sec, generally*, Part II., Sect. 4, sub-sect. 2, *ante*.

**2582. — Signature of broker's slip—Loss before premium paid or policy signed.]—**Pltfs., a firm of merchants in New Zealand, in Oct. 1886, employed a firm of insurance brokers in London to effect for them insurances against fire upon goods in New Zealand. The brokers instructed B., an insurance broker at Lloyd's, to effect a portion of the insurances, & B. prepared a slip containing particulars of the risk, which was initialled by deft. & other underwriters at Lloyd's. Owing to a misunderstanding between the insurance brokers no policy was put forward for signature by deft. & the other underwriters, & in Feb. 1887, the goods in New Zealand were seriously damaged by fire. No premiums had then been paid, but two days after the fire the insurance premiums were paid by pltfs. to the insurance brokers. A policy was then tendered to deft. for signature, but he refused to sign it or to pay the amount for which he had initialled the slip. In an action to recover the amount:—*Held*: the slip formed a complete & binding contract of insurance, it was not subject to an implied condition that a policy should be put forward for signature within a reasonable time, & in the absence of circumstances showing an intention on the part of pltfs. to abandon the insurance, they were entitled to recover.—THOMPSON *v.* ADAMS (1889), 23 Q. B. D. 361.

*Annotation*:—*Distd. Re Yager & Guardian Assco.* (1912), 108 L. T. 38.

**2583. — Acceptance of proposal.]—**ADIE & SONS *v.* INSURANCES CORPN., LTD. (1898), T. L. R. 544.

—.]—*See, also*, No. 2626, *post*.

**2584. Renewal of policy—Days of grace for payment of renewal premiums—Payment after expiry—Whether policy enforceable.]—**FISHER *v.* BROCAS (1730), 2 Eq. Cas. Abr. 163; 22 E. R. 139, L. C.

**2585. — Tender of premium before expiry but after loss.]—**In a policy of insurance against loss by fire from half a year to half a year, the assured agree to pay the premium half yearly, “as long as the insurers should agree to accept the same,” within fifteen days after the expiration of the former half year; & it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid:—*Held*: the insurers were not liable though the assured tendered the premium before the end of the fifteen days, but after the loss.—TARLETON *v.* STANFORTH (1796), 1 Bos. & P. 471; 3 Anst. 707; 126 E. R. 1015, Ex. Ch.

*Annotations*:—*Consd. Salvin v. James* (1805), 6 East, 571. *Apld. Want v. Blunt* (1810), 12 East, 183; *Simpson v. Accidental Death Insko.* (1857), 2 C. B. N. S. 257.

of Sess.) 287; 34 Sc. L. R. 247; 4 S. L. T. 241.—SCOT.

*k. Renewal of policy.]—*A fire policy is a contract for a year, & the renewal is a new & distinct contract.—HANLEY *v.* PACIFIC FIRE & MARINE INSURANCE CO. (1883), 14 N. S. W. L. R. 224; 9 N. S. W. W. N. 197.—AUS.

*l. Duration of risk—Until cancelled by proper notice.]—*GRANT *v.* RELIANCE MUTUAL INSURANCE CO. (1879), 44 U. C. R. 229.—CAN.

*m. —.]—*BANK OF COMMERCE *v.* BRITISH AMERICA ASSURANCE CO. (1889), 18 O. R. 234.—CAN.

*n. —.]—*BARNES *v.*



*Sect. 5.—Commencement and duration of risk. Sects. 6 & 7: Sub-sects. 1 & 2.]*

**2586. — Refusal by assured to pay higher rate—Subsequent tender at higher rates.]—**By a policy under seal referring to certain printed proposals, a fire office insured defts.' premises from Nov. 11, 1802 to Dec. 25, 1803, for a certain premium, which was to be paid yearly on each Dec. 25, & the insurance was to continue so long as the insured should pay the said premium at the said times, & the office should agree to accept it. By the printed proposals it was stipulated that the insured should make all future payments annually at the office within fifteen days after the day limited by the policy, upon forfeiture of the benefit thereof, & that no insurance was to take place till the premium were paid: & by a subsequent advertisement, agreed to be taken as part of the policy, the office engaged that all persons insured there by policies for a year or more had been & should be considered as insured for fifteen days beyond the time of the expiration of their policies:—*Held*: notwithstanding this latter clause; the assured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, otherwise they would not continue the insurance, which the assured had refused; the office was not liable for a loss which happened within fifteen days from the expiration of the year for which the insurance was made; though the assured, after the loss & before the fifteen days expired, tendered the full premium which had been demanded. The effect of the whole contract, etc. taken together, being only to give the assured an option to continue the insurance or not during fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option by giving notice that they would not renew the contract.

Where the [renewal] premium is received the effect of it is to give the assured an assurance for another year, to be computed from the expiration of the first policy, & not from the expiration of the following fifteen days (LORD ELLENBOROUGH, C.J.).—*SALVIN v. JAMES* (1805), 6 East, 571; 2 Smith, K. B. 646; 102 E. R. 1407.

*Annotations:—Apld. Simpson v. Accidental Death Insce.* (1857), 2 C. B. N. S. 257. *Refd. Want v. Blunt* (1810), 12 East, 183.

**2587. — Date from which renewal policy runs.]—***SALVIN v. JAMES*, No. 2586, *ante*.

**Payment to insurer's agent after expiry.]—***See* No. 2917, *post*.

**2588. — Receipt of premium covering lapsed policy—No specific appropriation to lapsed policy.]—**Where pltf's. being agents for an insurance office remitted to it £100 "for premiums," & it appeared that the £100 was to the knowledge of the office in excess of what they owed as agents, & that the terms on which certain lapsed policies should be renewed by the office for their benefit had been ascertained by consent:—*Held*: although there

was not in the office any specific appropriation of any part of the £100 to the payment of the premiums on the lapsed policies, yet it must be taken to have been received on account thereof, & from the date of receipt there was a good contract for the renewal of the old insurances.—*KIRKPATRICK v. SOUTH AUSTRALIAN INSURANCE Co.* (1886), 11 App. Cas. 177, P. C.

**2589. Duration of risk—Policy "from . . . until"—Whether last day included.]—***ISAACS v. ROYAL INSURANCE Co.*, No. 2580, *ante*.

## SECT. 6.—ASSIGNMENT OF POLICY AND PROPERTY INSURED.

**Whether policy assignable.]—***See* Nos. 2541, 2542, *ante*.

**Effect of assignment of property insured.]—***See* Nos. 2541–2549, *ante*.

## SECT. 7.—CONSTRUCTION OF POLICY.

### SUB-SECT. 1.—IN GENERAL.

*See, generally, Part I., Sect. 3, sub-sect. 2, ante.*

**2590. Latent ambiguity—Whether question for court or jury.]—**In an action upon a policy of fire insurance, if the evidence discloses a latent ambiguity in the policy so that it becomes necessary to go into the consideration of other documents, & to resort to parol evidence to solve that ambiguity, it ceases to be merely a question for the ct. on the construction of the instrument, & raises a question of fact which must be determined by the jury.—*HORDERN v. COMMERCIAL UNION INSURANCE Co.* (1887), 56 L. J. P. C. 78; 56 L. T. 240, P. C.

**2591. Warranty contained in proposal—Omitted from policy.]—**By Quebec Insurance Act, arts. 7034–7036, certain conditions are, as against the insurer, to be deemed part of every contract of fire insurance, & no variation of them is to be binding upon the insured unless it is printed upon the policy in a prescribed manner. Appls. were insured by resps. in respect of buildings forming part of an explosives manufactory. The policy contained the following warranty, "warranted free of claim for loss or damage caused by explosion of any of the materials used on the premises." These words appeared upon the slip by which applts. proposed the insurance, but were not printed on the policy in the prescribed manner. Under one of the statutory conditions resps. were to be liable for "all loss caused by any explosion." A fire broke out upon the insured premises, followed by an explosion which caused further fires & explosions ending in the destruction by fire or explosion of practically the whole of the insured buildings. Appls. sued resps. upon the policy:—*Held*: (1) subject to the requirements of the Act, the warranty applied to loss by any explosion, not merely to loss by an explosion originating a

*DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCN.* (1894), 25 O. R. 100.—CAN.

*o. —.]—SKILLINGS v. ROYAL INSURANCE Co.* (1903), 23 C. L. T. 294; 2 O. W. R. 123, 761; 6 O. L. R. 401.—CAN.

*p. —.]—VELTRE v. LONDON & LANCASHIRE FIRE INSURANCE Co., LTD.* (1917), 13 O. W. N. 158; 39 D. L. R. 221; 40 O. L. R. 619.—CAN.

*q. — Non payment of premium.]—OXFORD PERMANENT BUILDING*

*& SAVINGS SOCIETY v. WATERLOO COUNTY MUTUAL FIRE INSURANCE Co.* (1877), 42 U. C. R. 181.—CAN.

*r. Cancellation after loss.]—BROWN v. BRITISH AMERICA ASSURANCE Co.* (1875), 25 C. P. 514.—CAN.

### PART III. SECT. 7, SUB-SECT. 1.

*t. Policy on different kinds of goods.]—*A policy of insurance on several different kinds of goods for separate amounts of each is, in effect, a separate policy on each class.—*LINDSAY v. LANCASHIRE FIRE INSUR-*

*ANCE Co.* (1874), 34 U. C. R. 440.—CAN.

*a. Receipt wider than policy.]—*Where it appeared that the interim receipt was intended to cover & did cover goods not included in the policy subsequently issued:—*Held*: the right of action on the receipt remained, & the insured was entitled to recover for all his goods.—*WYLD v. LIVERPOOL, ETC. INSURANCE Co.* (1876), 23 Gr. 442; *affd.* 1 S. C. R. 604.—CAN.

*b. Insurance of special class of goods—General class not included.]—*

fire to cover which the insurance was extended by the statutory condition; (2) a variation of a statutory condition not printed in the prescribed manner was invalid, although it had formed part of the insured's proposal; but (3) the warranty was valid so far as it excluded loss caused by an explosion incidental to a fire, since the statutory condition referred only to loss by explosion originating a fire; & (4) an inquiry into the loss due respectively to fire & explosion was rightly ordered. —CURTIS'S & HARVEY (CANADA), LTD., *v.* NORTH BRITISH & MERCANTILE INSURANCE CO., [1921] 1 A. C. 303; *sub nom.* CURTIS'S & HARVEY (CANADA), LTD. *v.* NORTH BRITISH & MERCANTILE INSURANCE CO., CURTIS'S & HARVEY (CANADA), LTD. *v.* GUARDIAN ASSURANCE CO., 90 L. J. P. C. 9; 124 L. T. 259; 37 T. L. R. 40, P. C.

*Annotation*:—*As to* (3) *Distd. Palatine Insee. v. Gregory* (1925), 42 T. L. R. 4.

#### 2592. Evidence—What evidence admissible.]—

(1) *Pltfs.*, who were turpentine distillers, effected a floating policy of insurance with *defts.* on merchandise in any warehouse, shed, wharf, quay or yard, in a certain district, except in any building in which the assured might have a specific assurance. *Pltfs.* had a specific insurance upon the building, but not upon goods in the distillery, around which there was a space, pursuant to Act of Parliament, in which a large quantity of goods was destroyed by fire:—*Held*: this space was not to be considered as a part of the building of the distillery, & therefore that it was not covered by the specific insurance, but came within the meaning of the word "yard" in the floating policy. (2) The only plea upon the record was a plea of payment:—*Held*: neither a specific policy upon goods in the yards, which had been effected by *pltfs.* with *defts.* at a higher premium than the floating policy, but which had been cancelled by *defts.* on account of the hazardous nature of the premises, nor letters of *pltfs.*, were admissible to prove that *pltfs.* themselves did not consider the yards were covered by the policy; nor the evidence of parties connected with insurance offices, to show that the insurers did not so understand it; unless there were any question of whether or not good faith had been used, or a custom of trade could be shown extending to the assured, as well as the assurers. Nor the evidence of merchants of the place, that goods deposited in places covered by a specific policy are not considered as being within a floating policy. Nor evidence that a floating policy does not cover goods specially hazardous. (3) *Pltfs.* were not bound by a statement of the amount of goods covered by the policy, which they had rendered to *defts.* shortly after the fire, but which turned out to be incorrect.—PLATT *v.* YOUNG (1843), 2 L. T. O. S. 17, N. P.; *subsequent proceedings*, 2 L. T. O. S. 370.

2593. ——— Policy not ambiguous.]—A policy of insurance mentioned a building, oil-mill, of one floor only, with stone & tile, occupied by —, for crushing of linseed & grinding of

dyewood, but no refining of oil therein, £1,000; on fixed machinery & millwright works, including all the standing & growing gear therein, £1,000; one engine house adjoining the mill, £200; one steam engine therein, £300; one logwood warehouse, in which chopping dyewood is performed, communicating with the mill, £200; one warehouse on the other side of the mill, to the east side, merely for the stowing of goods, £300:—*Held*: there was no ambiguity in the policy, & evidence was not receivable to show that it was intended to insure the machinery & gear in the logwood warehouse.—HARE *v.* BARSTOW (1844), 8 Jur. 928.

*See, generally*, DEEDS, Vol. XVII., pp. 302 *et seq.*

#### SUB-SECT. 2.—PARTICULAR WORDS AND PHRASES.

*See, generally*, Part I., Sect. 3, sub-sect. 2, E., *ante*.

2594. Building—Open space surrounding distillery.]—PLATT *v.* YOUNG (1843), 2 L. T. O. S. 370.

2595. ——— Whether stained glass roof included.]—ROYAL INSURANCE CO. *v.* WESTMINSTER FIRE INSURANCE CO. (1877), cited in Halsbury's Laws of England, Vol. XVII, p. 528.

2596. Civil commotion—Rioting not amounting to rebellion.]—LANGDALE *v.* MASON (1780), 2 Marshall on Marine Insurance, 3rd ed. 793; 2 Park's Marine Insurances, 8th ed. p. 965, N. P. *Annotations*:—*Distd. London & Manchester Plate Glass Co. v. Heath*, [1913] 3 K. B. 411. *Refd. Rogers v. Whitaker*, [1917] 1 K. B. 942; *Curtis v. Mathews*, [1919] 1 K. B. 425.

2597. "Destruction" by government—Whether confined to intentional destruction.]—*Pltfs.*' premises in Dublin & the contents thereof were insured by a policy which covered loss & damage "directly caused by war, bombardment, military or usurped power, or by aerial craft, hostile or otherwise, . . . & fire . . . directly caused by any of the foregoing, whether originating on the premises insured or elsewhere." The policy contained a proviso that no claim was to attach for "destruction by the Govt. of the country in which the property is situated." During the currency of the policy certain persons, styling themselves a Provisional Govt., proclaimed an Irish Republic & occupied with armed forces the General Post Office & other public buildings in Dublin. The General Post Office was bombarded by the military forces of the Crown with shell, & as a result it caught fire. The conflagration spread & destroyed *pltfs.*' premises & their contents. In an action on the policy:—*Held*: (1) *pltfs.*' loss was caused, not by a mere riot or civil commotion, but by civil strife amounting to warfare; (2) the policy covered loss from fire caused by a bombardment carried on by the forces of the Crown; (3) the proviso only applied to the intentional destruction

The policy sued upon was effected on large quantities of wool purchased during the wool season, & kept separate from *pltfs.*' general stock. A prior insurance in another co. was on a general stock of goods, which included wool pickings, being small quantities purchased out of the wool season & kept in the general storehouse:—*Held*: not deemed to cover wool purchased during the wool season.—PARSONS *v.* QUEEN INSURANCE CO. (1878), 29 C. P. 188.—CAN.

a. Inclusion of "co-insurance

clause."—EOKARDT *v.* LANCASHIRE INSURANCE CO. (1900), 21 C. L. T. 138; 31 S. C. R. 72.—CAN.

d. Policy subject to mortgage clause.]—LONDON LOAN & SAVINGS CO. OF CANADA *v.* UNION INSURANCE CO. OF CANTON, LTD., [1925] 4 D. L. R. 676; *affg.* 56 O. L. R. 590.—CAN.

#### PART III. SECT. 7, SUB-SECT. 2.

2596 i. Civil commotion—Rioting not amounting to rebellion.]—Civil commotion means, not an act or occurrence, but a state or condition of things which

might last over a period in which there was a temporary suspension of actual tumult & by the term is implied a disturbance on a somewhat extensive scale amongst the citizens of the State, something more than a riot & less than an actual insurrection, & directed to a common purpose.—LINDSAY & PRIE *v.* GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPN., LTD., [1914] App. D. 574.—S. AF.

e. ———.]—CRAIG *v.* EAGLE STAR & BRITISH DOMINIONS INSURANCE CO. (1922), 56 I. L. T. 145.—IR.



**Sect. 7.—Construction of policy: Sub-sects. 2 & 3.]**

of property by the Govt.; & pl'ts.' loss was, therefore, recoverable under the policy.—**CURTIS & SONS v. MATHEWS**, [1918] 2 K. B. 825; 119 L. T. 78; 34 T. L. R. 615; 17 L. G. R. 291; 24 Com. Cas. 57, C. A.

**2598. "Dwelling-house"—Of insured—Insured a lodger living in one room.]—**Goods insured were described in the policy to be in the dwelling-house of the insured. The insured had only one room, as a lodger, in which the goods were:—**Held**: correctly described within a condition, that "the houses, buildings, or other places where goods are deposited & kept, shall be truly & accurately described:" such condition relating to the construction of the house, & not to the interest of the parties in it.—**FRIEDLANDER v. LONDON ASSURANCE CO.** (1832), 1 Mood. & R. 171, N. P.

**2599. Explosion—Whether limited to explosion causing fire.]—****STANLEY v. WESTERN INSURANCE CO.**, No. 2635, *post*.

**2600. Gas—Illuminating coal gas.]—****STANLEY v. WESTERN INSURANCE CO.**, No. 2635, *post*.

**2601. "Goods in trust"—Goods in possession of bailee—Warehouseman.]—****WATERS v. MONARCH LIFE ASSURANCE CO.**, No. 2568, *ante*.

**2602. ———.]—**A policy of fire insurance expressed the insurance to be on "merchandise the assured's own, in trust or on commission for which they are responsible" in or on certain specified warehouses, vaults, wharves, etc. While the policy was in force certain chests of tea, on a wharf included in the policy, were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger: the assured had purchased them from the importer, & the warrants had been indorsed in blank by him to the assured. Before the fire occurred the assured had resold the teas in specified chests to customers, & had been paid for them; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying, if required, the charges necessary for clearing the teas payable by such customers:—**Held**: the policy applied only to goods belonging to the assured, or for which they were responsible, & the property in the teas having, at the time of the fire, passed to the purchasers, they were then at the purchasers' risk, & were consequently not covered by the policy.—**NORTH BRITISH & MERCANTILE INSURANCE CO. v. MOFFATT** (1871), L. R. 7 C. P. 25; 41 L. J. C. P. 1; 25 L. T. 662; 20 W. R. 114.

**Annotation:—****Distd.** **Martineau v. Kitching** (1872), L. R. 7 Q. B. 436.

**2603. Inn—Whether coffee house included.]—**A coffee house is not an inn, within the meaning of a policy of insurance against fire, enumerating the trade of an innkeeper with others, as double hazardous.—**DOE d. PITT v. LAMING** (1814), 4 Camp. 73, N. P.

**Annotations:—****Consd.** **Re Universal Non-Tariff Fire Insco. Forbes' Claim** (1875), L. R. 19 Eq. 485. **Mentd.** **Green-slade v. Tapscott** (1834), 1 Cr. M. & R. 55; **Wilson v. Wilson** (1854), 14 C. B. 616; **Phillips v. Henson** (1877), 3 C. P. D. 26.

**2604. "Insurrection riots, civil commotion or military or usurped power"—Damage by bomb from enemy airship.]—**Damage by fire caused by a bomb from an enemy Zeppelin is within the exception in a policy of fire insurance of damage "resulting from insurrection, riots, civil commotion, or military or usurped power."—**ROGERS v. WHIT-**

**TAKER**, [1917] 1 K. B. 942; 86 L. J. K. B. 790; 116 L. T. 249; 33 T. L. R. 270.

**Annotations:—****Fold.** **Curtis v. Mathews**, [1918] 2 K. B. 825. **Refd.** **Upjohn v. Hitchens**, **Upjohn v. Ford**, [1918] 1 K. B. 171.

**2605. "Invasion, foreign enemy, military or usurped power"—Damage by mob.]—**Covenant upon a policy of insurance from fire, proviso that debts. shall not be liable in case the house be burnt by reason of any invasion, foreign enemies, or any military or usurped power. The house was burnt by a mob at Norwich, this is not within the proviso.—**DRINKWATER v. LONDON ASSURANCE CORPN.** (1767), 2 Wils. 363; Wilm. 282; 95 E. R. 863.

**Annotations:—****Consd.** **Rogers v. Whittaker**, [1917] 1 K. B. 942. **Refd.** **Upjohn v. Hitchens**, **Upjohn v. Ford**, [1918] 2 K. B. 48; **Curtis v. Mathews**, [1919] 1 K. B. 425.

**2606. ——— Incendiarism by private persons during military occupation.]—**Where goods are insured against loss or damage by fire under a policy which excepts the insurers from liability for losses due to incendiarism arising out of (*inter alia*) invasion, act of foreign enemies, hostilities or warlike operations, riot, civil commotion, rebellion, exercise of military or usurped power; & where goods so insured were destroyed by fire at Smyrna during the military occupation of that town by the Turks in Sept. 1922, but, as the result of looting or outrage by private persons:—**Held**: such losses by incendiarism in these circumstances were within the scope of the exceptions clause, & therefore, the insurers were not liable under the terms of the policy.—**AMERICAN TOBACCO CO. INCORPORATED v. GUARDIAN ASSURANCE CO., LTD., SOCIÉTÉ ANONYME DES TABACS D'ORIENT ET D'OUTRE MER v. ALLIANCE ASSURANCE CO.** (1925), 69 Sol. Jo. 621, C. A.

**2607. "Linen"—Insurance of stock-in-trade—Insured not a linen draper.]—**If a person who is not a linen draper, insures his "stock-in-trade, household furniture, linen, wearing apparel & plate," by a policy against fire, this will not protect linen drapery goods subsequently purchased on speculation; & the word linen in the policy must be confined to household linen or linen used by way of apparel.—**WATCHORN v. LANGFORD** (1813), 3 Camp. 422, N. P.

**2608. Loss or damage by fire—Whether excessive heat during manufacture included—No combustion.]—**An insurance "against all damage which the assured shall suffer by fire on stock & utensils in their regular built sugar house," does not extend to damage done to the sugar by the heat of the usual fires employed for refining, being accumulated by the mismanagement of the assured, who inadvertently kept the top of their chimney closed.—**AUSTIN v. DREWE** (1816), 6 Taunt. 436; 2 Marsh. 130; 128 E. R. 1104.

**Annotation:—****Consd.** **Marsden v. City & County Assee.** (1865), 35 L. J. C. P. 60.

**Proximate cause.]—***See* Sect. 6, sub-sect. 4, *post*.

**2609. "Military power"—Government military power included.]—****CURTIS & SONS v. MATHEWS**, No. 2597, *ante*.

**2610. "Premises."—**The word "premises" although in popular language it is applied to buildings, in legal language, means the subject or thing previously expressed. A policy of insurance against fire was effected on a ship. The policy contained a proviso to the effect, that it & the insurance thereby made, should be subject to the several conditions & regulations thereto & thereon expressed, so far as the same were or should be applicable. One of these conditions (all of which were primarily intended to apply to the insurance



of houses & buildings, & were in the form used for that purpose), provided, amongst other things, that if more than twenty pounds' weight of gunpowder should be "on the premises" at the time when the loss happened, such loss would not be made good:—*Held*: the proviso in question was, under the circumstances applicable to the case of the ship insured.—*BEACON LIFE & FIRE ASSURANCE CO. v. GIBB* (1862), 1 Moo. P. C. C. N. S. 73; 1 New Rep. 110; 7 L. T. 574; 9 Jur. N. S. 185, 11 W. R. 194, 1 Mar. L. C. 269; 15 E. R. 630, P. C.

*Annotation*:—*Mentd. County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

**2611. Stock-in-trade.**—*WATCHORN v. LANGFORD*, No. 2607, *ante*.

**2612. — Insured a corndealer & seedsman—Whether hops or matting included.**—A policy of insurance against fire was effected by a corndealer & seedsman upon his "stock-in-trade consisting of corn, seed, hay, straw, fixtures & utensils in business":—*Held*: upon the terms of that policy he could not recover for a loss by fire of hops or matting, although the jury found that hops & matting usually formed part of the stock-in-trade of a corndealer & seedsman in the place where pltf. carried on his business.—*JOEL v. HARVEY* (1857), 29 L. T. O. S. 75; 5 W. R. 488.

**2613. "Stored or kept"**—*Supply of gasoline kept for cooking purposes.*—In an action upon a fire insurance policy, the co. relied upon a statutory condition protecting from liability "for loss or damage occurring while gasoline is stored or kept in the building insured." It appeared that the fire was caused by a small quantity of gasoline in a stove which was being used for cooking purposes, no other gasoline being in the building:—*Held*: whatever the precise signification of the words "stored or kept," there was no infringement of the condition having regard to the ordinary meaning of the words used.—*THOMPSON v. EQUITY FIRE INSURANCE CO.*, [1910] A. C. 592; 80 L. J. P. C. 13; 103 L. T. 153; 26 T. L. R. 616, P. C.

**2614. "Subject to average"**—*Whether average clause implied—No average clause attached—Lloyd's policy.*—A timber yard, as a whole, was insured by a Lloyd's policy for £11,450, & in three

zones by various fire insurance cos. for £25,500. On zone B. there was only one co.'s policy for £3,000. The value in the three zones was £36,500, viz. £1,940 in zone A. £13,260, in B. & £21,300 in C.; & £12,850, viz. £1,900 in zone A., £9,400 in B. & £1,550 in C.—was the value of the timber burnt. The Lloyd's policy was expressed to be "subject to average," but had no average clause attached:—*Held*: the system of marshalling the policies, so as to apply the Lloyd's policy & the co.'s policy for £3,000 ratably to the loss in zone B. & the then unexhausted portion of the Lloyd's ratably with the other policies on zones C. & A. respectively, could not be introduced by the words "subject to average" in a Lloyd's policy. On this policy pltf., being insured on only a portion of the goods at risk, must be considered as being their own insurers for the difference, & must bear a ratable share of the loss accordingly.

Whether the average clause is attached to a Lloyd's policy or not, if the policy is expressed to be "subject to average," it is according to the usage of Lloyd's the same as if the clause were attached.—*ACME WOOD FLOORING CO., LTD. v. MARTEN* (1904), 90 L. T. 313; 20 T. L. R. 229; 48 Sol. Jo. 262; 9 Com. Cas. 157.

**2615. "To pay same as may be settled" on another policy—Fraudulent claim dismissed—Whether a "settlement."**—*BEAUCHAMP v. FABER*, No. 2622, *post*.

**2616. "War, bombardment, military or usurped power"—Rebellion amounting to warfare.**—*CURTIS & SONS v. MATHEWS*, No. 2597, *ante*.

**2617. "Yard"—Open space surrounding distillery—Required by statute.**—*PLATT v. YOUNG*, No. 2592, *ante*.

#### SUB-SECT. 3.—CONDITIONS.

**2618. Misrepresentation & fraud—Claim for excessive amount.**—Pltf. effected a policy of insurance against fire, with a condition that pltf. should forfeit all benefit under the policy, if there were any fraud or false swearing in the claim he made. A fire ensued, & pltf. made affidavit of damage

**2611 i. "Stock-in-trade."**—*BOWES v. NATIONAL INSURANCE CO.* (1880), 20 N. B. R. 437.—CAN.

**2613 i. "Stored or kept"**—*Supply of gasoline kept for cooking purposes.*—*PATTERSON v. CENTRAL CANADA INSURANCE CO.* (1910), 20 Man. L. R. 295.—CAN.

**f. "Main building."**—*ÆTNA INSURANCE CO. v. A.-G. OF ONTARIO* (1890), 18 S. C. R. 707.—CAN.

**g. "Owners."**—A condition provided that property must be insured in the names of the owners. The policy was on grain insured in the name of pltf., who had given warehouse receipts for it, indorsed to certain banks:—*Held*: such banks were the owners, by virtue of these receipts, not pltf., & the condition was broken.—*MCBRIDE v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1870), 30 U. C. R. 451.—CAN.

**h. "Flour"**—*Whether unfilled flour bags.*—Paper bags for flour not filled burned in a mill:—*Held*: not covered by a policy upon the flour.—*HUTCHISON v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO.* (1876), 2 Ont. Dig. 3351.—CAN.

**k. "Risk."**—*PROSSER v. OCEAN ACCIDENT & GUARANTEE CORPN.* (1910), 29 N. Z. L. R. 1157.—N.Z.

**l. "While occupied as a dwelling."**—*ROSS v. SCOTTISH UNION & NATIONAL INSURANCE CO.* (1918), 41

O. L. R. 108; 39 D. L. R. 528; 13 O. W. N. 191.—CAN.

**m. "Effects any other insurance thereon."**—*ROGERS v. GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPN., LTD., ROGERS v. MERCANTILE FIRE INSURANCE CO.* (1918), 42 O. L. R. 419; 14 O. W. N. 49; 42 D. L. R. 656.—CAN.

**n. "Usual vacation season."**—The phrase "usual vacation season" in a policy of fire insurance on a school building means, in the absence of a provision to the contrary the season of "vacation" as defined by School Act, 1920, s. 176.—*STONY PLAIN v. HOME INSURANCE CO.*, [1924] 3 W. W. R. 952; 19 Sas. K. L. R. 110.—CAN.

**o. "Untenanted."**—*SPARR v. NORTH WATERLOO FARMERS MUTUAL FIRE INSURANCE CO.* (1899), 20 C. L. T. 177; 31 O. R. 525.—CAN.

**p. "Seizure"**—*MAY v. STANDARD FIRE INSURANCE CO.* (1880), 5 A. R. 605.—CAN.

#### PART III. SECT. 7, SUB-SECT. 3.

**2618 i. Misrepresentation & fraud—Claim for excessive amount.**—*STEVENS v. LONDON ASSURANCE CORPN., STEVENS v. SCOTTISH UNION & NATIONAL INSURANCE CO.* (1899), 20 N. S. W. L. R. (L.) 153.—AUS.

**2618 ii.**—*PARK v. PHOENIX INSURANCE CO.* (1859), 19 U. C. R. 110.—CAN.

**2618 iii.**—*—*—*—*—A condition declared that if there should be any fraud, overcharge or false swearing, claimant should forfeit all claim under the policy. Pltf. made a false declaration as to the value of the goods lost by the fire:—*Held*: he could not recover the insurance.—*CASHMAN v. LONDON & LIVERPOOL INSURANCE CO.* (1862), 10 N. B. R. (5 All.) 246.—CAN.

**2618 iv.**—*—*—*—*—*LONGLEY v. NORTHERN INSURANCE CO.* (1879), 12 N. S. R. (3 R. & C.) 516.—CAN.

**2618 v.**—*—*—*—*—*GASTONQUAY v. SOVEREIGN FIRE INSURANCE CO.* (1882), 15 N. S. R. (3 R. & G.) 334.—CAN.

**2618 vi.**—*—*—*—*—*HARRIS v. WATERLOO MUTUAL FIRE INSURANCE CO.* (1886), 10 O. R. 718.—CAN.

**2618 vii.**—*—*—*—*—A false statement in the proofs of loss by fire that goods were destroyed which, in fact, had not existed, vitiates the claim for insurance under a policy containing the statutory conditions, notwithstanding the fact that there were goods actually damaged to an amount exceeding that of the policy, if the amount of the policy be but part of the total insurance & the inclusion of the false claim adds to the sum for which the co. is justly liable.—*MAPLE LEAF MILLING CO., LTD. v. COLONIAL ASSURANCE CO.*, [1917] 2 W. W. R. 1091; 36 D. L. R. 202; 27 Man. L. R. 621.—CAN.

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to the extent of £1,085. Having sued for the amount, & a jury having found a verdict for him, with only £500 damages, the ct. granted a new trial.—*LEVY v. BAILLIE* (1831), 7 Bing. 349; 5 Moo. & P. 208; 9 L. J. O. S. C. P. 108; 131 E. R. 135.

**2619.** ———.]—*BRITTON v. ROYAL INSURANCE CO.*, No. 2530, *ante*.

**2620.** ———.]—*CHAPMAN v. POLE*, P. O., No. 2531, *ante*.

**2621.** ———.]—*Re CARR & SUN FIRE INSURANCE CO.* (1897), 13 T. L. R. 186, C. A.

**2622.** ———.]—Pltf. insured his stock-in-trade with the Sun Insurance Office, & the profits of his business with defts., underwriters at Lloyd's. Both policies were against loss by fire. The Lloyd's policy contained the following clause: "In the event of fire to pay the same percentage as may be settled by the Sun on their policy." A fire having taken place at pltf.'s premises, he made a claim against the co., which was referred to arbn. The umpire found the value of the stock on the premises at the time of the fire, but he found also that the claim was so exaggerated as to be fraudulent, & that by reason of the provisions of the co.'s policy nothing was due under that policy. Pltf. then brought this action on the Lloyd's policy to recover a loss of profits:—*Held*: the co. had not "settled" within the meaning of their policy, & therefore pltf. was not entitled to recover on the Lloyd's policy.—*BEAUCHAMP v. FABER* (1898), 14 T. L. R. 544; 3 Com. Cas. 302. *Annotation*:—*Refd. Street v. Royal Exchange Assoc.* (1914), 111 L. T. 235.

**2623.** ———.]—**Whether necessarily fraudulent.]**—*GOULSTONE v. ROYAL INSURANCE CO.*, No. 2571, *ante*.

**2624.** ———.]—Where an excessive & exaggerated claim is made by a policy holder & resisted by a fire insurance co., such a claim will not preclude the policy holder from recovering the real value of the goods burnt & damaged, unless the claim is fraudulently made by the policy holder in the sense of endeavouring to obtain from the co. money he has no right to.—*NORTON v. ROYAL FIRE & LIFE ASSURANCE CO.* (1885), 1 T. L. R. 460, C. A.

**2625. Restrictions as to storing explosives—Whether reasonable—Insured traders in explosives.]**—Among the conditions contained in a policy of fire insurance, it was provided, that the policy was to be void, if at any time there was more than 56 lbs. weight of gunpowder on the insured premises, unless specially provided for in the policy. The insured premises were used for general trade, &

the assured sold, among other things, gunpowder, but no special insurance was made for the assured having more than 56 lbs. weight of gunpowder on the premises:—*Held*: the condition limiting the amount of gunpowder was not unreasonable, & was not discharged by the specification, of stock-in-trade (including hazardous) in the po. —*M'EWAN v. GUTHRIDGE* (1860), 13 Moo. P. C. C. 304; 8 W. R. 265; 15 E. R. 114.

— **What amounts to storing.]—Compare No. 2613, ante.**

**2626. Payment of premiums—Whether policy attaches before payment—No negative condition in policy—Whether implied.]**—In a policy of fire insurance, in the absence of a provision, that the policy is not to attach until payment of the premium, such a provision will not be implied.—*KEILY v. LONDON & STAFFORDSHIRE FIRE INSURANCE CO.* (1883), 1 Cab. & El. 47.

**2627.** ———.]—**Negative condition in policy—Payment recited in policy.]**—Resps. effected policies of fire insurance with appls. A condition of the policies was that no additional insurance on the property covered was allowed except with the consent of the co. indorsed thereon, & the policies were to be void on breach of the condition. Shortly before the occurrence of a fire, resps. took out a policy in another co., by which it was executed. A condition of this policy was that it should be of no effect unless the premium due had been wholly or partially paid. No payment was made in respect of it:—*Held*: there had been no breach of the condition in the policy issued by appls.—*EQUITABLE FIRE & ACCIDENT OFFICE, LTD. v. CHING WO HONG*, [1907] A. C. 96; 76 L. J. P. C. 31; 96 L. T. 1; 23 T. L. R. 200, P. C.

**2628. Double insurance—Failure to declare further insurance—Goods insured not affected by second insurance.]**—Pltfs. effected a policy of insurance with deft. as chairman of a fire insurance co. for £3,000, "on wool in bales or fleeces 'greasy' & 'washed,' in all or any shed or store, on station, or in transit to S. by land only, or in any shed or store, or in any wharf in S., until placed on ship." The policy contained a provision as follows: "No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the co. in writing." Pltf. subsequently effected an insurance with a marine insurance co. to cover £16,500 upon wool, the risk being described as "at & from the River H. to S. per ships & steamers, & thence per ship or ships to London, including the risk of craft from the time that the wools are first waterborne & of transshipment or landing & re-shipment at S." The frequent practice at the port

**2618 viii.** ———.]—*MILLER-MORSE HARDWARE CO. v. DOMINION FIRE INSURANCE CO.* (1922), 65 D. L. R. 292; [1922] 1 W. W. R. 1097; *affg.*, 61 D. L. R. 114; 14 Sask. L. R. 349; *reversg.*, 56 D. L. R. 738.—CAN.

**2618 ix.** ———.]—*NIEDRICLA v. ST. LAWRENCE AGENCY* (1923), 53 O. L. R. 599.—CAN.

**2618 x.** ———.]—*BUCKLEY v. LIVERPOOL LONDON & GLOBE INSURANCE CO.*, [1924] 4 D. L. R. 25.—CAN.

**2618 xi.** ———.]—*LAHMAN v. PHOENIX INSURANCE CO.* (1888), 7 N. Z. L. R. 271.—N.Z.

**2618 xii.** ———.]—Mere over-valuation of goods in a claim for fire loss is, in the absence of fraud or intent to deceive, insufficient to vitiate the policy.—*PROSSER v. OCEAN ACCIDENT & GUARANTEE CORPN.* (1910), 29 N. Z. L. R. 1157.—N.Z.

**q.** ———.]—**As to compliance with conditions.]**—*CROWLEY v. AGRICULTURAL MUTUAL ASSURANCE ASSOC. OF CANADA* (1871), 21 C. P. 567.—CAN.

**r.** ———.]—**Proof of fraud—Presumption or inference.]**—Where an insurance policy is to be forfeited if the claim is in any respect fraudulent, it is not essential that the fraud should be directly proved; it is sufficient if a clear case is established by presumption, or inference, or circumstantial evidence.—*NORTH BRITISH & MERCANTILE INSURANCE CO. v. TOURVILLE* (1895), 25 S. C. R. 177.—CAN.

**t.** ———.]—**Fraud in furnishing proofs of loss under a fire insurance policy cannot be presumed from the mere fact that the claim is shown to have been excessive.**—*DEVLIN v. WESTCHESTER FIRE INSURANCE CO.*, *DEVLIN v. BRITISH NORTH WESTERN FIRE INSURANCE CO.*,

[1925] 3 D. L. R. 1109; 2 W. W. R. 651; *affg.*, [1925] 1 D. L. R. 773; 1 W. W. R. 482; 19 Sask. L. R. 161.—CAN.

**a.** **Payment of premiums—Whether policy attaches before payment—Negative condition in policy.]**—A condition on a policy provided that no insurance should be considered as binding until the actual payment of the premium:—*Held*: even if this could not be set up as a condition, not being one of the statutory conditions or a variation thereof, it might still be relied upon as an agreement of the parties which went to the foundation of the contract, & denied that the insurance ever came into existence.—*GERALDI v. PROVINCIAL INSURANCE CO.* (1878), 29 C. P. 321.—CAN.

**b.** ———.]—*DOHERTY v. MILLERS & MANUFACTURERS INSURANCE CO.* (1902), 22 C. L. T. 295; 4



of S. is that wool arriving there for shipment is not delivered direct to the ship for which it is intended, but is conveyed to the stores belonging to the persons who are acting as the stevedores of the ship, & is there pressed for the purpose of reducing its bulk. By the practice & course of business, the stevedore's receipt is regarded as between the ship & the shippers as equivalent to the mate's receipt, & bills of lading are given in exchange for it. Certain wool belonging to pltf's. was forwarded by several consignments by several steamers from the River H. to S. Pltf.'s agent at S. had the wool conveyed on its arrival to his own stores, for the purpose of being weighed, & entered into a contract for its conveyance to London on board a ship. The wool was then conveyed from the warehouses to the stores of the stevedores of the ship, who gave the usual receipts for the same. While in the stevedore's warehouses, a portion of the wool was destroyed or damaged by a fire & pltf's. sought to recover such loss upon the policy effected with deft.'s co. The co. resisted the claim, upon the ground that the policy of marine insurance above mentioned came within the terms of the provision in the fire policy, & ought to have been communicated to them:—*Held*: the marine policy did not cover the wool in the stevedores' warehouses, & was not such an insurance as pltf's. were bound under the provision in the fire policy to notify to deft.'s co., & pltf's. were therefore entitled to recover.—*AUSTRALIAN AGRICULTURAL CO. v. SAUNDERS* (1875), L. R. 10 C. P. 668; 44 L. J. C. P. 391; 33 L. T. 447; 3 Asp. M. L. C. 63, Ex. Ch.; *affg.* (1872), cited 28 L. T. 844.

*Annotation*:—*Reid. Rodocanachi v. Elliott* (1873), 28 L. T. 840.

**2629. — Second insurance not effective.]**  
—*EQUITABLE FIRE & ACCIDENT OFFICE, LTD. v. CHING WO HONG, No. 2627, ante.*

O. L. R. 303; 1 O. W. R. 457; *affd.*, 2 O. W. R. 211; 6 O. L. R. 78.—*CAN.*  
c. —.—.]—*JOHNSON v. PROVINCIAL INSURANCE CO.* (1877), 27 C. P. 464.—*CAN.*

**2629 i. Double insurance—Failure to declare further insurance—Second insurance not effective.]**—*SINNAMON v. NEW ZEALAND INSURANCE CO.* (1898), 9 Q. L. J. 13, 24.—*AUS.*

**2629 ii. — — —.]**—A condition of a policy was, "in case insurance shall subsist or be effected on the premises or property insured by the co. in any other office during the continuance of such insurance, the policy granted thereon by the co. shall be void unless such double insurance subsist with the consent of the directors, signified by indorsement on the back of the policy." A second insurance, without the consent of the co., was effected:—*Held*: by the condition, & by the statute under which these cos. are incorporated, the policy was altogether avoided, & it was immaterial that such second insurance was with a foreign co., & therefore not capable of being enforced here, for the condition intends an insurance in fact.—*RAMSAY WOOLLEN CLOTH MANUFACTURING CO. v. MUTUAL FIRE CO. OF DISTRICT OF JOHNSTOWN* (1854), 11 U. C. R. 516.—*CAN.*

**2629 iii. — — —.]**—*COMMERCIAL UNION ASSURANCE CO. v. TEMPLE* (1898), 29 S. C. R. 206.—*CAN.*

**2629 iv. — — —.]**—A policy of insurance against fire contained the following condition: "If assured have or shall obtain any other policy, whether valid or not . . . this policy shall become void, unless consent in writing by the co. be indorsed hereon":—*Held*: where additional insurance was applied for, but not accepted

until after the property was destroyed by fire, the condition had no application.—*TEMPLE v. WESTERN ASSURANCE CO.* (1900), 35 N. B. R. 171.—*CAN.*

d. —.—.]—*Second insurance substitute for first.]*—*KLEIN v. UNION FIRE INSURANCE CO.* (1883), 3 O. R. 234.—*CAN.*

e. —.—.]—*DAFOE v. JOHNSTOWN DISTRICT MUTUAL INSURANCE CO.* (1857), 7 C. P. 55.—*CAN.*

—*HATTON v. BEACON INSURANCE CO.* (1858), 16 U. C. R. 316.—*CAN.*

—*NOAD v. PROVINCIAL INSURANCE CO.* (1859), 18 U. C. R. 584.—*CAN.*

—*PARK v. PHOENIX INSURANCE CO.* (1859), 19 U. C. R. 110.—*CAN.*

k. —.—.]—Defts. issued a policy to pltf's. containing a proviso that it should cease & be of no further effect if pltf's. thereafter effected any other insurance on the same property without giving notice to defts. Pltf's. effected a second insurance without such notice:—*Held*: pltf's. could not recover under the first policy.—*CAMPBELL v. AETNA INSURANCE CO.* (1860), Coch. 21.—*CAN.*

l. —.—.]—*DICKSON v. PROVINCIAL INSURANCE CO.* (1874), 24 C. P. 157.—*CAN.*

m. —.—.]—*PERRY v. LIVERPOOL & LONDON & GLOBE INSURANCE CO.* (1898), 34 N. B. R. 380.—*CAN.*

n. —.—.]—*AGRICULTURAL SAVINGS & LOAN CO. v. LIVERPOOL & LONDON & GLOBE INSURANCE CO.* (1900), 21 C. L. T. 124; 32 O. R. 369.—*CAN.*

o. —.—.]—*MANITOBA ASSURANCE CO. v. WHITLA, WHITLA v.*

**2630. — — — Substitution of other policies for greater amount than those declared—Construction of clause.]**—Under two policies in French resp. insured against fire a building & its contents, each for £600. The policies provided by condition III. that if the property should be insured under other contracts, subscribed either before or after the policies attached, he was "tenu de le déclarer, par écrit, et de le faire mentionner soit dans la police même, soit par un endos inscrit par la compagnie sur la dite police." Resp. had at the time of effecting the policies concurrent insurances with other cos. for £600 upon the building & £600 upon the contents, & these insurances were recorded in the policies respectively. Subsequently the concurrent insurances were replaced by other insurances to a slightly larger amount, the excess being due to new decoration of the building & additions to the contents. These substituted insurances were not communicated to applts. or indorsed on the policies:—*Held*: condition III. in the policies meant only that the fact that the property covered was further insured should be declared, & resp. had committed no breach of the condition & was entitled to recover upon the policies.—*NATIONAL PROTECTOR FIRE INSURANCE CO., LTD. v. NIVERT*, [1913] A. C. 507; 82 L. J. P. C. 95; 108 L. T. 390; 29 T. L. R. 363; 6 B. W. C. C. N. 93, P. C.

**2631. — Notice of termination of policy to be given—Whether condition precedent to recovery.]**—Defts. by a policy of fire insurance insured premises of pltf's. The policy contained this clause:—"This policy is subject to the same premium terms & conditions as a policy . . . of the N. B. & M. Co. . . . on identical interest." The N. B. & M. Co.'s policy contained the following conditions:—"The insured shall notify to the Co. . . . if any insurance previously effected ceases,

*ROYAL INSURANCE CO.* (1903), 34 S. C. R. 191; 24 C. L. T. 111.—*CAN.*

p. —.—.]—*PICCOTT v. GUARDIAN ASSURANCE CO.* (1909), 9 Nfld. L. R. 424.—*NFLD.*

—*It is a good defence to an action on a fire insurance policy that additional insurance has been effected by the insured in violation of a condition of the policy requiring the assent of the insured to be first obtained before such additional insurance is effected.*—*EMMETT v. CANADA ACCIDENT & FIRE ASSURANCE CO.*, [1924] 3 D. L. R. 125; 57 N. S. R. 286.—*CAN.*

r. —.—.]—*KEMPTON v. NATIONAL FIRE INSURANCE CO.* (1886), 5 N. Z. L. R. 47 (S. C.).—*N.Z.*

t. —.—.]—*SOMERVILLE v. AUSTRALIAN MERCANTILE UNION INSURANCE CO.* (1887), 6 N. Z. L. R. 108.—*N.Z.*

a. —.—.]—*DONALDSON v. MANCHESTER INSURANCE CO.* (1836), 14 Sh. (Ct. of Sess.) 601; 32 Fac. Coll. 519.—*SCOT.*

b. —.—.]—*Where prior insurance partial only.]*—*LANGE & CO. v. S. A. FIRE & LIFE ASSURANCE CO.* (1867), 5 S. 358.—*S. AF.*

aa. —.—.]—*Before loss.]*—*FAIR v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO.* (1876), 26 C. P. 398.—*CAN.*

—*In writing.]*—*WEBB v. NEW ZEALAND INSURANCE CO.*, 2 J. R. N. S. 193.—*N.Z.*

cc. —.—.]—*Waiver of condition*  
—*By agent.]*—*WESTERN ASSURANCE CO. v. DOULL* (1886), 12 S. C. R. 446.—*CAN.*

dd. —.—.]—*ROSEMAN*



**Sect. 7.—Construction of policy: Sub-sects. 3 & 4.]**

&:—"The insurance shall cease to attach & remain void until the above stipulation shall have been complied with, & it shall be optional for the Co., whenever such notification be made, to cancel the policy." Defts.' policy was dated Sept. 29, 1893, & the N. B. & M. policy was dated Feb. 19, 1892. The N. B. & M. Co. declined to renew their policy on Feb. 19, 1894, & no notice of the fact was given by pltfs. to defts. Pltfs.' premises were destroyed by fire on July 1, 1894:—*Held*: the fact that notice was not given by pltfs. to defts.

*v.* NORTH BRITISH ASSURANCE CO. (1904), O. R. C. 88.—S. AF.

**g. — First policy assigned to mortgagee—Rights of mortgagee.]**—An assignment was made of the policy to a mtgee. of the property with concurrence of the co., & afterwards the mtgor. effected another insurance without the consent required by the policy:—*Held*: the policy was not void in equity as respected the mtgee.—BURTON *v.* GORE DISTRICT MUTUAL FIRE INSURANCE CO. (1865), 12 Gr. 156.—CAN.

**h. — Condition observed—What constitutes assent.]**—MORAN *v.* NORTH EMPIRE FIRE INSURANCE CO., [1917] 1 W. W. R. 1192.—CAN.

Under the condition in fire insurance policies which requires notice of subsequent insurance to be given the co., the assent need not necessarily be written & may be given before or after the loss, & where subsequent insurance has been effected, notice of it in writing is not a prerequisite to a valid assent.—MCCOY *v.* NATIONAL BENEFIT, LIFE & PROPERTY ASSURANCE CO., LTD., [1918] 1 W. W. R. 466; 25 B. C. R. 162.—CAN.

**i. — No notice of dissent in stipulated time—Presumption of assent.]**—SHANNON *v.* HASTINGS MUTUAL INSURANCE CO. (1877), 26 C. P. 380; 2 A. R. 81.—CAN.

**m. — Mistake in declaration of second insurance.]**—The notice of further insurance stated the amount to be larger than it really was, & gave the name of the co. in which the further insurance was effected wrongly:—*Held*: inasmuch as defts. were neither prejudiced nor misled by the mistake, & there was no fraud in so giving the notice, the policy was not thereby vitiated.—OSSER *v.* PROVINCIAL INSURANCE CO. (1862), 12 C. P. 133.—CAN.

**2632 i. Time limit for proceedings for recovery—Whether reasonable.]**—A condition that any action on the policy should be barred, unless commenced within six months after the loss occurred:—*Held*: unreasonable, as another condition provided that the co. should have sixty days for payment after the completion of proofs of loss.—PEORIA SUGAR REFINING CO. *v.* CANADA FIRE & MARINE INSURANCE CO. (1885), 12 A. R. 418.—CAN.

**2632 ii. —**—MERCHANTS FIRE INSURANCE CO. *v.* EQUITY FIRE INSURANCE CO. (1905), 5 O. W. R. 27; 9 O. L. R. 241.—CAN.

**n. — Statutory condition superseding condition in policy.]**—It was objected that this action was premature, because by a condition of the policy sixty days was given for the payment of a claim, & the action was brought within such period:—*Held*: as the policy herein was only subject to the statutory conditions by which the period is thirty days, the objection could not be sustained.—HARTNEY *v.* NORTH BRITISH FIRE INSURANCE CO. (1887), 13 O. R. 581.—CAN.

**o. — Where period allowed for**

**payment.]**—MUTUAL FIRE INSURANCE CO. OF WELLINGTON COUNTY *v.* FREY (1880), 5 S. C. R. 82.—CAN.

**p. —**—BLAIR *v.* SOVEREIGN FIRE INSURANCE CO. (1886), 19 N. S. R. (7 R. & G.) 372; 7 C. L. T. 410.—CAN.

**q. — Waiver by insurer.]**—COUSINEAU *v.* CITY OF LONDON FIRE INSURANCE CO. (1888), 15 O. R. 329.—CAN.

**r. —**—NICKLE BROTHERS *v.* LIVERPOOL & LONDON & GLOBE INSURANCE CO. (1914), 33 N. Z. L. R. 1019.—N.Z.

**t. Condition as to notice of incumbrance—Not applicable to incumbrance by assignee.]**—RICHARDSON *v.* CANADA WEST FARMERS INSURANCE CO. (1866), 16 C. P. 430.—CAN.

**a. Condition avoiding policy—On change of interest—Mortgage.]**—PULL *v.* NORTH BRITISH CANADIAN INVESTMENT CO. (1888), 15 A. R. 421.—CAN.

**b. —**—SALTERIO *v.* CITY OF LONDON FIRE INSURANCE CO. (1892), 26 N. S. R. (14 R. & G.) 20; *affd. on appeal* (1893), 23 S. C. R. 32.—CAN.

**c. —**—CITIZENS' INSURANCE CO. OF CANADA *v.* SALTERIO (1894), 23 S. C. R. 155.—CAN.

**d. —**—TORROP *v.* IMPERIAL FIRE INSURANCE CO. (1896), 26 S. C. R. 585.—CAN.

**e. Manitoba statutory conditions on policy in Ontario—Inapplicable—Policy subject to Ontario conditions.]**—MAPLE LEAF MILLING CO., LTD. *v.* COLONIAL ASSURANCE CO. (1915), 30 W. L. R. 567; 7 W. W. R. 1124.—CAN.

**f. Condition for cancellation by notice—Written notice required.]**—ELKINGTON *v.* PHOENIX ASSURANCE CO. (1895), 14 N. Z. L. R. 237.—N.Z.

**aa. Restrictions as to storing explosives—Amount stored not excessive, unusual or unnecessary.]**—HAMMOND *v.* CITIZENS' INSURANCE CO. OF CANADA (1886), 26 N. B. R. 371.—CAN.

**bb. — Explosives not proximate cause of loss.]**—FAULKNER *v.* CENTRAL FIRE INSURANCE CO. OF NEW BRUNSWICK (1841), 3 N. B. R. (1 Kerr) 279.—CAN.

**cc. Restriction as to storing gasoline—Gasoline necessary in small quantities—Condition inapplicable.]**—THOMPSON *v.* EQUITY FIRE INSURANCE CO., C. R., [1910] A. C. 151; 80 L. J. P. C. 13; [1910] A. C. 592; 103 L. T. 153; 26 T. L. R. 616.—CAN.

**dd. —**—The words "stored or kept," in a condition providing against liability of the co. for loss or damage occurring while gasoline, etc., is stored or kept on the premises, do not apply to a small quantity kept on hand for domestic purposes but import the idea of warehousing or depositing for safe custody or keeping in stock for trading purposes.—PATTERSON *v.* CENTRAL CANADA INSURANCE CO. (1910), 20 Man. L. R. 295.—CAN.

**ee. —**—EVANGELINE FRUIT CO. *v.* PROV. FIRE INSUR

of the cessor of the N. B. & M. policy relieved defts. from liability.—SULPHITE PULP CO., LTD. *v.* FABER (1895), 11 T. L. R. 547; 1 Com. Cas. 146.

**Proposal form as basis of contract.]**—See Sect. 1, sub-sect. 4, *ante*.

**Notice to insurers—As condition precedent to liability.]**—See Sect. 10, sub-sect. 1, *post*.

**Mode of ascertainment of loss—As condition precedent to liability.]**—See Sect. 10, sub-sect. 1, *post*.

**2632. Time limit for proceedings for recovery—Whether reasonable.]**—HOME INSURANCE CO. OF

ANCE CO. OF CANADA (1915), 51 S. C. R. 474.—CAN.

**ff. — Excessive amount.]**—HORNSTEIN *v.* GREAT AMERICAN INSURANCE CO., [1920] 1 W. W. R. 1019.—CAN.

**gg. — Policy covering stock of illuminating oils.]**—A co. insuring against loss by fire is not liable "for loss or damage occurring while gasoline is stored or kept, etc." Insurance was effected "on stock consisting chiefly of illuminating & lubricating oils, etc., & all other goods kept by them for sale." A quantity of gasoline was in the building containing the stock when destroyed by fire:—*Held*: that gasoline, being an illuminating oil, was part of the stock insured & the above statutory condition could not be invoked to defeat the policy.—PRAIRIE CITY OIL CO. *v.* STANDARD MUTUAL FIRE INSURANCE CO. (1910), 44 S. C. R. 40.—CAN.

**hh. Restrictions as to storing oil—Quantity necessary for lubrication.]**—A condition stated the co. should not be liable for any loss occurring while oil, etc., was stored or kept on the property insured:—*Held*: the fact of there being a small quantity of lubricating oil, used for lubricating the engine, was not such a storing of oil, etc., as was contemplated by the condition.—MITCHELL *v.* CITY OF LONDON ASSURANCE CO. (1888), 15 A. R. 262.—CAN.

**kk. Condition establishing liability—For fire after explosion—Whether liable for damage from explosion.]**—HOBBS *v.* NORTHERN ASSURANCE CO., HOBBS *v.* GUARDIAN ASSURANCE CO. (1886), 12 S. C. R. 631.—CAN.

**ll. Condition as to book-keeping.]**—SHAME'S TRUSTEE *v.* YORKSHIRE INSURANCE CO., LTD., [1922] T. P. D. 259.—S. AF.

**mm. —**—ABRAHAMSON *v.* GUARDIAN ASSURANCE CO., LTD. (1907), 24 S. C. 594.—S. AF.

**nn. Condition must be reasonable.]**—SANDS *v.* STANDARD INSURANCE CO. (1879), 27 Gr. 167.—CAN.

**oo. Whether condition just & reasonable—Where prima facie valid.]**—ECKARDT *v.* LANCASHIRE INSURANCE CO. (1900), 20 C. L. T. 297; 27 A. R. 373.—CAN.

**pp. — Onus of proof.]**—The onus of proof that a condition is not just & reasonable within Fire Insurance Policy Act, 1911, lies on the assured.—HALL MINING & SMELTING CO., LTD. *v.* CONNECTICUT FIRE INSURANCE CO. (1913), 18 B. C. R. 113.—CAN.

**qq. Implied condition—Insured's duty to protect property.]**—DEVIAN *v.* QUEEN INSURANCE CO. (1882), 46 U. C. R. 611.—CAN.

**rr. Variation of statutory conditions—Rules as to indication of—Necessity for strict compliance.]**—The policy contained the statutory conditions, & also what purported to be variations thereof. The variations had not the notices required by the statute to be

NEW YORK v. VICTORIA-MONTREAL FIRE INSURANCE Co., No. 2739, *post*.

SUB-SECT. 4.—PROXIMATE CAUSE OF LOSS.

*See, also*, Sub-sect. 2, *ante*.

2633. "Loss by fire"—Damage by mob attracted by fire.]—By a policy of insurance, plate glass in pltf.'s shop front was insured against "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises," none of the glass being "horizontally placed or movable." A fire broke out on premises adjoining those of pltf. & slightly damaged the rear of his shop, but did not approach that part where the plate glass was. Whilst pltf., assisted by neighbours, was removing his stock & furniture to a place of safety, a mob, attracted by the fire, tore down the shop shutters, & broke the windows for the purpose of plunder:—*Held*: the proximate cause of the damage was the lawless act of the mob, & it did not originate from "fire or breakage during removal," within the exception in the policy. The policy, which had been effected through L., the local agent of defts., was subject, amongst others, to a condition that "in case of loss or damage, an immediate notice must be given to the manager, or to some known agent of the co." After the making of the policy, & before the loss, defts. had transferred this branch of their business to another co. Pltf., not being aware of this transfer, gave notice of the damage to L., who made his report thereon to the latter co.:—*Held*: the notice to L. was a sufficient notice within the above condition.

"Breakage during removal" evidently means breakage during the time of removal, from some accident resulting from or incident to the removal (WILLES, J.).—MARSDEN v. CITY & COUNTY ASSURANCE Co. (1865), L. R. 1 C. P. 232; Har. & Ruth. 53; 35 L. J. C. P. 60; 13 L. T. 465; 12 Jur. N. S. 76; 14 W. R. 106.

prefixed thereto, but all the conditions & variations were set out in the declaration as part of the contract:—*Held*: no effect could be given to the variations, as they did not comply with the statute.—SLY v. OTTAWA AGRICULTURAL INSURANCE Co. (1878), 29 C. P. 28; *further proceedings*, 29 C. P. 557.—CAN.

l. ———.]—*Held*: the conditions of the policy not being headed either "Statutory Conditions," or "Variations," the policy was one without conditions.—MCINTYRE v. NATIONAL INSURANCE Co. OF MONTREAL (1879), 44 U. C. R. 501; *affd.* 5 H. R. 580.—CAN.

g. ———.]—The policy stated that it was made subject to the statutory conditions as varied by the conditions thereunder written, etc.:—*Held*: a condition not headed in accordance with the statute could not vary the statutory condition indorsed.—SAUVEY v. ISOLATED RISK & FARMERS' FIRE INSURANCE Co. (1879), 44 U. C. R. 523.—CAN.

h. ———.]—WANLESS v. LANCASHIRE INSURANCE Co. (1896), 23 A. R. 224.—CAN.

k. ———.]—COPE & TAYLOR v. SCOTTISH UNION & NATIONAL INSURANCE Co. (1897), 5 B. C. R. 329.—CAN.

l. ———.]—GREEN v. MANITOBA ASSURANCE Co. (1901), 13 Man. L. R. 395.—CAN.

m. ———.]—MORIN v. ANGLO-CANADIAN FIRE INSURANCE Co. (1910), 13 W. L. R. 667.—CAN.

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2634. — Fire causing explosion—Fire not on or adjoining property insured—Damage by atmospheric concussion.]—Pltf. by a policy of insurance insured certain property with defts. against loss or damage occasioned by fire. A quantity of gunpowder belonging to H., at some distance from pltf.'s property, ignited, the explosion of which shattered the windows & damaged the structure of pltf.'s property:—*Held*: as the proximate cause of the damage was a concussion of air, & not fire, pltf. could not upon this policy recover from defts. for the damage occasioned by this explosion.—EVERETT v. LONDON ASSURANCE (1865), 19 C. B. N. S. 126; 6 New Rep. 234; 34 L. J. C. P. 299; 11 Jur. N. S. 546; 13 W. R. 862; 144 E. R. 734.

2635. — Damage from efforts to extinguish fire.]—A policy of fire insurance contained the following exception: "Neither will the co. be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas." In the premises of pltf. (the insured), who carried on the business of extracting oil from shoddy, an inflammable & explosive vapour evolved in the course of the process escaped & caught fire, setting fire to other things; it afterwards exploded & caused a further fire, besides doing damage by the explosion:—*Held*: (1) the word gas in the policy meant ordinary illuminating coal gas; (2) the exemption of liability for loss by explosion was not limited to cases where the fire was originated by the explosion, but included cases where the explosion occurred in the course of a fire; & it exempted defendants in respect both of the damage from the explosion itself, & of the damage done by the further fire caused by the explosion.

I agree that any loss resulting from an apparently necessary & *bonâ fide* effort to put out a fire, whether it be by spoiling the goods by water, or throwing the articles of furniture out of window, or even the destroying of a neighbouring house by an explosion for the purposes of checking the

n. ———.]—PRATT v. CONNECTICUT FIRE INSURANCE Co. (1914), 27 W. L. R. 547.—CAN.

o. ———.]—EXCELSIOR TAILORING Co. v. GLEN FALLS INSURANCE Co. (1923), 55 O. L. R. 35.—CAN.

p. ———.]—A clause endorsed on a fire insurance policy:—*Held*: a variation of the statutory conditions, & not being indicated as such in the manner required by Alberta Insurance Act, s. 70, to be ineffective against the insured.—MCPHERSON & QUIGLEY v. FIDELITY-PHENIX INSURANCE Co. OF NEW YORK, [1924] 3 D. L. R. 621; 2 W. W. R. 1019; *affd.*, [1925] 1 D. L. R. 169; [1924] S. C. R. 666.—CAN.

q. ———.]—MARSHALL v. WAWANESA MUTUAL INSURANCE Co., [1924] 2 D. L. R. 419; 2 W. W. R. 270; 33 B. C. R. 404; *affg.*, [1923] 3 D. L. R. 696; 3 W. W. R. 418; 32 B. C. R. 419.—CAN.

r. ———.]—GREGORY v. PALATINE INSURANCE Co., [1924] 3 D. L. R. 987.—CAN.

t. ———.]—An insurer who has not printed on the policy or contract of insurance the statutory conditions in the manner indicated in the statute, cannot set up against the insured his own conditions or the statutory conditions, but in such a case the insured alone is entitled to avail himself of any statutory condition.—CITIZENS' INSURANCE Co. v. PARSONS, QUEEN INSURANCE Co. v. PARSONS, WESTERN INSURANCE Co. v. JOHNSTON (1880), 4 S. C. R. 215; *affd.* 7 App. Cas. 96.—CAN.

a. ———.]—DEVLIN v. QUEEN INSURANCE Co. (1882), 46 U. C. R. 611.—CAN.

b. ———.]—Necessity for indorsement on policy.]—MORROW v. WATERLOO COUNTY MUTUAL FIRE INSURANCE Co. (1876), 39 U. C. R. 441.—CAN.

c. ———.]—Unreasonable variation.]—*Held*: the variation was not binding upon the assured, not being "just & reasonable to be exacted by the co." inasmuch as it was more stringent & onerous than the statutory condition.—COLE v. LONDON MUTUAL FIRE INSURANCE Co. (1907), 15 O. L. R. 619; 10 O. W. R. 930.—CAN.

d. ———.]—Any variation or condition added to the statutory ones which is intended to prevent a judge or jury from determining the materiality of any statement is not reasonable or just.—FRITZLEY v. GERMANIA FARMERS' MUTUAL FIRE INSURANCE Co. (1909), 14 O. W. R. 18; 19 O. L. R. 49.—CAN.

PART III. SECT. 7, SUB-SECT. 4.

26351. "Loss by fire"—Damage from efforts to extinguish fire.]—*Semble*: in the form adopted in ordinary policies, injuries to goods by wet, or in any manner from the exposure during the confusion of the fire before they can be got to a place of safety, & goods lost or stolen in such confusion, & the destruction, injury or loss, of which the fire can be said to be the proximate cause, are within the policy.—THOMPSON v. MONTREAL INSURANCE Co. (1850), 6 U. C. R. 319.—CAN.



**Sect. 7.—Construction of policy: Sub-sects. 4 & 5.**  
**Sects. 8 & 9: Sub-sect. 1.]**

progress of the flames, in a word, every loss that clearly & proximately results, whether directly or indirectly, from the fire, is within the policy (KELLY, C.B.).—*STANLEY v. WESTERN INSURANCE CO.* (1868), L. R. 3 Exch. 71; 37 L. J. Ex. 73; 17 L. T. 513; 16 W. R. 369.

*Annotations:—As to (2) Folld. Re Hooley Hill Rubber & Chemical Co. & Royal Insce., [1920] 1 K. B. 257. Apprvd. Curtis's & Harvey (Canada) v. North British & Mercantile Insce., [1921] 1 A. C. 303. Refd. The Knight of St. Michael, [1898] P. 30; Re Etherington & Lancashire & Yorkshire Accident Insce., [1909] 1 K. B. 591.*

**2636.** ———.]—*AHMEDBOHY HABBIBHOY v. BOMBAY FIRE & MARINE INSURANCE CO., No. 2724, post.*

**2637.** ——— **Indirect consequences of fire—Loss on business carried on on temporary premises—Profits not covered by policy.]—**An innkeeper having insured, against fire, his "interest in the inn & offices," cannot, upon such inn & offices being partly burnt, recover against the insurers for loss sustained by his hiring other premises while his own were being repaired, & by the refusal of persons to go to the inn while under repair, the insurers having reinstated the premises in proper time.

If a party would recover such profits as these, he must insure them *quâ* profits. I never heard before of a recovery of profits of a business as an incidental part of the loss, under an insurance upon a house or ship (TAUNTON, J.).—*Re WRIGHT & POLE* (1834), 1 Ad. & El. 621; 110 E. R. 1344; *sub nom. Re SUN FIRE OFFICE CO. & WRIGHT*, 3 Nev. & M. K. B. 819.

**2638. Explosion occurring during fire—Explosion of gas generated in manufacture.]—***STANLEY v. WESTERN INSURANCE CO., No. 2635, ante.*

**2639.** ——— **Explosion of chemicals manufactured by insured—Construction of policy.]—**Manufacturers of explosives insured their buildings & the contents thereof by policies of insurance whereby the insurers agreed to pay the sums named if the property or any part thereof should be destroyed or damaged by fire. Each policy contained a condition to the effect that the insurance did not cover loss or damage by explosion, except explosion of illuminating gas, & a memorandum indorsed in these words; "This policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused directly or indirectly thereby or was not the result thereof." A fire broke out at the works of the

**2635 ii.** ———.]—*Held:* any loss resulting from an effort to put out a fire, whether by spoiling goods, directly or indirectly, is within the policy; breakage by removal, damage by water, loss or theft, occasioned by exposure, are within the loss covered by the policy.—*MCPHERSON v. GUARDIAN INSURANCE CO.* (1893), 7 Nfld. L. R. 768.—**NFLD.**

**e.** ——— **Indirect consequences of fire—Trade losses.]—***Held:* an insurance on buildings against fire does not without special stipulation cover consequential damage arising from loss of profit that might have been made by the occupant by his trade in the subjects during that period.—*MENZIES v. NORTH BRITISH INSURANCE CO.* (1847), 9 Dunl. (Ct. of Sess.) 694; 19 Sc. Jur. 291.—**SCOT.**

**f.** ——— **Fire in adjoining house—Fall of gable on insured house.]—***JOHNSTON v. WEST OF SCOTLAND INSURANCE CO.* (1828), 7 Sh. (Ct. of

Sess.) 52; 4 Fac. Coll. 45; 4 Murr. 189.—**SCOT.**

**g. Loss by lightning—Damage increased by wind—Lightning proximate cause.]—***ROTH v. SOUTH EASTHOPE FARMERS MUTUAL FIRE INSURANCE CO.* (1918), 41 O. L. R. 52; 13 O. W. N. 208.—**CAN.**

**PART III. SECT. 7, SUB-SECT. 5.**

**2643 i. Wilful incendiarism—By insured—Sufficiency of proof.]—**The defence that the insured or his assignee wilfully & maliciously set fire to the insured premises, ought to be as satisfactorily established in the minds of the jury as to justify them in convicting him of the criminal charge for the same offence.—*RICHARDSON v. CANADA WEST FARMERS INSURANCE CO.* (1866), 17 C. P. 341.—**CAN.**

**2643 ii.** ———.]—*PROSSER v. OCEAN ACCIDENT & GUARANTEE CORPN.* (1910), 29 N. Z. L. R. 1157.—**N.Z.**

**h.** ——— **Effect of acquittal on**

manufacturers. After much damage had been done, a quantity of tri-nitro-toluol exposed to the heat of the fire exploded & destroyed the buildings & their contents:—*Held:* as to the damage caused by the explosion the insurers were exempted from liability by the condition & memorandum, although the explosion occurred in the course of a fire.—*Re HOOLEY HILL RUBBER & CHEMICAL CO., LTD., & ROYAL INSURANCE CO., LTD.*, [1920] 1 K. B. 257; *sub nom. HOOLEY HILL RUBBER & CHEMICAL CO. v. ROYAL INSURANCE CO.*, 89 L. J. K. B. 179; 122 L. T. 173; 36 T. L. R. 81; 25 Com. Cas. 23, C. A.

*Annotation:—Apprvd. Curtis's & Harvey (Canada) v. North British & Mercantile Insce., [1921] 1 A. C. 303.*

**2640.** ——— **Distinguished from explosion causing fire.]—***CURTIS'S & HARVEY (CANADA), LTD. v. NORTH BRITISH & MERCANTILE INSURANCE CO.*, No. 2591, *ante.*

**2641. Breakage during removal—Confined to loss or damage incident to removal.]—***MARSDEN v. CITY & COUNTY ASSURANCE CO.*, No. 2633, *ante.*

**2642. Bombardment by Crown forces during rebellion.]—***CURTIS & SONS v. MATHEWS*, No. 2597, *ante.*

**SUB-SECT. 5.—FIRE CAUSED BY INSURED.**

**2643. Wilful incendiarism—By insured—Sufficiency of proof.]—**Where, in an action on a policy of insurance to recover a loss sustained by fire, deft., as director of the co., endeavoured to establish that pltf. had wilfully set fire to the premises, & the judge directed the jury, that they should be satisfied that the crime imputed to pltf. was as fully & satisfactorily proved & established, as would warrant them in finding him guilty, in case a criminal charge had been preferred against him for the same offence:—*Held:* such direction was right. The ct. refused to grant a new trial, although, after a verdict for pltf., a grand jury had found a bill against him & others for a conspiracy to defraud the insurance co., & affidavits were produced imputing perjury to pltf.'s witnesses, & disclosing the nature of the conspiracy, & also tending to show that pltf.'s claim was founded in fraud, which was not known to deft. at the time of the trial.—*THURTELL v. BEAUMONT* (1824), 8 Moore, C. P. 612; *previous proceedings* (1823), 1 Bing. 339.

*Annotations—Consd. Hurst v. Evans, [1917] 1 K. B. 352. Mentd. Maclean v. Maclean (1829), 2 Hag. Ecc. 601; Kenrick v. Kenrick (1831), 4 Hag. Ecc. 114.*

**2644.** ——— **By wife of insured—Without priority of insured.]—**An insurance co. granted a fire policy

*criminal charge.]—*In an action on a fire policy the jury found for pltf. on a plea of arson, for which she had been prosecuted & acquitted, & the ct., notwithstanding very strong circumstances of suspicion, refused a new trial.—*DEAR v. WESTERN ASSURANCE CO.* (1877), 41 U. C. R. 553.—**CAN.**

*Proof of.]—*Where the question in issue was whether pltf. had fraudulently set fire to a house in which he lived, evidence that he had given a bill of sale of his furniture, & subsequently insured it & claimed the insurance after the fire, is relevant being an act of pltf. tending to show a motive for the destruction of the house.—*WHELAN v. WETMORE* (1857) 8 N. B. R. (3 All.) 482.—**CAN.**

**l.** ———.]—*MANN & HOBSON v. WESTERN ASSURANCE CO.* (1859) 17 U. C. R. 190.—**CAN.**

**m.** ———.]—*FREY v. MUTUA FIRE INSURANCE CO.* (1878), 43 U. C. R. 102.—**CAN.**

**n.** ———.]—**If incendiarism i**



to S., & during the currency of the policy S.'s wife feloniously burnt the property insured. The co., not admitting any claim on the policy, brought an action against S. & his wife for the damage done by the act of the wife :—*Held* : (1) the action could not be maintained, as the insurer has no rights other than those of his assured, & can enforce those only in his name & after admitting the claim on the policy ; (2) the action for the felony if it were maintainable was maintainable without showing that the felon had been prosecuted.—*Semble* : a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy.—**MIDLAND INSURANCE CO. v. SMITH** (1881), 6 Q. B. D. 561 ; 50 L. J. Q. B. 329 ; 45 L. T. 411 ; 45 J. P. 699 ; 29 W. R. 850.

*Annotations* :—As to (1) *Consd.* **Weld-Blundell v. Stephens**, [1919] 1 K. B. 520 ; **Pailin v. Northern Employers' Mutual Indemnity Co.**, [1925] 2 K. B. 73. *Refd.* **Trinder, Anderson v. North Queensland Insc.** (1897), 66 L. J. Q. B. 802. *Generally*, *Mentd.* **Admiralty Comrs. v. S.S. Amerika**, [1917] A. C. 38.

**2645.** ——— **Claim by insurer for damages—Though claim under policy not admitted—Whether enforceable.**—**MIDLAND INSURANCE CO. v. SMITH**, No. 2644. *ante*.

**2646.** **Fire caused by negligence of insured.**—**SHAW v. ROBERDS**, No. 2670, *post*.

**2647.** ———.]—**REDMAN v. HAY** (1844), 7 L. T. 398 ; *subsequent proceedings*, 4 L. T. O. S. 118 ; (1845), 14 M. & W. 476.

#### SECT. 8.—RECTIFICATION OF POLICY.

**2648.** **Jurisdiction of court.**—**ALLOM v. PROPERTY INSURANCE CO.** (1911), *Times Commercial Supplement*, Feb. 10 ; cited in *Halsbury's Laws of England*, Vol. XVII., p. 404, n.

*See, generally*, Part I. : Sect. 10, *ante* ; **EQUITY**, Vol. XX., p. 289.

alleged & payment resisted on that ground, it is necessary to adduce such evidence as would justify a conviction on a criminal charge for the same offence ; more suspicions even though weighty are not enough.—**MAPLE LEAF MILLING CO., LTD. v. COLONIAL ASSURANCE CO.** (1915), 30 W. L. R. 567 ; 7 W. W. R. 1124 ; 36 D. L. R. 202 ; 27 Man. L. R. 621.—**CAN.**

**o.** ——— **Settlement before incendiarism shown—Recovery by insurers.**—Some months after settlement of claim, the co. having received information which satisfied them that a fraud had been committed upon them, & that the assured had himself feloniously caused the fire, instituted proceedings to compel repayment ; when the ct., being satisfied that the act as charged had been committed, made the decree as asked.—**QUEEN INSURANCE CO. v. DEVINNEY** (1878), 25 Gr. 394.—**CAN.**

**p.** ——— **On adjoining premises—By person other than insured—Direct cause of loss—Insurers not liable.**—**WALKER v. LONDON & PROVINCIAL INSURANCE CO.** (1888), 22 L. R. Ir. 572.—**IR.**

**2646 i.** **Fire caused by negligence of insured.**—If the premises be burned down through the negligence of assured, yet the policy of insurance is an indemnity against that negligence.—**NEVILLE & JACK v. EQUITABLE FIRE INSURANCE CO.** (1857), 4 Nfld. L. R. 120.—**NFLD.**

**2646 ii.** ———.]—That the loss was occasioned by the negligence of assured is no defence to an action on a policy of insurance against fire.—**JAMESON v. ROYAL INSURANCE CO.** (1873), 1 R. 7 C. L. 126.—**IR.**

#### PART III. SECT. 8.

**q.** **Policy not in accordance with**

*intention of parties.*—**WYLD v. LONDON & LIVERPOOL & GLOBE INSURANCE CO.** (1873), 33 U. C. R. 284 ; 21 Gr. 458 ; 23 Gr. 442.—**CAN.**

**r.** ———.]—A policy covering store but intended to cover goods was rectified.—**TROTTER v. WESTERN CANADA FIRE INSURANCE CO.** (1909), 9 W. L. R. 664.—**CAN.**

#### PART III. SECT. 9, SUB-SECT. 1.

**t.** **General rule.**—Any fraud, concealment, or misrepresentation, by a party effecting a policy of insurance, of a matter material to be known by the insurer, will avoid the policy.—**McFAUL v. MONTREAL INLAND INSURANCE CO.** (1845), 2 U. C. R. 59.—**CAN.**

**a.** ———.]—**KONOWSKY v. PACIFIC MARINE INSURANCE CO.**, [1923] 2 D. L. R. 1198 ; 2 W. W. R. 71.—**CAN.**

**b.** ———.]—**FINE v. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPN., LTD.** (1915), App. D. 213.—**S. AF.**

**c.** **What amounts to misstatement—Misstatement in original proposals.**—**WHITE v. AGRICULTURAL MUTUAL ASSURANCE CO.** (1871), 22 C. P. 98.—**CAN.**

**d.** ———.]—**SINCLAIR v. CANADIAN MUTUAL FIRE INSURANCE CO.** (1876), 40 U. C. R. 206.—**CAN.**

**e.** ———.]—**BROGAN v. MANUFACTURERS & MERCHANTS MUTUAL FIRE INSURANCE CO.** (1878), 29 C. P. 414.—**CAN.**

**f.** ———.]—**McGUGAN v. MANUFACTURERS & MERCHANTS MUTUAL FIRE INSURANCE CO.** (1879), 29 C. P. 494.—**CAN.**

—.]—**O'NEILL v. OTTAWA**

#### SECT. 9.—REPRESENTATIONS AND WARRANTIES.

##### SUB-SECT. 1.—MISREPRESENTATION AND CONCEALMENT.

**2649.** **What amounts to misstatement—Misstatement in original proposals—Notice of correction given to insurers' agent—Before cover note issued.**—Where a person in making a proposal to an insurance co. for an insurance against fire makes a *bonâ fide* mistake in his answers to the questions on the proposal form, but before the issue of a cover note draws the attention of the agent of the co. to the mistake & corrects it, it is the duty of the agent to convey to the co. the correct answer, & if he fails to do so the co. are not entitled to refuse to pay a claim under the cover note on the ground that there was a misstatement in the answers to the questions on the proposal form. A question on a fire insurance proposal form as to whether the proposer is or has been "insured in this or any other office" does not include all property ever occupied by the proposer, but only refers to the particular premises proposed to be insured, unless other premises are distinctly referred to. The question whether any other office has declined to "accept" or "renew" the proposer's insurance has no reference to a refusal to transfer to the proposer a policy issued to another person.—**GOLDING v. ROYAL LONDON AUXILIARY INSURANCE CO., LTD.** (1914), 30 T. L. R. 350.

*Annotation* :—*Refd.* **Taxman v. Union Assoc. Soc.** (1923), 39 T. L. R. 424.

**2650.** ——— **Partial disclosure of previous claims.**—Applt. sued resps. upon a policy issued by them insuring certain laundry premises against fire. A proposal form filled up by applt. when applying for the policy contained the following question. "Has proponent ever been a claimant on a fire insurance co. in respect of the property now proposed, or any other property ? If so, state when

**AGRICULTURAL INSURANCE CO.** (1879), 30 C. P. 151.—**CAN.**

**h.** ———.]—**BUTLER v. STANDARD FIRE INSURANCE CO.** (1879), 4 A. R. 391.—**CAN.**

**k.** ———.]—**BILLINGTON v. PROVINCIAL INSURANCE CO.** (1879), 3 S. C. R. 182.—**CAN.**

**l.** ———.]—**NICHOLSON v. PHOENIX INSURANCE CO.** (1880), 45 U. C. R. 359.—**CAN.**

**m.** ———.]—**GUARDIAN INSURANCE CO. v. CONNELLY** (1892), 20 S. C. R. 208.—**CAN.**

**n.** ———.]—A misleading & inaccurate description of the premises in an application for a fire insurance policy avoids the policy.—**DODGE v. WESTERN CANADA FIRE INSURANCE CO.** (1912), 20 W. L. R. 558 ; 1 W. W. R. 916 ; 2 W. W. R. 972 ; 4 D. L. R. 465 ; *reversd.* 2 W. W. R. 992 ; 6 D. L. R. 355 ; 5 Alta. L. R. 294.—**CAN.**

**aa.** ———.]—**ROYAL INSURANCE CO. v. COLEMAN** (1906), 26 N. Z. L. R. 526.—**N.Z.**

**bb.** ———.]—**WILLIAMS & CO. v. PHOENIX ASSURANCE CO.** (1898), 5 O. R. 142.—**S. AF.**

**2650 i.** ——— **Partial disclosure of previous claims.**—To the question "Have you ever had a fire loss or made a claim for fire loss upon an insurance co. ?" pltf. answered "Yes, May 13, 1903. N. Insurance Co." Defts. pleaded that this was a misstatement of fact :—*Held* : the plea was good since if defts. could show that pltf. had in fact had other fires the answer would amount to a misstatement.—**STIBBARD v. STANDARD FIRE & MARINE INSURANCE CO. OF NEW ZEALAND** (1905), 5 S. R. N. S. W. 473.—**AUS.**

**Sect. 9.—Representations and warranties: Sub-sect. 1.]**

& name of co." Applt.'s answer was "Yes. 1917. 'Ocean.'" That answer was literally true, as in 1917 he had claimed against the Ocean Insurance Co. in respect of the burning of a motor car, but in 1912 he had made a claim against another co. in respect of a similar loss. The proposal form stated that it was the basis of the policy, & that the particulars given by applt. were to be express warranties. The policy contained a condition that if there was any misrepresentation as to any fact material to be known in estimating the risk, resps. were not to be liable upon the policy:—*Held*: (1) the answer was untrue, since the question could not reasonably be read as being intended to have the limited scope which would render the answer true; (2) there was a breach of warranty, whether or not the misrepresentation was as to a material fact; & (3) applt. could not recover on the policy.—*CONDOGIANIS v. GUARDIAN ASSURANCE CO.*, [1921] 2 A. C. 125; 90 L. J. P. C. 168; 125 L. T. 610; 37 T. L. R. 685, P. C.

*Annotation*:—As to (2) & (3) *Refd.* *Paxman v. Union Assee. Soc.* (1923), 39 T. L. R. 424.

— **Misstatement by insurer's agent filling up proposal form.]—See Part I., Sect. 14, sub-sect. 4, ante.**

*Compare Nos. 2661, 2662, 2669–2671, post.*

**2651. What amounts to concealment—Omission to disclose facts known to insurer's agent.]—On a condition in a policy, that it should be void if the assured should "omit to communicate any matter material to be made known to the in-**

**surer":—Held**: this meant some matter, not only material, but also unknown to the insurers; & it did not apply to something which it might well be presumed was known to them or their agents.—*PIMM v. LEWIS* (1862), 2 F. & F. 778.

**Knowledge of agent as knowledge of insurer.]—See Part I., Sect. 14, sub-sect. 5, ante.**

**2652. Materiality of facts concealed or misstated—Fire in adjoining premises on day of proposals—Risk of fire breaking out again.]—A.**, abroad, having two warehouses, writes to this country to effect an insurance upon one of them only, without stating, as was the fact, that a house nearly adjoining it had been on fire on that evening, & that there was danger of the fire again breaking out; & sends his letter after the regular post time. The fire having broken out again on the day next but one following, & consumed A.'s warehouse:—*Held*: this was a material concealment, although A.'s letter was written without any fraudulent intention.—*BUFE v. TURNER* (1815), 6 Taunt. 338; 2 Marsh. 46; 128 E. R. 1065.

*Annotations*:—*Refd.* *Lindenau v. Desborough* (1828), 8 B. & C. 586; *Everett v. Desborough* (1829), 3 Moo. & P. 190; *Jones v. Provincial Insee.* (1857), 3 C. B. N. S. 65.

**2653. — Roofing material of premises insured—Buildings described as slate-roofed—One building roofed with tarred felt.]—A** fire insurance was effected in respect of certain property through an agent named D., who inspected the premises. One condition of the policy was, that any material misdescription of the property would render the policy void. The buildings were described as built of brick & slated, but it turned out that one

**2651 i. What amounts to concealment—Omission to disclose facts known to insurer's agent.]—Where an applt. for insurance in his printed form of application stated that he was the owner of the estate subject to a mtge. in favour of a building society for \$1,500, the facts being, that he only held a contract of purchase; that a portion of the purchase money remained unpaid; & that a mtge. for the amount mentioned had been agreed for, but not executed; of which facts the co., through their agent, was aware:—Held: the insurance was not avoided, it not being shown that such misstatement was intentional or material.—*LIDLAW v. LIVERPOOL & LONDON, ETC. INSURANCE CO.* (1867), 13 Gr. 377; *reversd.* 7 App. Cas. 96.—*CAN.***

**q. — Omission to disclose incumbrance.]—Pltf.** had not complied with a condition, which required him to declare whether there was or was not any incumbrance:—*Held*: he could not recover.—*MARKLE v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO.* (1869), 28 U. C. R. 525.—*CAN.*

**r. — —.]—DEAR v. WESTERN ASSURANCE CO.** (1877), 41 U. C. R. 553.—*CAN.*

**t. — —.]—PARKER v. AGRICULTURAL MUTUAL INSURANCE CO.** (1877), 28 C. P. 80.—*CAN.*

**a. — —.]—A mtgor. has a right to insure to the value of his property, without disclosing the incumbrance, unless stipulation in policy to the contrary.**—*CHATHAM (ROMAN CATHOLIC BP.) v. WESTERN ASSURANCE CO.* (1882), 22 N. B. R. 242.—*CAN.*

**b. — Facts disclosed to insurer's agent—Omitted from proposal form.]—NAUGHTER v. OTTAWA AGRICULTURAL INSURANCE CO.** (1878), 43 U. C. R. 121.—*CAN.*

**c. — —.]—KNISELEY v. BRITISH AMERICA ASSURANCE CO.** (1900), 32 O. R. 376.—*CAN.*

**d. — Omission to disclose interest.]**

—The fact that the vendor is not sole owner need not be stated in the policy, nor disclosed to the insurer.—*KEEFER v. PHOENIX INSURANCE CO.* (1901), 31 S. C. R. 144.—*CAN.*

**e. — —.]—GAINER & CO. v. ANCHOR FIRE & MARINE INSURANCE CO.** (1913), 23 W. L. R. 291; 9 D. L. R. 673; 3 W. W. R. 808.—*CAN.*

**f. — Effect of renewal of policy—Under altered circumstances.]—Where at the time of a new contract by way of renewal, no prior insurance is in force, the insurance is not avoided, although when the original contract was entered into prior insurance was in force, & this fact was not disclosed.**—*AGRICULTURAL SAVINGS & LOAN CO. v. LIVERPOOL & LONDON & GLOBE INSURANCE CO.* (1901), 21 C. L. T. 582; 32 O. R. 369; *affd.* 33 S. C. R. 94.—*CAN.*

**g. — —.]—GRUND v. NORWICH UNION FIRE INSURANCE SOCIETY, LTD.**, [1922] W. L. D. 146.—*S. AF.*

**h. — Indefinite verbal answer.]—If an insurance is effected orally & in reply to a question an indefinite answer is given by the person who is to be insured which the insurer accepts, the latter cannot afterwards claim that the insured has been guilty of non-disclosure of material facts.**—*GREGORY v. PALATINE INSURANCE CO.*, [1924] 3 D. L. R. 987.—*CAN.*

**k. — Omission of wife to disclose previous fire loss by husband.]—PROSSER v. OCEAN ACCIDENT & GUARANTEE CORPN.** (1910), 29 N. Z. L. R. 1157.—*N.Z.*

**l. — Whether limited to answers to questions.]—COLONIAL INDUSTRIES, LTD. v. PROVINCIAL INSURANCE CO., LTD.**, [1922] App. D. 33.—*S. AF.*

**m. — Answers limited to actual parties concerned.]—EHRIG & WEYER v. TRANSATLANTIC FIRE INSURANCE CO.** (1905), T. S. 557.—*S. AF.*

**n. Materiality of facts concealed or misstated—Previous fires.]—LONDON**

**& LANCASHIRE INSURANCE CO. v. HONEY** (1876), 8 V. L. R. 7.—*AUS.*

**o. — —.]—BURNSIDE v. MELBOURNE FIRE OFFICE, LTD.**, [1920] V. L. R. 56.—*AUS.*

**p. — —.]—WESTERN ASSURANCE CO. v. HARRISON** (1903), 33 S. C. R. 473.—*CAN.*

**aa. — —.]—Non-disclosure of a previous trivial fire some years previous to the making of the policies in other premises in another town, where the co. holding the risk continued to do so after payment of loss is not a fact material to the risk.**—*STRONG v. CROWN FIRE INSURANCE CO.* (1913), 23 O. W. R. 701; 4 O. W. N. 584; 10 D. L. R. 42; 28 O. L. R. 33; *affd.* 13 O. L. R. 686; 29 O. L. R. 33.—*CAN.*

**bb. — —.]—An untrue reply to a question as to whether there had been a prior destruction of property by fire of an applt. for fire insurance is material to the risk & precludes recovery upon the fire insurance policy based upon such reply.**—*WILTON v. OCCIDENTAL FIRE INSURANCE CO.*, [1917] 2 W. W. R. 787; 35 D. L. R. 267; 11 Alta. L. R. 581.—*CAN.*

**cc. — Fear of incendiarism.]—WATT v. UNION INSURANCE CO.** (1884), 5 N. S. W. L. R. (L.) 48.—*AUS.*

**dd. — —.]—CAMPBELL v. VICTORIA MUTUAL FIRE INSURANCE CO.** (1880), 45 U. C. R. 412.—*CAN.*

**ee. — —.]—GREET v. CITIZENS INSURANCE CO., GREET v. ROYAL INSURANCE CO.** (1880), 5 A. R. 596.—*CAN.*

**ff. — —.]—FINDLEY v. FIRE INSURANCE CO. OF NORTH AMERICA** (1894), 25 O. R. 515.—*CAN.*

**gg. — —.]—KNISELEY v. BRITISH AMERICA ASSURANCE CO.** (1900), 21 C. L. T. 117; 32 O. R. 376.—*CAN.*

— **].—The danger of incendiarism is a circumstance material to be made known to the co. in order**



of the buildings was not roofed with slate but with tarred felt. The co. alleged that D. was not their agent, but the agent of the insured; & that the misdescription rendered the policy void:—*Held*: the misdescription was immaterial, & not sufficient to vitiate the policy; but that if material, it was made by D., as the agent of the insurance co., & the insured were not responsible for it.—*Re* UNIVERSAL NON-TARIFF FIRE INSURANCE CO., *FORBES & CO.'S CLAIM* (1875), L. R. 19 Eq. 485; 44 L. J. Ch. 761; 39 J. P. 500; 23 W. R. 464.

**2654. — Nature of tenancy of assured—Tenancy at will.**—A tenant at will of premises insured machinery & trade fixtures with deft. co. The buildings were destroyed by fire & the machinery, etc., damaged. The landlord having determined pltf.'s tenancy, the co. elected to reinstate, & replaced the machinery on the premises when rebuilt. *Semble*: the fact that pltf. was only tenant at will was a material fact which ought to have been disclosed by pltf., as it might have made the exercise of the option to reinstate impossible.—*ANDERSON v. COMMERCIAL UNION ASSURANCE CO.* (1885), 34 W. R. 189; 1 T. L. R. 511, D. C.; *affd.*, 55 L. J. Q. B. 146, C. A.

**2655. — Refusal by another company to accept insured—Whether refusal to transfer policy included.**—*GOLDING v. ROYAL LONDON AUXILIARY INSURANCE CO., LTD.*, No. 2649, *ante*.

**2656. — Identity of risk—Business converted into limited company.**—*ARTHRUDE PRESS, LTD. v. EAGLE, STAR & BRITISH DOMINIONS INSURANCE CO.* (1924), 59 L. Jo. 529.

to enable them to judge of the risk, & if not disclosed to the co. the policy is avoided.—*GABEL v. HOWICK FARMERS MUTUAL FIRE INSURANCE CO.* (1917), 40 O. L. R. 158; 38 D. L. R. 139.—*CAN.*

*IMPERIAL PRESS-ING CO. v. BRITISH CROWN ASSURANCE CORPN., LTD.* (1913), 1 L. R. 41 Calc. 581.—*IND.*

**g. — Occupation & use.**—*HORDERN v. COMMERCIAL UNION ASSURANCE CO.* (1884), 5 N. S. W. L. R. (L.) 309; 1 N. S. W. W. N. 7, 30.—*AUS.*

*MCGIBBON v. IMPERIAL FIRE INSURANCE CO.* (1881), 14 N. S. R. (2 R. & G.) 6; 1 C. L. T. 192.—*CAN.*

**k. —**—A misrepresentation as to the person occupying the premises is of such a material fact as to avoid a policy of fire insurance.—*SPENCER v. LONDON & LANCASHIRE INSURANCE CO.* (1884), 5 N. L. R. 37.—*S. AF.*

**l. —**—*RICHARDS v. GUARDIAN ASSURANCE CO.* (1907), T. H. 24.—*S. AF.*

**m. — Nature of title & interest.**—Pltf. applied as if the property were his own, stating that it was occupied by himself & unincumbered, & he obtained a policy for two-thirds of the actual value. He was only a lessee for years of the land on which the buildings were erected:—*Held*: the policy was void.—*SHAW v. ST. LAWRENCE COUNTY MUTUAL INSURANCE CO.* (1853), 11 U. C. R. 73.—*CAN.*

**n. —**—*BROWN v. GORE DISTRICT MUTUAL INSURANCE CO.* (1853), 10 U. C. R. 353.—*CAN.*

**o. —**—*WALROTH v. ST. LAWRENCE COUNTY MUTUAL INSURANCE CO.* (1853), 10 U. C. R. 525.—*CAN.*

**p. —**—*BUTLER v. STANDARD FIRE INSURANCE CO.* (1879), 4 A. R. 391.—*CAN.*

**q. —**—*COMPTON v. MER-*

*CANTILE INSURANCE CO.* (1880), 27 Gr. 334.—*CAN.*

**r. —**—*HOWES v. DOMINION FIRE & MARINE INSURANCE CO.* (1883), 2 O. R. 89; 8 A. R. 644.—*CAN.*

**t. —**—*NORWICH UNION FIRE INSURANCE CO. v. LEBELL* (1899), 29 S. C. R. 470.—*CAN.*

**a. —**—*DANIELS v. ACADIA FIRE INSURANCE CO.* (1917), 51 N. S. R. 133; 35 D. L. R. 601.—*CAN.*

**b. —**—*STEYN v. MALMESBURY BOARD OF EXECUTORS & TRUST & ASSURANCE CO.*, [1921] C. P. D. 96.—*S. AF.*

**c. — Other insurances.**—The not communicating at the time of the proposal for an insurance, the fact that there was an insurance already effected with another co.:—*Held*: not to be such a wrongful concealment as to sustain a plea of fraud, avoiding the policy.—*MCDONELL v. BEACON FIRE & LIFE ASSURANCE CO.* (1857), 7 C. P. 308.—*CAN.*

**—**—*MOORE v. CITIZENS FIRE INSURANCE CO.* (1888), 14 A. R. 582.—*CAN.*

**e. —**—*BANK OF AUSTRALASIA v. NORTH GERMAN INSURANCE CO.* (1898), 17 N. Z. L. R. 387.—*N.Z.*

**aa. — Over-valuation.**—*DICKSON v. EQUITABLE ASSURANCE CO.* (1859), 18 U. C. R. 246.—*CAN.*

**—**—*CANN v. IMPERIAL FIRE INSURANCE CO.* (1875), 10 N. S. R. (1 R. & C.) 240.—*CAN.*

**cc. —**—Excessive valuation of the property destroyed does not avoid a policy, unless shown to have been excessive to the knowledge of the assured.—*PARSONS v. CITIZENS' INSURANCE CO.* (1879), 43 U. C. R. 261.—*CAN.*

**dd. —**—*MCGIBBON v. IMPERIAL FIRE INSURANCE CO.* (1881), 14 N. S. R. (2 R. & G.) 6; 1 C. L. T. 192.—*CAN.*

**2657. — Refusal by another company to renew policy.**—In Oct. 1909, claimant effected a fire insurance policy for £2,000 with the L. Co., renewable at Michaelmas 1910, & in Aug. 1910, with the object of getting an increased insurance for £1,600; this policy was taken to the Guardian Assurance Co. & a cover note for the £1,600 up to Michaelmas 1910 was issued. It was arranged that the Guardian should issue a policy for the whole £3,600 & on Sept. 21, 1910, the Guardian sent a statement showing the premium payable. At the side of this statement were the words "held covered" & underneath was the sum to be insured, £3,600, from Michaelmas 1910 to Michaelmas 1911 & the amount of the premium for the £1,600 up to Michaelmas 1910, & a note in print that "No insurance is in force until the premium is paid." On Sept. 27, 1910, claimant became aware that the L. Co. had refused to continue the policy for £2,000 beyond Michaelmas 1910, but this fact was not communicated to the Guardian, & on Sept. 28, the Guardian executed the policy for £3,600 from Michaelmas 1910 to Michaelmas 1911, & on the next day the premium was paid & the policy forwarded & indorsed upon it was the condition that any omission to state any material fact rendered the policy void. A fire having occurred & an arbitrator having found that the fact of the refusal of the L. Co. to renew the policy was a material fact which ought to have been communicated to the Guardian:—*Held*: the fact that the L. Co. had refused to continue the policy was a material fact; when this fact became known to claimant on Sept. 27, there was no

**ee. —**—*DOULL v. FIRE INSURANCE CO.* (1886), 18 N. S. R. (6 R. & G.) 511; 6 C. L. T. 541.—*CAN.*

**ff. —**—*MOORE v. CITIZENS FIRE INSURANCE CO.* (1888), 14 A. R. 582.—*CAN.*

**gg. — Incumbrances.**—Defts.' travelling agent obtained from pltf. his application, & in filling up the answers the question as to the existence of incumbrances was answered in the negative, when in fact the land on which one of the houses insured stood was mortgaged:—*Held*: this vitiated the policy, not only as to that house, but also as to another building standing on land not in the mtge., although separate sums were named in respect of each building.—*BLEAKLEY v. NIAGARA DISTRICT MUTUAL INSURANCE CO.* (1869), 16 Gr. 198.—*CAN.*

**hh. —**—*GORE DISTRICT MUTUAL FIRE INSURANCE CO. v. SAMO* (1878), 2 S. C. R. 411.—*CAN.*

**kk. —**—*PHILLIPS v. GRAND RIVER FARMERS' MUTUAL FIRE INSURANCE CO.* (1881), 46 U. C. R. 334.—*CAN.*

**ll. —**—*WILBY v. STANDARD INSURANCE CO.* (1883), 3 O. R. 115.—*CAN.*

**mm. —**—*GORING v. LONDON MUTUAL FIRE INSURANCE CO.* (1885), 10 O. R. 236.—*CAN.*

**nn. —**—*REDDICK v. SAUGEEN MUTUAL FIRE INSURANCE CO.* (1888), 15 A. R. 363.—*CAN.*

**oo. — Value & ownership.**—*KERR v. HASTINGS MUTUAL FIRE INSURANCE CO.* (1877), 41 U. C. R. 217.—*CAN.*

**pp. —**—*CANADIAN CREDIT MEN'S ASSURANCE v. STUYVESANT INSURANCE CO.* (1916), 26 Man. L. R. 226.—*CAN.*

**qq. — Adjoining premises.**—*BENSON v. OTTAWA AGRICULTURAL INSURANCE CO.* (1877), 42 U. C. R. 282.—*CAN.*

**rr. —**—*NAUGHTER v.*



**Sect. 9.—Representations and warranties: Sub-sects. 1 & 2, A.]**

concluded contract & it was still the duty of claimant to disclose such fact to the Guardian, & having omitted to do so, claimant was not entitled to treat the policy as a valid policy.—*Re YAGER & GUARDIAN ASSURANCE CO. (1912)*, 108 L. T. 38; *sub nom. YAGER v. GUARDIAN ASSURANCE CO., LTD.*, 29 T. L. R. 53; 6 B. W. C. C. N. 67, D. C.

*Annotation:—Refd. Allis Chalmers Co. v. Fidelity & Deposit Co. of Maryland (1913)*, 29 T. L. R. 506.

**2658. — Refusal relating to other property of insured.]—GOLDING v. ROYAL LONDON AUXILIARY INSURANCE CO., LTD.**, No. 2649, *ante*.

**2659. — Whether refusal to transfer policy included.]—GOLDING v. ROYAL LONDON AUXILIARY INSURANCE CO., LTD.**, No. 2649, *ante*.

**2660. — Place where insured lorry garaged.]—DAWSONS, LTD. v. BONNIN**, No. 2558, *ante*.

*See, also*, No. 2665, *post*.

**SUB-SECT. 2.—WARRANTIES.**

**A. In General.**

**2661. What amounts to warranty—Description of property—Mill described as of wrong class.]—**It is a first principle of the law of insurance that, when a thing is warranted to be of a particular nature or description, it must be exactly such as it is represented to be, otherwise the policy is void, & there is no contract. Therefore where a cotton & woollen mill was insured as being of one class, & turned out to have been of another class at the time:—*Held*: an action on such a policy could not be sustained.—*NEWCASTLE FIRE INSURANCE CO. v. MACMORRAN & CO. (1815)*, 3 Dow. 255; 3 E. R. 1057, H. L.

*Annotations:—Consd. Re Universal Non-Tariff Fire Insee., Forbes' Claim (1875)*, L. R. 19 Eq. 485; *Hambrough v. Mutual Life Insee. of New York (1895)*, 72 L. T. 140. *Apprvd. Condogianis v. Guardian Assce., [1921]* 2 A. C. 125. *Refd. Wells, Fargo v. Pacific Insee. (1872)*, 2 Asp. M. L. C. 111. *Mentd. Thomson v. Weems (1884)*, 9 App. Cas. 671; *Ellinger v. Mutual Life Insee. of New York, [1905]* 1 K. B. 31.

**2662. — Three storied house described as two storied.]—**By a policy executed in London, on Apr. 7, 1851, premises in California were in-

sured against fire for a year from Feb. 1, 1851. The premises were described in the policy as "a brick building used as a dwelling house & store (described in the paper attached to this policy)." The paper attached gave a minute description of a two storied house, with what purported to be a certificate that the description was accurate, signed on Oct. 30, 1850. The description was, in fact, accurate up to Mar. 1851; in which month the assured altered the house by adding a third story. This was unknown in London when the policy was signed. In May, 1851, the house, thus altered, was destroyed by fire. In an action on the policy, on a case stating the above facts:—*Held*: the description in the policy amounted to a warranty that the assured would not, during the term insured, voluntarily do anything to make the condition of the premises vary from that description, so as to increase the liability of the assurer: this warranty was broken; & consequently, plffs. could not recover.—*SILLEM v. THORNTON (1854)*, 3 E. & B. 868; 2 C. L. R. 1710; 23 L. J. Q. B. 362; 23 L. T. O. S. 187; 18 Jur. 748; 2 W. R. 524; 118 E. R. 1367.

*Annotations:—Apprvd. Stokes v. Cox (1856)*, 1 H. & N. 320. *Consd. Thompson v. Hopper (1858)*, E. B. & E. 1038. *Refd. Hurst v. Osborne (1856)*, 25 L. J. C. P. 209; *Stokes v. Cox (1856)*, 1 H. & N. 533; *Scott v. Legg (1877)*, 46 L. J. M. C. 267.

**2663. — Whether continuance of condition implied.]—**A policy of assurance against fire, in the description of the buildings, after stating that part of the lower story was used as a boiler house, added, "No steam engine employed on the premises. The steam from the said boiler being used for heating water & warming the shops. —N.B. The process of melting tallow by steam in the said boiler house & the use of two pipe stoves in the said building are hereby allowed." The rates of insurance were stated as common, hazardous, doubly hazardous & special risk. The seventh condition provided that if, after the insurance, the risk should be increased by the erection of any stove, etc., or by any other alteration of circumstances, & the particulars were not indorsed on the policy by the secretary, & a higher premium paid if required, the insurance should be of no force. The assured paid as for a special risk. Some time after the policy had been effected

OTTAWA AGRICULTURAL INSURANCE CO. (1878), 43 U. C. R. 121.—CAN.

—.]—*QUINLAN v. UNION FIRE INSURANCE CO. (1883)*, 8 A. R. 376.—CAN.

**f. — Question for jury.]—PERKINS v. EQUITABLE INSURANCE CO. (1860), 9 N. B. R. (4 All.) 562.—CAN.**

**g. — Number of stores.]—**One of the pleas set up that the insured stated in the application that there was only one stove on the premises whereas there were two:—*Held*: this was an untrue statement which avoided the policy.—*O'NEILL v. OTTAWA AGRICULTURAL INSURANCE CO. (1879)*, 30 C. P. 151.—CAN.

**h. — Building standing on leased ground.]—**One of the conditions of a policy of insurance was that if the building insured stood upon leased ground, & it was not so represented to the co. & expressed in the policy, the policy should be void:—*Held*: a breach of this condition rendered the policy void, even though in the co.'s printed forms of application signed by the assured no question was asked as to this.—*ROSS v. CITIZENS' INSURANCE CO. (1879)*, 19 N. B. R. 120.—CAN.

— *Construction of plea.]—v. PHOENIX INSURANCE CO. (1897)*, 34 N. B. R. 223.—CAN.

**i. — Onus of proof on insurers.]—PATTERSON v. OXFORD FARMERS MUTUAL FIRE INSURANCE CO. (1912), 23 O. W. R. 122; 4 O. W. N. 140; 7 D. L. R. 217.—CAN.**

**m. — Gasoline stored adjacent to premises.]—EVANGELINE FRUIT CO. v. PROV. FIRE INSURANCE CO. OF CANADA (1915), 51 S. C. R. 474.—CAN.**

**Misdescription of property.]—**A misdescription of property, insured against fire, where the misdescription is not material to the contract & is not to the prejudice of the insurer, cannot be relied on as a defence to an action for recovery of the insurance money.—*KONOWSKY v. PACIFIC MARINE INSURANCE CO., [1923]* 2 D. L. R. 1198; 2 W. W. R. 71; *affd. (1924)*, 2 D. L. R. 1029; 37 Man. L. R. 149.—CAN.

**o. — Sale for taxes—Right to redeem.]—BARCHA v. ATLAS ASSURANCE CO., [1924] 2 D. L. R. 836; 2 W. W. R. 467.—CAN.**

**p. — Suspicion as to honesty of occupant.]—MALCHER & MALCOMES v. KING WILLIAM'S TOWN FIRE & MARINE INSURANCE & TRUST CO. (1883), 3 E. D. C. 271.—S. AF.**

**q. — Fabric of building.]—GORDON v. TRANSATLANTIC FIRE IN-**

SURANCE CO. (1905), T. H. 146.—S. AF.

**r. — Previous proposal.]—MORRIS v. NORTHERN ASSURANCE CO., LTD., [1911] C. P. D. 293.—S. AF.**

**t. Truth of statement — Question for jury.]—MEAGHER v. LONDON & LANCASHIRE FIRE INSURANCE CO. (1881), 7 V. L. R. 390.—AUS.**

**a. Misstatement by original insurer—Whether assignee affected.]—CHAPMAN v. GORE DISTRICT MUTUAL INSURANCE CO. (1876), 26 C. P. 89.—CAN.**

**b. Fraud of mortgagor — Defence to action by mortgagee.]—OMNIUM SECURITIES CO. v. CANADA FIRE MUTUAL INSURANCE CO. (1882), 1 O. R. 494.—CAN.**

**c. Bonâ fide acceptance of expert's report.]—MACKAY, LTD. & ATKINSON LUMBER CO. v. BRITISH AMERICA ASSOCN. CO., [1923] 2 D. L. R. 506; [1923] S. C. R. 335.—CAN.**

**PART III. SECT. 9, SUB-SECT. 2.—A.**

**d. What amounts to warranty — Description of property.]—DINGEE v. AGRICULTURAL INSURANCE CO. (1875), 16 N. B. R. (3 Pug.) 80.—CAN.**

**ee. — ]—HAMMOND v. CITIZENS' INSURANCE CO. OF CANADA (1886), 26 N. B. R. 371.—CAN.**

the assured erected a steam engine on the premises & supplied it with steam from the boiler, but gave no notice of it to the insurance office. It was found as a fact, that the risk to the office was not increased by the erection of the steam engine. The premises were destroyed by an accidental fire, not attributable to the use of the steam engine:—*Held*: taking the policy together, there was no implied warranty that the premises should continue in the state in which they were described as being at the time when the policy was effected; & the alteration of the premises by the erection of the steam engine did not avoid the policy, though no notice had been given to the office, as it had not increased the risk.—*STOKES v. COX* (1856), 1 H. & N. 533; 26 L. J. Ex. 113; 28 L. T. O. S. 161; 3 Jur. N. S. 45; 5 W. R. 89; 156 E. R. 1313, Ex. Ch.

*Annotations*:—*Refd.* *Wheulton v. Hardisty* (1858), 8 E. & B. 285; *Baxendale v. Harvey* (1859), 4 H. & N. 445. *Mentd.* *Liverpool Borough Bank v. Eccles* (1859), 4 H. & N. 139; *Johnson v. Raylton* (1881), 7 Q. B. D. 438.

**2664.** — — — — — ]—The renewal of a fire policy is impliedly made on the basis that the statements in the original proposal are still accurate. On Nov. 8, 1915, a motor car was insured for its full value on a proposal stating the present value at £250. The policy was renewed in Nov. 1916, 1917 & 1918, & the car was destroyed by fire on June 17, 1919, at which date the arbitrator found it was worth £400, & stated a special case for the ct. to determine the insurer's liability:—*Held*: if the increase in value had wholly accrued since the date of the last renewal, the insured was entitled to recover £100, but if it had partly accrued before that date he could only recover £250, & the case must accordingly go back to the arbitrator with this intimation.—*Re WILSON & SCOTTISH INSURANCE CORPN.*, [1920] 2 Ch. 28; 89 L. J. Ch. 329; 123 L. T. 404; 64 Sol. Jo. 514; *sub nom.* *WILSON v. SCOTTISH INSURANCE CORPN., LTD.*, 36 T. L. R. 545.

*See, also*, No. 2670, *post*.

**2665.** — — — — — *Statement as to locality of property.* ]—A time policy against fire was effected on a steamship. The policy described it as then "lying in the V. docks," but gave it "liberty to go into dry dock, & light the boiler fires once or twice during the currency of this policy." The only dry dock into which the ship could go was L.'s dock, at some distance up the river. To go there it was necessary to remove the paddlewheels; they were removed in the V. docks, & the ship was then towed up to L.'s dock. The necessary repairs there having been completed, the ship was brought out & moored in the river, preparatory to replacing the paddlewheels. This operation could have been perfectly performed in the V. docks, but it was found that in such case it was customary, as the more economical course, to replace the paddlewheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt:—*Held*: the policy covered the ship while in the V. docks, & while passing from them to the dry dock, & while directly returning from the dry dock to the V. docks; but did not cover the vessel while moored in the river for a collateral purpose.

An insurance against fire necessarily has regard to the locality of the subject-matter of the policy (*LORD CHELMSFORD*).

**2670 i.** — — — — — *As to user of premises.]* —*HOWES v. DOMINION FIRE & MARINE INSURANCE CO.* (1883), 8 A. R. CAN.

**f.** — — — — — *Statement as to incum-*

*brances.]*—*MARSHALL v. TIMES FIRE INSURANCE CO.* (1860), 9 N. B. R. (4 All.) 618.—CAN.

**g.** — — — — — *As to occupation of pre-*  
*mises.]*—*KUNTZ v. NIAGARA DISTRICT*

*FIRE INSURANCE CO.* (1866), 16 C. P. 573.—CAN.

**h.** — — — — — ]—*REDDICK v. SAUGEN MUTUAL FIRE INSURANCE CO.* (1888), 15 A. R. 363.—CAN.

[The desire to save expense was] no reason at all for imposing upon the underwriters, by implication, an undertaking to accept a risk different & more expensive than that to which they had expressly agreed to be liable (*LORD CHELMSFORD*).—*PEARSON v. COMMERCIAL UNION ASSURANCE CO.* (1876), 1 App. Cas. 498; 45 L. J. Q. B. 761; 35 L. T. 445; 24 W. R. 951; 3 Asp. M. L. C. 275, H. L.

*Annotations*:—*Consd.* *Wingate v. Foster* (1878), 3 Q. B. D. 582. *Refd.* *Mountain v. Whittle*, [1921] 1 A. C. 615.

**2666.** — — — — — ]—*DAWSONS, LTD. v. BONNIN*, No. 2553, *ante*.

**2667.** — — — — — *Right of insured to move & restore property.]*—*PEARSON v. COMMERCIAL UNION ASSURANCE CO.*, No. 2665, *ante*.

**2668.** — — — — — *What amounts to.]*—Where a contract of fire insurance is made by one person on behalf of another without authority, it cannot be ratified by the party on whose behalf it is made after & with knowledge of the loss of the thing insured.

*Pltfs.* insured a pianoforte factory, situated at New Southgate at Lloyd's. The insurance was effected through a bank manager, who subsequently moved to Bank House, Newington Green & notified his change of address to the insurance broker. In the course of negotiations for a fresh policy, the insurance broker made out the following slip "insured on account of . . . on building (pianoforte factory). Grover & Grover Limited, The Bank House, Newington Green, N," which was duly initialled:—*Held*: the underwriters were entitled to assume that the factory which was the subject of the insurance was situated at the place mentioned on the slip.

The slip must bear in its ordinary sense a description not only of the assured, & the amount insured, but also the subject-matter, the building insured (*HAMILTON, J.*).—*GROVER & GROVER, LTD. v. MATHEWS*, [1910] 2 K. B. 401; 79 L. J. K. B. 1025; 102 L. T. 650; 26 T. L. R. 411; 15 Com. Cas. 249.

**2669.** — — — — — *Statement as to amount of existing insurance.]*—Underwriters at Lloyd's subscribed a fire policy on *pltfs.*' stock-in-trade. The policy contained the following clause:—"Warranted same gross rate, terms & conditions as, & to follow, the British Law, which co. has £1,750 on the block of brick buildings in which the risk is a portion of the same." The buildings were not insured with the British Law Co. for £1,750, but for £1,350. During the currency of the policy some of *pltfs.*' goods were destroyed by fire:—*Held*: the statement that the co. had £1,750 on the buildings was a warranty, the performance of which was a condition precedent to the liability of the underwriters on the policy, & there having been a breach of the warranty, the underwriters were not liable to pay a loss.

The ordinary rule for ascertaining whether a statement is a condition or a mere representation is to ascertain whether or not the statement is material to the contract about to be entered into.—*BANCROFT v. HEATH* (1901), 17 T. L. R. 425; 6 Com. Cas. 137, C. A.

*See, generally*, Part I., Sect. 7, sub-sect. 2, *ante*.

— *Whether necessarily material.]* — *See* Nos. 2650, 2661, *ante*.

**2670.** — — — — — *As to user of premises.]*—An insurance against fire was effected on a granary with a



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kiln for drying corn attached, & the third condition indorsed on the policy stated, that unless the trades carried on in the insured premises were accurately described, & if a kiln or any process of fire heat were used & not noticed in the policy, the policy should be void; & the sixth condition stated that if the risk to which the insured premises were exposed should be by any means increased, notice should be given to the office, & allowed by indorsement on the policy, otherwise the insurance to be void. A vessel laden with a cargo of bark having sunk near the premises of the insured, he allowed the bark to be dried at his kiln, gratis, & in consequence of the fire at the kiln during this process, the premises were burnt down. It was found by the jury, that the trade of drying bark is more dangerous than that of drying corn:—

**Held:** (1) the user of the kiln for a different purpose than that intended at the time when the policy was made, was not an inaccurate description within the third condition; (2) this gratuitous use of the kiln by a third person, was not such an alteration of the business & increase of the risk as required to be notified to the office within the sixth condition; (3) there was no warranty that nothing but corn should be dried in the kiln; (4) there was no negligence on the part of the insured, which would vacate the policy.—**SHAW v. ROBERDS** (1837), 6 Ad. & El. 75; 1 Nev. & P. K. B. 279; Will. Woll. & Dav. 94; 6 L. J. K. B. 106; 1 Jur. 6; 112 E. R. 29.

**Annotations:**—As to (1) **Consd.** *Pim v. Reid* (1843), 6 Man. & G. 1; *Sillem v. Thornton* (1854), 3 E. & B. 868. As to (2) **Consd.** *Glen v. Lewis* (1853), 8 Exch. 607; *Sillem v. Thornton* (1854), 3 E. & B. 868. **Refd.** *Barrett v. Jermy* (1849), 3 Exch. 535. As to (3) **Refd.** *Sillem v. Thornton* (1854), 3 E. & B. 868. As to (4) **Refd.** *Benham v. United Guaranty & Life Assce.* (1852), 7 Exch. 744.

**2671.** ———.]—A policy of insurance was made subject, amongst others, to the following condition: "In the insurance of goods, wares, or merchandise, the building or place in which the same are deposited is to be described, the quality & description of such goods, also whether any hazardous trade is carried on or any hazardous

k. ———.]—**MORIN v. ANGLO-CANADIAN FIRE INSURANCE CO.** (1910), 13 W. L. R. 667.—**CAN.**

l. ———.]—**Statement as to value of building.**—Pltf. falsely represented that the value of the dwelling-house insured was \$2,000, whereas it was of a much smaller value:—**Held:** the representation as to the value was not a warranty, but a statement of matter of opinion, a mistake in which, in the absence of fraud, would not avoid the policy.—**REDFORD v. MUTUAL FIRE INSURANCE CO. OF CLINTON** (1876), 38 U. C. R. 538.—**CAN.**

m. ———.]—**Statement as to keeping watchman.**—**WHITLAW v. PHOENIX INSURANCE CO.** (1877), 28 C. P. 53.—**CAN.**

n. ———.]—**WORKSWICK v. CANADA FIRE & MARINE INSURANCE CO.** (1879), 3 A. R. 487.—**CAN.**

o. ———.]—**Statement as to danger of incendiarism.**—To a question asked of pltf., on his application for insurance, whether there was any incendiary danger either threatened or apprehended the answer was in the negative, but the evidence showed the contrary in both respects. The contract of insurance made the answer a warranty: **Held:** he could not recover.—**HERBERT v. MERCANTILE FIRE INSURANCE CO.** (1878), 43 U. C. R. 384.—**CAN.**

p. ———.]—**Statement as to refusal of risk.**—In a form of application for fire insurance, the question was asked: "Has this risk been refused by any

articles deposited therein; &, if any person or persons shall insure his or their buildings or goods, & shall cause the same to be described otherwise than as they really are, to the prejudice of the co., or shall misrepresent or omit to communicate any circumstance which is material to be made known to the co. in order to enable them to judge of the risk they have undertaken or are required to undertake, such insurance shall be of no force":—**Held:** this condition applied only to misrepresentations or omissions to communicate circumstances existing at the time of effecting the policy; & the insurance was not avoided by the carrying on a more hazardous trade upon the premises, or the placing hazardous goods thereon, pending the current year of the insurance.—**PIM v. REID** (1843), 6 Man. & G. 1; 6 Scott, N. R. 982; 12 L. J. C. P. 299; 1 L. T. O. S. 230; 134 E. R. 784.

**Annotations:**—**Consd.** *Sillem v. Thornton* (1854), 3 E. & B. 868. **Refd.** *Barrett v. Jermy* (1849), 3 Exch. 535; *Re Wilson & Scottish Insce. Corpn.*, [1920] 2 Ch. 28. **Mentd.** *Carruthers v. West* (1848), 11 L. T. O. S. 246.

**2672.** ———.]—**HALL v. STAR FIRE INSURANCE CO.** (1850), 14 L. T. O. S. 135, 446.

**The proposal as basis of contract.**—See Sect. 1, sub-sect. 4, *ante*.

**2673. Necessity for compliance.**—**NEWCASTLE FIRE INSURANCE CO. v. MACMORRAN & CO.**, No. 2661, *ante*.

**2674.** ———.]—Deft. & other underwriters subscribed a fire policy, which contained the following clause: "Warranted to be on same rate, terms, & identical interest as U. Insurance Co. £800 & G. Insurance Co. £700." In the policy of one of the two cos. the premium & also the interest insured differed from those in deft.'s policy:—**Held:** the warranty must be taken to be a condition precedent; the facts showed that there had been a breach of such warranty; & the policy was consequently void, & deft. not liable.—**BARNARD v. FABER**, [1893] 1 Q. B. 340; 62 L. J. Q. B. 159; 68 L. T. 179; 41 W. R. 193; 9 T. L. R. 160; 4 R. 201, C. A.

**Annotations:**—**Apld.** *Hambrough v. Mutual Life Insce. of New York* (1895), 72 L. T. 140; *Ellinger v. Mutual Life Insce. of New York*, [1905] 1 K. B. 31.

other co., or has any co. cancelled a policy or receipt on it?":—**Held:** the answer to the question was clearly a warranty, having reference as it had to the property to be insured.—**STOTT v. LONDON & LANCASHIRE FIRE INSURANCE CO.** (1891), 21 O. R. 312.—**CAN.**

q. ———.]—**JOHN v. NORTH BRITISH & MERCANTILE INSURANCE CO.** (1902), 19 S. C. 414; 12 C. T. R. 771.—**CAN.**

r. ———.]—**Statement as to value of goods.**—**COPE & TAYLOR v. SCOTTISH UNION & NATIONAL INSURANCE CO.** (1897), 5 B. C. R. 329.—**CAN.**

t. ———.]—**Effect of variation of statutory conditions.**—**MENUTT v. WESTERN ASSURANCE CO.**, (1902) 40 N. S. R. 375.—**CAN.**

**2673 i. Necessity for compliance.**—Where by a policy the insured agreed to keep twelve pails full of water on each flat of the building during the continuance of the policy, & he neglected to do so, but it appeared that the loss was not in any way affected by his default:—**Held:** he could not recover.—**GARRETT v. PROVINCIAL INSURANCE CO.** (1860), 20 U. C. R. 200.—**CAN.**

**2673 ii.** ———.]—**ARNOLD v. BRITISH** (1917),

**2673 iii.** ———.]—A policy insured certain "agricultural machines" then being in a specified place, & provided

that, in case of their removal from that place without assent, the risk should cease; in an action on the policy for the loss by fire of the identical machines, it appeared that they were not, at the time of the fire, in the place specified:—**Held:** the contract rendered the place material.—**GORMAN v. HAND IN HAND INSURANCE CO.** (1877), 1 R. 11 C. L. 224.—**IR.**

**2673 iv.** ———.]—Strict observance of the terms of a warranty is a condition precedent to liability upon a fire insurance policy.—**LEWIS, LTD. v. NORWICH UNION FIRE INSURANCE CO., LTD.** (1916), App. D. 509.—**S. AF.**

a. **Waiver—Knowledge of insurer.**—A policy of fire insurance contained the following clause: "It is warranted by the assured in accepting this policy that a clear space of 300 feet shall be maintained between the lumber hereby insured & any standing wood, brush, or forest, any steam or water-power, saw-mill, planing-mill, or other special hazard, & that no railway passes through the lot on which said lumber is piled or within 200 feet":—**Held:** the insured was not relieved from this warranty by the fact that the insurance co. were aware at the time of accepting the risk & issuing the policy that a railway was under construction within 100 feet of the lumber yard of the insured, & upon which construction engines were being employed.—**GUIMOND v. FIDELITY-**



**2675.** —.]—**PAXMAN v. UNION ASSURANCE SOCIETY, LTD.,** No. 2555, *ante*.

*B. Particular Warranties.*

**2676. Construction—“No fire kept in premises & no hazardous goods deposited”—Casual keeping of fire.]—**In a policy of insurance on premises of a certain description, “where no fire is kept, & no hazardous goods are deposited” these words must be understood of the habitual use of fire & deposit of hazardous goods. Where, therefore the loss on such a policy happened in consequence of the making a fire & bringing a tar barrel on the premises for the purpose of repairing them:—*Held*: the insured was entitled to recover.—**DOBSON v. SOTHEY** (1827), Mood. & M. 90.

*Annotations:—Appld. Shaw v. Robberds* (1837), 6 Ad. & El. 75. *Consd. Sillem v. Thornton* (1854), 3 E. & B. 868. *Refd. Glen v. Lewis* (1853), 8 Exch. 607.

**2677.** — **Description of premises—Casual user for different purpose.]—SHAW v. ROBBERDS,** No. 2670, *ante*.

**2678.** — **Use of fire heat—Experiment with steam engine—Not in regular course of business.]—**A declaration on a fire policy, made between pltf. & an insurance co., stated the proposals of insurance thus: “Class 4. Special hazardous. Coopers, etc., & any other risks of more than ordinary hazard by reason of any steam engine, stove, kiln, furnace, oven, or other fire heat, used in the process of any manufactory,” etc. The conditions of insurance were stated to be, first, that if in the buildings insured shall be used any steam engine, stove, etc., or any description of fire heat to be carried on therein, the same must be noticed & allowed in the policy; & in case of any circumstance happening after an insurance has been effected, whereby the risk shall be increased, the insured is to give notice to the co., & the same must, previous to a loss, be allowed by indorsement on the policy, otherwise the policy is void; fourthly, in case of any alteration being made in a building insured, or in case of any steam engine, stove, etc. being introduced, notice thereof must be given, & every such alteration must be allowed by indorsement on the policy, & any further premium which the alteration may occasion must be paid; & unless such notice be duly given, & such premium paid, no benefit will arise to the insured in case of loss. Pltf., who was a cabinet maker, built in the insured premises a permanent erection, consisting of a furnace or boiler, connected with a small steam engine, neither of which was comprised in the original insurance, or allowed by indorsement on the policy. The steam engine & boiler were used in a heated state for the purpose of turning a lathe, not in the course of pltf.’s business, but in order to ascertain by experiment whether it would answer his purpose to use it in his business. Pltf.’s stock & premises were subse-

quently consumed by fire:—*Held*: the simple introduction of a steam engine into the premises, without its having fire heat attached to it, would not affect the policy, but it would be otherwise if fire heat were put to it; it made no difference whether the steam engine was used on trial, with the intention of ascertaining whether it would succeed or not, or as an approved means of carrying on pltf.’s business; nor did it make any difference whether it was used for a longer or a shorter time; & the assured was not entitled to recover.—**GLEN v. LEWIS** (1853), 8 Exch. 607; 1 C. L. R. 187; 22 L. J. Ex. 228; 21 L. T. O. S. 115; 17 Jur. 842; 155 E. R. 1494.

**2679.** — **Stove or apparatus for producing heat to be specified—Steam engine specified in policy adapted for additional work.]—**Pltfs. had effected, with the Norwich Union Fire Insurance Society, a policy of insurance, which contained, amongst others, the following condition:—“Every policy issued by this Society will be void, unless the nature & material structure of the buildings & property insured, & of all buildings which contain any part of the property insured, be fully & accurately described in such policy, & unless the trades carried on in all such buildings be correctly shown; & unless it is stated in such policy whether any hazardous goods are deposited in any such buildings; & whether there be any stove or apparatus for producing heat (other than common fire places in private houses) used or employed in such buildings, or in any building, yard, or other place adjoining or near to the property insured, & belonging to or occupied by the party insured; & if there be any building of a hazardous nature or structure, or in which hazardous trades are carried on or hazardous goods deposited, belonging to or occupied by the party insured, adjoining or near to the property insured, the same must also be specified in the policy, or it will be void.” Pltfs., who were carriers, in 1843, erected on the premises insured a steam engine which they used for hoisting goods. This steam engine was specified in the policy. Pltfs. in 1844 applied the steam engine to grinding provender for their horses. They attached to it a horizontal shaft, which was carried through the floor to an upper room where they erected winnowing & grinding machines. The policy was renewed in 1857. The Society had no knowledge of the erection of the additional machinery or that the steam engine was used for grinding. The premises having been destroyed by fire:—*Held*: the alteration did not avoid the policy, the jury having found that there was no increase of risk.—**BAXENDALE v. HARVEY** (1859), 4 H. & N. 445; 28 L. J. Ex. 236; 33 L. T. O. S. 110; 7 W. R. 494; 157 E. R. 913.

**2680.** — **Mill “worked by day only”—Engine kept running by night.]—**(1) In a policy of insurance against fire on certain cotton mills, mill-

**PHENIX INSURANCE CO. OF NEW YORK** (1912), 10 E. L. R. 562; 2 D. L. R. 654; 41 N. B. R. 145; *affd.* 9 D. L. R. 463.—CAN.

**b.** —.]—**HOPKINS v. MANUFACTURERS & MERCHANTS MUTUAL FIRE INSURANCE CO.** (1878), 43 U. C. R. 254.—CAN.

**PART III. SECT. 9, SUB-SECT. 2.—B.**

**c. Construction — Notice if “insured elsewhere”—Insurance by different party.]—****DONALDSON v. MANCHESTER INSURANCE CO.** (1836), 14 Sh. (Ct. of Sess.) 601; 11 Fac. Coll. 519.—SCOT.

**d.** — **Disclosure of surrounding buildings.]—****WILSON v. STANDARD FIRE**

**INSURANCE CO.** (1878), 29 C. P. 308.—CAN.

**e.** — **Statutory condition—Change of occupation or use.]—****HOWES v. DOMINION FIRE & MARINE INSURANCE CO.** (1883), 8 A. R. 644.—CAN.

**f.** — **Keeping small quantity of gasoline.]—****PATTERSON v. CENTRAL CANADA INSURANCE CO.** (1910), 15 W. L. R. 123; *affd.* (1911), 16 W. L. R. 647.—CAN.

**g.** — **Precautions against bush hazard.]—**To a policy of fire insurance on sawn lumber there was added the following typewritten clause: “It is understood & agreed that this insurance also covers loss or damage arising from or traceable to prairie fires, it

being warranted by the assured that the several locations named therein in which lumber are piled shall be entirely surrounded by ploughed ground & in no way exposed to bush hazard:”—*Held*: the warranty was restricted in its application to the risk from prairie fire & could not be regarded as part of the description of the property for the general purposes of the policy.—**ST. PAUL LUMBER CO. v. BRITISH CROWN ASSURANCE CORPN., LTD.**, [1923] 2 D. L. R. 1165; [1923] S. C. R. 515; 2 W. W. R. 690; *reversg.*, 63 D. L. R. 386; 18 Alta. L. R. 242; *reversg.*, 32 D. L. R. 587.—CAN.

**h.** — **“Complete set of books.”]**—A warranty in a policy of fire insurance to keep a complete set of books

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wrights' work including standing & going gear therein, engine house adjoining & the steam engine therein, etc., it was recited that the "buildings were brick-built & slated; warmed exclusively by steam, lighted by gas, etc., worked by the steam engine above mentioned; in the tenure of one firm only, standing apart from all other mills, & 'worked by day only':—*Held*: the words "worked by day only," referred to the mill only, & not to the steam engine or any part of the gear; & it was no breach of the policy that the steam engine was kept going by night, & that some parts of the machinery were turned by it, the cotton mill not being worked except by day only.

(2) One of the conditions indorsed on the policy provided, "That every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, was to be specially indorsed on the policy, so that the risk might be fairly understood; if not so expressed, or if any misrepresentation should be given, etc., or if, after the insurance should be effected, the risk should be increased by the erection of any stove, the carrying on any hazardous trade, operation or process, or hazardous communication, the insured should not be entitled to any benefit under the policy." In an action of covenant on this policy by the assured, defts. pleaded that, "after the making of the policy the steam engine, in the said policy of assurance mentioned, was worked by night & not by day only, whereby, the risk in the said policy of assurance was increased":—*Held*: the plea was bad & pltf. would be entitled to judgment.—*WHITEHEAD v. PRICE* (1835), 2 Cr. M. & R. 447; 1 Gale, 151; 5 Tyr. 825; 150 E. R. 193.

*Annotation*:—As to (1) *Folld. Mayall v. Mitford* (1837), 6 Ad. & El. 670.

**2681.** ———. ———.]—(1) A policy of insurance against fire of certain cotton mills worked by steam, contained a warranty that the mills should work by day only:—*Held*: the warranty meant that the ordinary manufacture should be carried on by day only, & therefore the working of the engine alone by night for the purpose of communicating power to some machinery in a neighbouring building was no breach of the warranty.

(2) Plea, to a declaration on the policy, that the steam engine & certain shafts being parts of the

requires that the insured shall keep such books as will show all the transactions of his business, though it is not necessary that the books should be elaborate & contain every detail.—*LE RICHE v. ATLAS INSURANCE CO.* (1913), C. P. D. 697.—S. AF.

**k.** ———.]—*LEWIS, LTD. v. NORWICH UNION FIRE INSURANCE CO., LTD.*, [1916] App. D. 509.—S. AF.

**l.** ———.]—*NORWICH UNION FIRE INSURANCE SOCIETY, LTD. v. SOUTH AFRICAN TOILET REQUISITE CO., LTD.*, [1924] App. D. 212.—S. AF.

**m.** ——— *Contents of stack.*—*ZEKMAN v. ROYAL EXCHANGE ASSURANCE*, [1919] C. P. D. 63.—S. AF.

**PART III. SECT. 9, SUB-SECT. 2.—C.**

**n.** *What amounts to breach—Alteration of premises—Communication with adjoining premises.*—*McKENZIE v. VANSICKLES* (1859), 17 U. C. R. 226.—CAN.

**o.** ——— *Erection of new*

*chimney.*—A condition was, "if the risk shall be increased or if the buildings shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void." After insurance alterations were made in the premises insured, consisting of the erection of a new chimney, slightly increasing, if considered as an isolated act, but to a great extent diminishing the risk:—*Held*: the risk on the whole was not increased & verdict for assured.—*DATE v. GORE DISTRICT MUTUAL INSURANCE CO.* (1865), 15 C. P. 175.—CAN.

**p.** ——— *Before delivery of policy.*—*FOURDRINIER v. HARTFORD FIRE INSURANCE CO.* (1865), 15 C. P. 403.—CAN.

**q.** ——— *Where landlord insured.*—Defts. pleaded that a co. had, before the policy, leased the property to L., who had covenanted to insure & keep insured, & that L., as lessee, made additions to the buildings which increased the risk, & that such

mill, had worked by night & not by day only, is bad in arrest of judgment as there might be a working of parts of the mills, & yet no working of the mills within the meaning of the warranty.—*MAYALL v. MITFORD* (1837), 6 Ad. & El. 670; 1 Nev. & P. K. B. 732; Will. Woll. & Dav. 310; 112 E. R. 258.

**2682.** ——— *"Steam engine"—Engine without fire.*—*GLEN v. LEWIS*, No. 2678, *ante*.

**2683.** ——— *Notice if "insured elsewhere"—Insurance for different risk.*—*AUSTRALIAN AGRICULTURAL CO. v. SAUNDERS*, No. 2628, *ante*.

**2684.** ——— *"Warranted highest rate."*—Pltfs. effected a policy against fire with deft. on "buildings & contents" at a premium of 2s. 6d. per cent. The policy was "warranted same premium & conditions as the Union Assurance Society . . . & to follow their settlements in case of loss, identical interest. Warranted highest rate." Pltfs. had already insured the same subject-matter with the Westminster Fire Office at a premium of 7s. 6d. per cent. The buildings & contents were damaged by fire:—*Held*: the warranty contained in the words "warranted highest rate," had been broken by pltfs., & deft. was not liable.—*WALKER & SONS v. UZIELLI* (1896), 1 Com. Cas. 452.

**2685.** ——— *Disclosure of former claim—Partial disclosure insufficient.*—*CONDOGIANIS v. GUARDIAN ASSURANCE CO.*, No. 2650, *ante*.

*C. Alteration of Risk Clause.*

**2686.** *What amounts to breach—Casual use for more hazardous purpose—Use direct cause of fire.*—*SHAW v. ROBBERS*, No. 2670, *ante*.

**2687.** ———.]—*Assumpsit* on a policy of insurance effected by pltfs., who were varnish makers, with the Norwich Union Fire Insurance Society. The declaration stated the insurance to be £100 on the stock-in-trade in the oil store room marked No. 7 (& which room was warranted as having no manufacturing process carried on therein), & £50 on the stock-in-trade in the open part of the yard; subject to a condition that if any alteration was made to any building insured, by which the risk of fire to the building or any insured property was increased, such alteration must be immediately notified to the Society, in order to its being allowed by indorsement on the policy, otherwise the policy would be void. The declaration then averred, that certain stock-in-trade in the open yard was destroyed by fire, & that defts. waived the warranty of the oil store

increased risk was within the control of the co. as lessors:—*Held*: these conditions, made by a lessee, were not within the control of the lessors.—*HENEKER v. BRITISH AMERICA ASSURANCE CO.* (1864), 14 C. P. 57.—CAN.

**r.** ———.]—*LONDON & WESTERN TRUSTS CO. v. CANADIAN FIRE INSURANCE CO.* (1906), 8 O. W. R. 273, 872; 13 O. L. R. 540.—CAN.

**t.** ——— *Adaptation of premises to other purposes.*—Premises were, when insured, used as a store, & were after insurance used as a printing office, without notice to the co. or the settlement & payment of any additional premium for the increased risk, contrary to condition indorsed thereon:—*Held*: the policy was vitiated.—*HERVEY v. MUTUAL FIRE INSURANCE CO. v. PRESCOTT* (1861), 11 C. P. 394.—CAN.

**u.** ———.]—*HOWES v. DOMINION FIRE & MARINE INSURANCE CO.* (1883), 8 A. R. 644.—CAN.

**b.** ——— *Use for more hazardous*



room No. 7 having no manufacturing process carried on therein, & permitted pl'ts. to carry on the manufacturing process of boiling varnish; & that, after the waiver, certain stock in the oil store room was destroyed by fire. Pleas, (a) that an alteration was made in the oil store room, by which alteration the risk of fire to the room & stock-in-trade therein was increased; & that the alteration was not notified to the Society; (b) that pl'ts. erected the two boilers in the policy mentioned as placed outward of the oil store room No. 7 inside that room, & used the same therein, by which the risk of fire to the room & stock-in-trade insured therein, & also the stock-in-trade in the open yard, was increased; & that the increase of risk, was not notified to the Society; (c) that pl'ts. carried on in the oil store room No. 7 the hazardous trade of a varnish maker, whereby the risk of fire to the room & stock-in-trade was increased; & that the increase of risk was not notified to the Society. Replications *de injuria*. With respect to the first issue, the judge directed the jury to consider whether the alteration increased the risk of fire in the room No. 7:—*Held*: (1) a misdirection; the question being, whether the use of the boilers in the ordinary way as boilers, & not for boiling varnish, would have increased the risk; *Semle*: (2) the second plea was bad for want of an averment of the perpetual

use of the boilers; also the third plea was bad, inasmuch as the declaration alleged a waiver of the warranty of the oil store room having no manufacturing process carried on therein.—*BARRETT v. JERMY* (1849), 3 Exch. 535; 18 L. J. Ex. 215; 12 L. T. O. S. 494; 154 E. R. 957.

*Annotations*:—As to (1) *Reid. Stokes v. Cox* (1856), 1 H. & N. 533. *Generally, Reid. Benham v. United Guarantio & Life Assce.* (1852), 7 Exch. 744; *Marsden v. City & County Assce.* (1865), Har. & Ruth. 53.

**2688.** — *Alteration of premises—Boilers moved into premises.*—*BARRETT v. JERMY*, No. 2687, *ante*.

**2689.** — *Partly before & partly after date of policy.*—*SILLEM v. THORNTON*, No. 2662, *ante*.

**2690.** — *Erection of steam engine.*—*GLEN v. LEWIS*, No. 2678, *ante*.

**2691.** — *—*—*STOKES v. COX*, No. 2663, *ante*.

**2692.** — *Adaptation of existing engine to fresh purpose.*—*BAXENDALE v. HARVEY*, No. 2679, *ante*.

**2693.** *Whether implied.*—*PIM v. REID*, No. 2671, *ante*.

**2694.** — *—*—*HALL v. STAR FIRE INSURANCE Co.* (1850), 14 L. T. O. S. 135, 446.

**2695.** *Notice to insurer—Onus of proof that notice given.*—*BARRETT v. JERMY* (1849), 3 Exch.

*purpose.*—*MERRICK v. PROVINCIAL INSURANCE Co.* (1857), 14 U. C. R. 439.—*CAN.*

**c.** — *—*—*SOVEREIGN FIRE INSURANCE Co. v. MOIR* (1887), 14 S. C. R. 612.—*CAN.*

**d.** — *Substitution of steam for water power.*—*LOUNT v. LONDON MUTUAL FIRE INSURANCE Co.* (1905), 6 O. W. R. 84; 9 O. L. R. 549.—*CAN.*

**e.** — *Erection of steam sawmill—On adjoining land—By stranger.*—*COPP v. GLASGOW & LONDON INSURANCE Co.* (1890), 30 N. B. R. 197.—*CAN.*

**f.** — *Erection of elevator.*—*TODD v. LIVERPOOL & LONDON & GLOBE INSURANCE Co.* (1868), 18 C. P. 192.—*CAN.*

**g.** — *Construction of oven.*—A condition provided that if the risk was increased the policy should be void. After effecting the insurance, insured built an oven on the premises, but it was safely built, & was only in use for a short time, & there was evidence to show that it did not increase the risk. The agent had power, when the risk became more hazardous, to cancel the policy, & though aware of the oven did not do so:—*Held*: this did not avoid the policy.—*NAUGHTER v. OTTAWA AGRICULTURAL INSURANCE Co.* (1878), 43 U. C. R. 121.—*CAN.*

**h.** — *Temporary use of steam engine.*—*JOHNSTON v. DOMINION GRANGE MUTUAL FIRE INSURANCE Co.* (1896), 23 A. R. 729.—*CAN.*

**k.** — *Change in location of goods.*—A change of the location of a stock of merchandise insured under policies which assume the risk only when contained in a specified building from the building specified to another avoids the policy absolutely.—*ARNOLD v. BRITISH COLONIAL FIRE INSURANCE Co.* (1917), 45 N. B. R. 285.—*CAN.*

**l.** — *Non-occupancy.*—A policy upon a dwelling-house contained a condition that if, after the insurance was effected, the risk was increased by any means within the control of the assured, or if the building should, without the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, the insurance should be void:—*Held*: the assured afterwards

ceasing to occupy the house without any fraudulent intent, was not an increase of the risk within the condition, unless it was proved that, under the circumstances & situation of the building insured, its destruction by fire was more probable when unoccupied than if the assured had continued to reside in it.—*FOY v. AETNA INSURANCE Co.* (1854), 8 N. B. R. (3 All.) 29.—*CAN.*

**m.** — *—*—*ABRAHAM v. AGRICULTURAL MUTUAL ASSURANCE ASSOCN.* (1876), 40 U. C. R. 175.—*CAN.*

**n.** — *—*—*PECK v. AGRICULTURAL INSURANCE Co.* (1890), 19 O. R. 494.—*CAN.*

**o.** — *—*—*BISHOP v. NORWICH UNION FIRE INSURANCE SOCIETY* (1893), 25 N. S. R. (13 R. & G.) 492.—*CAN.*

**p.** — *—*—*McKAY v. NORWICH UNION INSURANCE Co.* (1895), 27 O. R. 251.—*CAN.*

**q.** — *—*—Where by a condition in a fire policy on a dwelling house, any change material to the risk, etc., should avoid the policy, the fact of the premises being unoccupied & vacant does not constitute a breach of such condition.—*BOARDMAN v. NORTH WATERLOO FARMERS MUTUAL FIRE INSURANCE Co.* (1899), 20 C. L. T. 176; 31 O. R. 525.—*CAN.*

**r.** — *—*—*PAYSON v. EQUITABLE FIRE INSURANCE Co.* (1908), 38 N. B. R. 436; 5 E. L. R. 186.—*CAN.*

**t.** — *—*—*BOUTRY v. NORTH BRITISH & MERCANTILE INSURANCE Co.*, [1918] 1 W. W. R. 704; 39 D. L. R. 414; 13 Alta. L. R. 43.—*CAN.*

**a.** — *Change of occupancy.*—*WILSHIRE v. GUARDIAN ASSURANCE Co., LTD.* (1912), 15 C. L. R. 516.—

**b.** — *—*—*HOBSON v. WELLINGTON DISTRICT MUTUAL FIRE INSURANCE Co.* (1850), 6 U. C. R. 536.—*CAN.*

**aa.** — *Change in occupancy of adjoining premises—Vacation of premises.*—The conditions of a fire insurance policy provided that the policy should be void if the insured failed to give notice of "a change in the nature of the occupation either of the premises or of the adjacent premises":—*Held*: the fact of the

adjacent premises having become vacant without notification by the insured, did not avoid the policy, such change not being in the nature of the occupation.—*LITTLEJOHN v. NORWICH UNION FIRE INSURANCE SOCIETY* (1905), T. H. 374.—*S. AF.*

*Change of tenancy.*—Change of tenancy does not *per se* constitute such an increase of risk as to invalidate a policy of fire insurance.—*IRVING v. SUN INSURANCE OFFICE* (1906), O. R. 24.—*S. AF.*

**cc.** — *Loss of hotel license.*—*RHODES v. UNION INSURANCE Co.* (1883), 2 N. Z. L. R. 106 (S. C.).—*N.Z.*

**dd.** *Notice to insurer—Within reasonable time.*—*CANADA LANDED CREDIT Co. v. CANADA AGRICULTURAL INSURANCE Co.* (1870), 17 Gr. 418.—*CAN.*

**ee.** — *Sufficiency of.*—*PECK v. PHOENIX MUTUAL INSURANCE Co.* (1881), 45 U. C. R. 620.—*CAN.*

**ff.** *Alteration must be specified.*—Deft. co. pleaded that subsequently to the making of the policy there was a change in the risk not made known to defts., & by condition of the policy, if the occupancy, situation or circumstances affecting the risk should be so altered as to cause an increase of the risk, then the policy should become void:—*Held*: the plea was bad for not alleging what the change in the risk was.—*LONG v. PHOENIX INSURANCE Co.* (1897), 34 N. B. R. 223.—*CAN.*

**gg.** *Knowledge of assured—How far material.*—H. effected a fire policy on his premises with deft. co. The policy contained a clause that assured should give notice to the co. "of anything on the premises insured, or on those adjacent thereto, within assured's knowledge, whereby the risk should be in any way increased":—*Held*: where the risk was increased by the deposit of goods on the assured's own premises, the question of knowledge did not arise; it only had reference to what took place on the adjacent premises.—*HILLERMAN v. NATIONAL INSURANCE Co.* (1870) 1 V. R. (Law) 155.—*AUS.*

**hh.** — *—*—*REID v. GORE DISTRICT MUTUAL INSURANCE Co.* (1854), 11 U. C. R. 345.—*CAN.*

**kk.** *"Increased or changed"—Meaning of.*—Where the words in a condition in a policy are, "if the risk



*Sect. 9.—Representations and warranties: Sub-sect. 2, C. Sect. 10: Sub-sect. 1.]*

535; 18 L. J. Ex. 215; 12 L. T. O. S. 494; 154 E. R. 957.

*Annotations:—Mentd. Benham v. United Guarantle & Life Asso. (1852), 7 Exch. 744; Stokes v. Cox (1856), 1 H. & N. 533; Marsden v. City & County Asso. (1865), Har. & Ruth. 53.*

## SECT. 10.—ADJUSTMENT OF LOSS.

### SUB-SECT. 1.—CONDITIONS PRECEDENT TO LIABILITY.

**2696. Notice of loss to insurers—Whether condition precedent.]—RALSTON v. BIGNOLD (1853), 22 L. T. O. S. 106.**

**2697. — Sufficiency—Notice to agent through whom policy effected—Though no longer agent of insurers.]—MARSDEN v. CITY & COUNTY ASSURANCE CO., No. 2633, ante.**

**2698. — Time for giving—Time extended by insurers.]—Re CARR & SUN FIRE INSURANCE CO. (1897), 13 T. L. R. 186, C. A.**

**2699. Delivery of particulars of loss—Within limited time—Whether condition precedent.]—**By a condition indorsed on a policy of insurance, it was stipulated that in case of fire, the assured should, within three months, deliver to the secretary of the co. full particulars of the loss sustained:—*Held*: the delivery of particulars was a condition precedent to the right of the assured to recover for the loss.—**MASON v. HARVEY (1853), 8 Exch. 819; 22 L. J. Ex. 336; 21 L. T. O. S. 158; 155 E. R. 1585.**

be increased or changed by any means whatever," the term "change" is used rather as a synonym of "increase" than as a word of different signification.—**GILL v. CANADA FIRE & MARINE INSURANCE CO. (1882), 1 O. R. 341.—CAN.**

### PART III. SECT. 10, SUB-SECT. 1.

**n. General rule.]—**The policy was stated to be to pay loss or damage which should happen by fire "subject to the conditions thereon indorsed":—*Held*: the language did not imply that the conditions were conditions precedent, & therefore it was not necessary to show due performance.—**WORKMAN v. ROYAL INSURANCE CO. (1869), 16 Gr. 185.—CAN.**

**2696 i. Notice of loss to insurers—Whether condition precedent.]—WESTERN AUSTRALIAN BANK v. ROYAL INSURANCE CO. (1908), 5 C. L. R. 533.—AUS.**

**2696 ii. —.]—BELL BROTHERS v. HUDSON BAY INSURANCE CO. (1910), 14 W. L. R. 709; 3 Sask. L. R. 219.—CAN.**

**2696 iii. —.]—**A provision of a fire insurance policy requiring the insured to give notice in writing of any loss to the co. forthwith as a condition precedent to the liability of the co. must be strictly complied with; & if the insured fails to give such notice, he cannot recover on the policy, even in a case where the co. was advised of the loss on the same day by a telegram from its agent, & he at once employed a professional adjuster to investigate the loss & report to the co.—**PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO. (1910), 19 Man. L. R. 720.—CAN.**

**o. — Sufficiency — Notice to agent through whom policy effected.]—WETMORE v. BRITISH & CANADIAN UNDERWRITERS OF NORWICH, ENGLAND (1910), 12 B. R. 304; 45 D. L. R. 666.—CAN.**

**p. —.]—**Notice of loss by fire given verbally to the local

agent through whom the insurance was effected, communicated to his principals, followed by the sending of an adjuster to examine & report to the co. whereby the co. was put in possession of all the facts called for by the policy:—*Held*: a compliance with the condition as to the delivery of a written notice.—**SPOUL v. NATIONAL FIRE INSURANCE CO., [1925] 1 D. L. R. 1152; 58 N. S. R. 32.—CAN.**

**q. — Notice to sub-agent followed by notice to agent.]—**A condition of a policy required insured to give notice of loss in writing forthwith to the agent of the corp. at his office in H., & to furnish preliminary proof to the corp. in fifteen days. The fire took place Jan. 17. Pltf. went on the next day to the sub-agents, who sent a telegram to the agent, & on Jan. 23 pltf. sent the agent a written notice which he received Jan. 27:—*Held*: the notice of loss was sufficient.—**PEPPIT v. NORTH BRITISH & MERCANTILE INSURANCE CO. (1879), 13 N. S. R. (1 R. & G.) 219.—CAN.**

**r. — Notice by agent of insurers.]—BELL BROTHERS v. HUDSON BAY INSURANCE CO. (1911), 44 S. C. R. 419.—CAN.**

**t. — Time for giving—Meaning of "forthwith."]—PRAIRIE CITY OIL CO. v. STANDARD MUTUAL FIRE INSURANCE CO. (1910), 14 W. L. R. 41, 380.—CAN.**

**a. — Sufficiency of declaration.]—KETCHUM v. PROTECTION INSURANCE CO. (1848), 1 All. 136.—CAN.**

**b. — Whether assignee may give.]—FITZGERALD v. GORE DISTRICT MUTUAL FIRE INSURANCE CO. (1870), 30 U. C. R. 97.—CAN.**

**c. — Omission—Equitable relief.]—PATTERSON v. OXFORD FARMERS MUTUAL FIRE INSURANCE CO. (1912), 23 O. W. R. 122; 4 O. W. N. 140; 7 D. L. R. 217.—CAN.**

**2699 i. Delivery of particulars of loss—Within limited time—Whether condi-**

**2700. —.]—RALSTON v. BIGNOLD (1853), 22 L. T. O. S. 106.**

**2701. —.]—**A condition in a contract to refer to arbn. any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract; but unless the condition expressly stipulate that until arbn. had no action shall be brought, its performance is not precedent to the right to sue on the contract. In cases where the condition is not precedent to the right to sue, if either party sue without offering to refer, it is open to the other party to apply for a reference under C. L. P. Act, 1854 (c. 125), s. 11.

A policy of insurance against fire contained, among others, the following conditions:—that the amount of loss should be paid immediately after the same should be established to the satisfaction of the directors; that all persons insured sustaining any damage by fire should forthwith give notice thereof to the co., & within fifteen days after the loss, deliver in as particular an account of their loss or damage as the nature of the case would admit of; & in case any difference or dispute should arise between the insured & the co. touching the loss or damage, such differences should be referred to arbn., & the award of the arbitrators be conclusive on all parties:—*Held*: (1) the delivery of particulars within fifteen days after the loss was a condition precedent to the right to sue on the policy; (2) the reference to arbn. of the amount of the loss was not a condition precedent to the right to sue on the policy.—**ROPER v. LENDON (1859), 1 E. & E. 825; 28**

*tion precedent.]—GRIEVE v. NORTHERN ASSURANCE CO. (1879), 5 V. L. R. 443.—AUS.*

**2699 ii. —.]—GRAU v. COLONIAL INSURANCE CO. OF NEW ZEALAND (1884), 2 Q. L. J. 53.—AUS.**

**2699 iii. —.]—**A condition that the particulars of the loss shall be given under oath within a specified time after the loss must be complied with before the insured can recover the policy.—**McFAUL v. MONTREAL INLAND INSURANCE CO. (1845), 2 U. C. R. 59.—CAN.**

**2699 iv. —.]—CAMERON v. TIMES & BEACON FIRE INSURANCE CO. (1857), 7 C. P. 234.—CAN.**

**2699 v. —.]—CINQMARS v. EQUITABLE INSURANCE CO. (1857), 15 U. C. R. 143.—CAN.**

**2699 vi. —.]—LANGEL v. PRESCOTT MUTUAL INSURANCE CO. (1859), 17 U. C. R. 524.—CAN.**

**2699 vii. —.]—ROSS v. COMMERCIAL UNION ASSURANCE CO. OF LONDON (1867), 26 U. C. R. 552.—CAN.**

**2699 viii. —.]—MORRISON v. CITY OF LONDON FIRE INSURANCE CO. (1889), 6 Man. L. R. 225.—CAN.**

**2699 ix. —.]—ATLAS ASSURANCE CO. v. BROWNELL (1899), 29 S. C. R. 537.—CAN.**

**2699 x. —.]—COMMERCIAL UNION ASSURANCE CO. v. MARGESON (1899), 29 S. C. R. 601.—CAN.**

**2699 xi. —.]—WEIR v. NORTHERN COUNTIES OF ENGLAND INSURANCE CO. (1879), 4 L. R. Ir. 689.—IR.**

**2699 xii. —.]—DORSET v. NEW ZEALAND INSURANCE CO., MATTHEWS v. NEW ZEALAND INSURANCE CO. (1890), 8 N. Z. L. R. 308.—N.Z.**

**2699 xiii. —.]—KANNE-MEYER v. SUN INSURANCE CO. (1896), 13 S. C. 451.—S. AF.**

L. J. Q. B. 260; 5 Jur. N. S. 491; 7 W. R. 441; 120 E. R. 1120.

*Annotations:—As to (2) Consd. Elliott v. Royal Exchange Assce. (1867), L. R. 2 Exch. 237; Edwards v. Aberayron Mutual Ship Insce. Soc. (1876), 1 Q. B. D. 583. Distd. Viney v. Bignold (1887), 20 Q. B. D. 172.*

**2702.** ————.]—WHYTE v. WESTERN ASSURANCE Co. (*circa* 1876), cited in 1 App. Cas. at p. 330, P. C.

*Annotation:—Consd. Moore v. Harris (1876), 1 App. Cas.*

**2703.** ———— **Waiver—Possession taken by insurers before expiry of time limit.**—Resp. insured goods in his business premises against fire under a policy issued by applt. co. The policy contained a condition that the assured was to give notice of any loss or damage under the policy forthwith, & within a specified time was to deliver detailed particulars; failure to observe this condition was to preclude the assured from recovering. There was a further condition, under the head "salvage," by which the co., so long as a claim was not adjusted, without incurring any further liability, might take possession of the premises & of any goods thereon at the date of the fire, with power to sell the goods. A fire having occurred, resp. gave notice of it forthwith. Before the

**2703 i.** ———— **Waiver—Possession taken by insurers before expiry of time limit.**—SMITH v. COMMERCIAL UNION INSURANCE Co. (1872), 33 U. C. R. 69.—CAN.

**d.** ————.]—WALKER v. WESTERN ASSURANCE Co. (1859), 18 U. C. R. 19.—CAN.

**e.** ———— **Condition as to indorsement.**—MCKEAN v. COMMERCIAL UNION INSURANCE Co. (1882), 21 N. B. R. 583.—CAN.

**f.** ———— **Repudiation of liability by insurers.**—MORROW v. LANCASHIRE INSURANCE Co. (1898), 29 O. R. 377.—CAN.

without formal proofs, before trial, of loss by fire it is not open to defts. to put forward the non-delivery of proofs as a defence, when they dispute their liability & deny that they have any insurance on the property & deny any liability for the loss by fire.—BEURY v. CANADA NATIONAL FIRE INSURANCE Co. (1917), 38 O. L. R. 597; *affd.* 87 D. L. R. 105; 39 O. L. R. 343.—CAN.

**h.** ————.]—MYBURGH & Co. v. PROTECTEUR FIRE ASSURANCE Co. (1878), Buch. 153; 3 R. 19.—S. AF.

the insurers from the outset repudiated a claim under a fire insurance policy & thereby rendered it futile for the insured to deliver an account of the particulars of loss:—*Held*: they could not afterwards rely upon a condition of the policy making the delivery of such account a condition precedent to a claim under the policy.—PASSAPORTIS v. GUARDIAN ASSURANCE Co., LTD. (1916), S. R. 14.—S. AF.

**Agreement substituted for condition.**—BRADBURY'S OFFICIAL ASSIGNEE v. SOUTH BRITISH FIRE & MARINE INSURANCE Co. (1889), 8 N. Z. L. R. 82.—N. Z.

**m.** ———— **Neglect of insurers to provide necessary claim forms.**—HUTCHINSON v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE Co. (1876), 39 U. C. R. 483.—CAN.

**n.** ————.]—Where a policy required that persons sustaining loss should forthwith give notice thereof to the co., & apply for its blank forms, & execute & file the proof of claim, within fifteen days after the fire; & pltf. gave notice to the in-

surers' agent & applied for blanks within the time, but did not receive the blanks till after the fifteen days had expired:—*Held*: the insurers, having by their neglect prevented pltf. from obtaining the blank forms & completing the claim within the fifteen days, could not take advantage of his failure.—HAMMOND v. CITIZENS' INSURANCE Co. OF CANADA (1886), 26 N. B. R. 371.—CAN.

**o.** ———— **Statutory relief.**—In an action upon a policy of fire insurance pltf. may be relieved, on the ground of mistake, from the effects of his failure to give notice & proofs of loss.—PACHAL v. GERMANIA FIRE INSURANCE Co., [1918] 1 W. W. R. 502.—CAN.

**Time extended by court.**—SHEPARD v. BRITISH DOMINIONS GENERAL INSURANCE Co., SHEPARD v. GLENS FALLS INSURANCE Co. OF NEW YORK, [1919] 2 W. W. R. 440.—CAN.

**q.** ———— **"As soon as possible"—Compliance question for jury.**—MANN & HOBSON v. WESTERN ASSURANCE Co. (1860), 19 U. C. R. 314.—CAN.

**r.** ———— **Failure to comply with statutory conditions.**—ROBINS v. VICTORIA MUTUAL FIRE INSURANCE Co. (1881), 6 A. R. 427.—CAN.

**t.** ————.]—GABEL v. HOWICK FARMERS MUTUAL FIRE INSURANCE Co. (1917), 40 O. L. R. 158; 38 D. L. R. 139.—CAN.

**a.** ———— **Effect of non-compliance by mortgagor.**—ANDERSON v. SAUGEEN MUTUAL FIRE INSURANCE Co. OF MOUNT FOREST (1889), 18 O. R. 355.—CAN.

**b.** ———— **What amounts to—Posting.**—MALDOVER v. NORWICH UNION FIRE INSURANCE Co. (1917), 40 O. L. R. 532.—CAN.

**c.** ———— **Duly authenticated—Whether condition precedent.**—GORDON v. TRANS-ATLANTIC FIRE INSURANCE Co. (1905), T. H. 146.—S. AF.

**2704 i.** ———— **Sufficiency of particulars—Fullest possible.**—HUMPHREY v. LIVERPOOL & LONDON & GLOBE INSURANCE Co. (1875), 13 N. S. W. S. C. R. (L.) 367.—AUS.

**2704 ii.** ————.]—COOK v. SCOTTISH IMPERIAL INSURANCE Co. (1884), 5 N. S. W. L. R. (C.) 35.—AUS.

**2704 iii.** ————.]—MANN & HOBSON v. WESTERN ASSURANCE Co. (1859), 17 U. C. R. 190.—CAN.

expiration of the time specified for the delivery of the particulars, applt. co. took possession under the condition above referred to; they remained in possession for four months, but did not sell any of the goods. Particulars were delivered by resp. but after the specified period:—*Held*: applt. co. was precluded from relying upon the failure to deliver the particulars within the time specified.—YORKSHIRE INSURANCE Co. v. CRAINE, [1922] 2 A. C. 541; 91 L. J. P. C. 226; 128 L. T. 77; 38 T. L. R. 845; 66 Sol. Jo. 708, P. C.

*Annotation:—Distd. Macaura v. Northern Assce., [1925] A. C. 619.*

**2704.** ———— **Sufficiency of particulars—Fullest possible.**—Where, in an action on a fire policy, pltf.' evidence showed that they could have complied with the condition as to giving within fifteen days a detailed account of their loss "as the nature & circumstances of the case will admit" much more fully & completely than they had done:—*Held*: they were rightly non-suited, since even if the question of compliance were for the jury, a verdict could not have been reasonably given in their favour.—HIDDLE v. NATIONAL FIRE & MARINE INSURANCE Co. OF NEW ZEALAND, [1896] A. C. 372; 65 L. J. P. C. 24; 74 L. T. 204, P. C.

**2704 iv.** ————.]—Pltf., suing upon a policy which required a particular account of the loss, had given only a statement that the property insured, consisting of general merchandise in his store, was totally consumed, as were also his books of account, invoices & papers relating to the business, & that the value, as nearly as could be ascertained without such books, etc., was \$3,000. His affidavit was attached verifying this statement. The evidence at the trial, however, showed that he had the means of furnishing a more particular account through those from whom he purchased:—*Held*: no compliance.—BANTING v. NIAGARA DISTRICT MUTUAL FIRE ASSURANCE Co. (1866), 25 U. C. R. 431.—CAN.

**2704 v.** ————.]—MULVEY v. GORE DISTRICT MUTUAL FIRE ASSURANCE Co. (1866), 25 U. C. R. 424.—CAN.

**2704 vi.** ————.]—SMITH v. QUEEN INSURANCE Co. (1868), 12 N. B. R. (1 Har.) 311.—CAN.

**2704 vii.** ————.]—CARTER v. NIAGARA DISTRICT MUTUAL INSURANCE Co. (1868), 19 C. P. 143.—CAN.

**2704 viii.** ————.]—STICKNEY v. NIAGARA DISTRICT MUTUAL INSURANCE Co. (1873), 23 C. P. 372.—CAN.

**2704 ix.** ————.]—HARTNEY v. NORTH BRITISH FIRE INSURANCE Co. (1887), 13 O. R. 581.—CAN.

**2704 x.** ————.]—NIXON v. QUEEN INSURANCE Co. (1894), 23 S. C. R. 26; 25 N. S. R. 317.—CAN.

**Reasonable compliance.**—By one of the conditions indorsed on a policy of insurance, the insured was required to deliver a particular & detailed account of the loss, &, if required, to produce the books of account & other papers, vouchers, original or duplicate invoices:—*Held*: only a reasonable compliance with the condition was required.—GOLDSMITH v. GORE DISTRICT MUTUAL FIRE INSURANCE Co. (1877), 27 C. P. 435.—CAN.

**bb.** ———— **Separate classes of goods.**—A policy of insurance on several different kinds of goods for separate amounts on each is, in effect, a separate policy on each class; & where such a policy required the assured to deliver "as particular an account of the loss & damage as the nature of the



Sect. 10.—*Adjustment of loss: Sub-sect. 1.]*

**2705. Production of certificate of bona fides—Condition precedent under policy.]**—Till the affidavit is made, & the certificate [of bona fides] procured, the money is not to be payable: the time of payment therefore is not yet come. Though a person were a *bona fide* sufferer, still he is not entitled without a certificate. The stipulation is a condition precedent, that there shall be a certificate that there is no kind of fraud (GOULD, J.).—*OLDMAN v. BEWICKE* (1786), 2 Hy. Bl. 577, n.; 126 E. R. 713.

*Annotations:—*Folld. *Worsley v. Wood* (1796), 6 Term Rep. 710. *Refd. Mason v. Harvey* (1853), 8 Exch. 819.

**2706. ——— Effect of wrongful refusal of certificate.]**—If a policy of insurance refer to certain printed proposals, the proposals will be considered as part of the policy. By the proposals of the Phoenix Co. it is stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, & procure a certificate of the minister, churchwardens & some reputable householders of the parish, importing that they knew the character, etc. of the assured, & believe that he really sustained the loss & without fraud": *Held*: the procuring of such a certificate was a condition precedent to the right of the assured to recover, & it was immaterial that the minister, etc. wrongfully refused to sign the certificate.—*WORSLEY v. WOOD* (1796), 6 Term Rep. 710; 101 E. R. 785; *revsg. S. C. sub nom. WOOD v. WORSLEY* (1795), 2 Hy. Bl. 574.

*Annotations:—*Folld. *Mason v. Harvey* (1853), 21 L. T. O. S. 158. *Refd. Lothian v. Henderson* (1803), 3 Bos. & P. 499; *Braunstein v. Accidental Death Insc.* (1861), 1 B. & S. 782; *London Guarantee Co. v. Fearnley* (1880), 5 App. Cas. 911. *Mentd. Neave v. Pratt* (1807), 2 Bos.

case would admit":—*Held*: he must give such account of the loss on each class of goods, & a statement of loss upon his stock of merchandise, generally, was not sufficient.—*LINDSAY v. LANCASHIRE FIRE INSURANCE CO.* (1874), 34 U. C. R. 440.—CAN.

**f. ——— How objection raised.]**—It was a condition that "payment of losses shall be made in sixty days after the loss shall have been ascertained & proved":—*Held*: any objection to the sufficiency of proof must be raised by a special plea, not under that condition.—*HATTON v. PROVINCIAL INSURANCE CO.* (1858), 7 C. P. 555.—CAN.

**g. ——— ———.]**—*RICE v. PROVINCIAL INSURANCE CO.* (1858), 7 C. P. 548.—CAN.

**h. ——— Failure to object.]**—The fact of the co., after receiving the insured's proofs of loss, remaining silent for some months & until action brought:—*Held*: no waiver of right to receive proper proofs.—*MASON v. ANDES INSURANCE CO.* (1873), 23 C. P. 37.—CAN.

**k. ——— ———.]**—Failure by a co. to notify the assured of its objections to the proofs of claim & the particulars in which the proofs are defective prevents the co. from pleading an objection to the sufficiency of such proof.—*KONOWSKY v. PACIFIC MARINE INSURANCE CO.*, [1923] 2 D. L. R. 1198; 2 W. W. R. 71.—CAN.

**l. ——— Requirements must be reasonable.]**—When a condition is indorsed on a policy of insurance requiring particulars of loss to be delivered within a certain date after a fire has occurred, the particulars required by the co. must be reasonable in the circumstances of the case.—*MICHEL v. COLONIAL INSURANCE CO. OF NEW ZEALAND* (1885), 2 Q. L. J. 105.—AUS.

**m. ——— Books — Place of production.]**—*BEALE v. NORWICH UNION*

*FIRE INSURANCE CO.* (1888), 9 N. S. W. L. R. (L.) 384; 5 N. S. W. N. 3.—AUS.

**n. ——— Effect of incorrect statement of title.]**—*MASON v. AGRICULTURAL ASSURANCE ASSOCN. OF CANADA* (1808), 18 C. P. 19; 16 C. P. 493.—CAN.

**o. ——— ———.]**—*SHERBONEAU v. BEAVER MUTUAL FIRE INSURANCE ASSOCN.* (1872), 30 U. C. R. 472; 33 U. C. R. 1.—CAN.

**p. ——— To insurers' adjuster.]**—Delivery of proofs of loss to adjuster for the co. is sufficient.—*TROTTER v. WESTERN CANADA FIRE INSURANCE CO.* (1909), 9 W. L. R. 664.—CAN.

**2705 i. Production of certificate of bona fides—Condition precedent under policy.]**—*PLATT v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1859), 9 C. P. 405.—CAN.

**2705 ii. ———.]**—*KERR v. BRITISH AMERICA ASSURANCE CO.* (1872), 32 U. C. R. 569.—CAN.

**2705 iii. ———.]**—*MASON v. ANDES INSURANCE CO.* (1873), 23 C. P. 37.—CAN.

**2705 iv. ———.]**—*CAMMELL v. BEAVER & TORONTO MUTUAL FIRE INSURANCE CO.* (1876), 39 U. C. R. 1.—CAN.

**2705 v. ———.]**—*MORROW v. WATERLOO COUNTY MUTUAL FIRE INSURANCE CO.* (1876), 39 U. C. R. 441.—CAN.

**2705 vi. ———.]**—The condition as to proof of loss required a certificate from the magistrate most contiguous to the place of fire:—*Held*: the requirement of a literal compliance with this condition was not just & reasonable.—*SHANNON v. HASTINGS MUTUAL INSURANCE CO.* (1877), 26 C. P. 380; 2 A. R. 81; *affd.* 2 S. C. R. 394.—CAN.

**2705 vii. ———.]**—*BORDEN v. PROVINCIAL INSURANCE CO. OF CANADA* (1878), 18 N. B. R. (2 P. & B.) 381.—CAN.

& P. N. R. 408; *Hughes v. Humphreys* (1827), 6 B. & C. 680; *Lowndes v. Stamford* (1852), 19 Q. B. 425.

**2707. ——— Incorporation in policy by reference.]**—*ROUTLEDGE v. BURRELL*, No. 2536, *ante*.

**Effect of excessive claim.]**—See Sect. 7, sub-sect. 3, *ante*.

**2708. Ascertainment of damages in prescribed mode—Mode prescribed by insurers—Whether condition precedent.]**—Plea set up by the insurer that the damages sustained by fire had not been ascertained in the mode prescribed by their particular office, rejected, as the damage appeared to be fairly ascertained.—*HADWIN v. LOVELACE* (1809), 1 Act. 126; 12 E. R. 48, P. C.

**2709. ——— ———.]**—In an action on a fire policy deft. pleaded that the policy was made subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbn., & the insured should not be entitled to commence or maintain any action upon the policy until the amount of the loss should have been referred & determined as therein provided, & then only for the amount so determined, that a difference had arisen, & the amount had not been referred or determined:—*Held*: the determination of the amount by arbn. was a condition precedent to the right to recover on the policy, & the defence was an answer to the action.—*VINEY v. BIGNOLD* (1887), 20 Q. B. D. 172; 58 L. T. 26; 36 W. R. 479; 4 T. L. R. 128; *sub nom. VINEY v. NORWICH UNION FIRE INSURANCE SOCIETY*, 57 L. J. Q. B. 82.

*Annotation:—**Refd. Toronto Ry. v. National British & Irish Millers Insc.* (1914), 111 L. T. 555.

**2710. ——— Reference to arbitration—Whether**

**2705 viii. ———.]**—*HERKINS v. PROVINCIAL INSURANCE CO.* (1878), 12 N. S. R. (3 R. & C.) 176.—CAN.

**2705 ix. ———.]**—*LOGAN v. COMMERCIAL UNION INSURANCE CO.* (1880), 13 S. C. R. 270.—CAN.

**2705 x. ———.]**—*MARGESON v. COMMERCIAL UNION ASSURANCE CO.* (1898), 31 N. S. R. 337.—CAN.

**2705 xi. ———.]**—A policy of fire insurance contained a condition requiring the assured, in case of loss, to procure a certificate as to the matters contained in the statement of loss under the hands of two magistrates most contiguous to the place of the fire:—*Held*: the production of the certificate of the magistrates most contiguous to the place of fire was a condition precedent to the assured's right to recover.—*LE BLANCHE v. COMMERCIAL UNION INSURANCE CO.* (1902), 35 N. B. R. 665.—CAN.

**2705 xii. ———.]**—*FORREST v. HOME INSURANCE CO.* (1912), 22 W. L. R. 773; 3 W. W. R. 575; 8 D. L. R. 764.—CAN.

**2708 i. Ascertainment of damages in prescribed mode—Mode prescribed by insurers—Whether condition precedent.]**—*LONDON & LANCASHIRE INSURANCE CO. v. HONEY* (1876), 2 V. L. R. 7.—AUS.

**2708 ii. ———.]**—*FAWCETT v. LIVERPOOL, LONDON & GLOBE INSURANCE CO.* (1868), 27 U. C. R. 225.—CAN.

**2708 iii. ———.]**—*WILLIAMSON v. HAND-IN-HAND MUTUAL FIRE INSURANCE CO.* (1876), 26 C. P. 266.—CAN.

**2708 iv. ———.]**—*JOHNSTON v. WESTERN ASSURANCE CO.* (1879), 4 A. R. 281.—CAN.

**2708 v. ———.]**—*CAMERON v. CANADA FIRE & MARINE INSURANCE CO.* (1884), 6 O. R. 392.—CAN.

**2710 i. ——— Reference to arbitration—Whether condition precedent.]**—*ADAMS*



condition precedent.]—*ROPER v. LONDON*, No. 2701, *ante*.

2711. ———.]—In a policy of fire insurance entered into by pltf. with defts. the covenant for payment was made subject to certain articles; one of which provided that, on a loss occurring, the assured should within fifteen days send in particulars of his loss, "which loss or damage, after the same shall be adjusted, shall immediately be paid in money by" defts., with an option to them to reinstate, & a proviso that "in case any difference shall arise touching any loss or damage, such difference shall be submitted" to arbitrators, "whose award in writing shall be conclusive & binding on all parties; but if there shall appear any fraud or false swearing, claimant shall forfeit all benefit of his claim." In an action brought on this policy to which defts. pleaded this article, & that pltf. had not submitted the matter to arbn.:—*Held*: the covenant was only a covenant to pay the adjusted loss, & pltf. had no cause of action.—*ELLIOTT v. ROYAL EXCHANGE ASSURANCE CO.* (1867), 1 L. R. 2 Exch. 237; 36 L. J. Ex. 129; 16 L. T. 399; 15 W. R. 907.

*Annotations*:—*Reid. Edwards v. Aberayron Mutual Ship Insee. Soc.* (1876), 1 Q. B. D. 563; *Viney v. Bignold* (1887), 20 Q. B. D. 172. *Mentd. Dawson v. Fitzgerald* (1876), 1 Ex. D. 257.

2712. ——— "Settlement" with other insurers—Whether rejected claim a "settlement."—*BEAUCHAMP v. FABER*, No. 2622, *ante*.

2713. ——— Waiver by insurers—Other evidence considered—Request for compliance after expiry of time limit.]—It was a condition of a fire insurance policy that the loss should not become payable

until sixty days after notice, ascertainment, estimate, & satisfactory proof of the loss had been received by the co., & that a magistrate or notary public should, if the co. required it, certify that he had examined the circumstances & believed the insured had honestly sustained the loss as appraised. Pltfs., having suffered losses by fire, served notice of a claim on the insurance co. & appointed an adjuster with the assent of the co. to ascertain the loss. A full report of the adjustment having been sent to the co., a long correspondence ensued, & ultimately the co. asked to be supplied with a certificate of a magistrate or notary public, & further, they said that if that information, in their opinion, was insufficient, they would require the loss to be ascertained by disinterested appraisers. In an action brought by pltfs. to recover their losses as ascertained by the adjuster:—*Held*: deft. co. had by their conduct waived their right to insist on the above stipulations in the policy as a condition precedent to pltfs.' right of action.—*TORONTO RY. CO. v. NATIONAL BRITISH & IRISH MILLERS INSURANCE CO., LTD.* (1914), 111 L. T. 555; 20 Com. Cas. 1, C. A.

*Annotation*:—*Appld. Burrage v. Haines* (1918), 87 L. J. K. B. 641.

2714. Waiver of condition—As to mode of ascertainment.]—*TORONTO RY. CO. v. NATIONAL BRITISH & IRISH MILLERS INSURANCE CO., LTD.*, No. 2713, *ante*.

2715. ——— As to delivery of particulars.]—*YORKSHIRE INSURANCE CO. v. CRAINE*, No. 2703, *ante*.

*v. NATIONAL INSURANCE CO.* (1881), 20 N. B. R. 569.—CAN.

2710 ii. ———.]—A clause in a policy providing for arbn. in the event of a difference as to the amount of the loss does not make an arbn. a condition precedent to the bringing of an action.—*PATTERSON v. CENTRAL CANADA INSURANCE CO.* (1910), 15 W. L. R. 123; *affd.* (1911), 16 W. L. R. 647.—CAN.

2710 iii. ———.]—*EAGLE, ETC. v. DINANBLE* (1922), 1 L. R. 47 Bom. 509.—IND.

2710 iv. ———.]—A fire policy contained the condition that if any difference should arise between the co., the assurers, & the insured, with respect to any claim for loss by fire, such difference should be submitted to arbn.:—*Held*: this was a condition precedent to any action brought by the insured against the insurers for any claim for loss by fire.—*DAVIES v. SOUTH BRITISH INSURANCE CO.* (1885), 3 S. C. 416.—S. AF.

2715 i. Waiver of condition—As to delivery of particulars.]—Where notice of the loss & the particulars of it are required by a policy, they may be waived by the conduct of the insurers.—*LAMBKIN v. ONTARIO MARINE & FIRE INSURANCE CO.* (1855), 12 U. C. R. 578.—CAN.

2715 ii. ———.]—*NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO. v. LEWIS* (1862), 12 C. P. 123.—CAN.

2715 iii. ———.]—The mere fact that an insurance co. makes no objection to the preliminary proof of a loss, delivered by the insured, at or after the time of its being received, is no evidence of a waiver by them of objections to it; but where objections are made on other grounds, & no objection taken to the sufficiency of the preliminary proof, it may be evidence of a waiver.—*McMANUS v. Co.* (1865), 11 N. B. R. (6 All.) 314.—CAN.

2715 iv. ———.]—*CROZIER v. PHOENIX INSURANCE CO.* (1870), 13

N. B. R. (2 Han.) 200.—CAN.

2715 v. ———.]—*CANN v. IMPERIAL FIRE INSURANCE CO.* (1875), 10 N. S. R. (1 R. & C.) 240.—CAN.

2715 vi. ———.]—*O'CONNOR v. COMMERCIAL UNION INSURANCE CO.* (1878), 12 N. S. R. (3 R. & C.) 119.—CAN.

2715 vii. ———.]—*BOWES v. NATIONAL INSURANCE CO.* (1880), 20 N. B. R. 437.—CAN.

2715 viii. ———.]—Where the insured does not comply with the requirements of the policy as to formal proofs of loss, such requirements are not waived by the insurance co. having an inspection made by its appraisers as to the origin of the fire & the amount of loss.—*GUIMOND v. FIDELITY-PHOENIX INSURANCE CO. OF NEW YORK* (1912), 10 E. L. R. 562; 2 D. L. R. 654.—CAN.

2715 ix. ———.]—*ROBINSON v. MIDLAND FIRE, ETC. CO.* (1916), 34 W. L. R. 577; 10 W. W. R. 824.—CAN.

2715 x. ———.]—*SMITH v. LIVERPOOL LONDON & GLOBE INSURANCE CO.* (1891), 10 N. Z. L. R. 8.—N.Z.

2715 xi. ———.]—*HOLLANDER & CO. v. ROYAL INSURANCE CO.* (1885), 4 S. C. 66.—S. AF.

to time for bringing action.]—One condition of a policy was, that no action should be brought under it against the co., unless within twelve months after the right accrued. Pltf. alleged a waiver of this condition & relied upon an alleged conversation between his agent & the president of the co.:—*Held*: the condition could not be so waived.—*LAMPKIN v. WESTERN ASSURANCE CO.* (1858), 13 U. C. R. 237.—CAN.

r. ———.]—*DAVIS v. CANADA FARMERS' MUTUAL INSURANCE CO.* (1876), 39 U. C. R. 452.—CAN.

t. ———.]—*MCDERMOTT v. WESTERN CANADA FIRE INSURANCE CO.* (1913), 24 W. L. R. 375.—CAN.

a. ——— Stipulation in policy.]—The stipulation in a policy of insurance, that nothing "less than a distinct

specific agreement, clearly expressed & indorsed on the policy, shall be construed as a waiver of any printed or written condition therein," is confined to those conditions which are involved in the creation of the contract itself, & does not extend to those relating to the steps to be taken by the assured for the recovery of a loss upon the policy, especially where in the clause of the policy which deals with the question of proofs it is agreed that no "act of the co. except their written declaration shall operate to waive the requirements of such proofs."—*BOWES v. NATIONAL INSURANCE CO.* (1880), 20 N. B. R. 437.—CAN.

b. ——— As to time of payment.]—*CITY OF LONDON FIRE INSURANCE CO. v. SMITH* (1888), 15 S. C. R. 69.—CAN.

c. ——— Agent's authority.]—Neither the local agent for soliciting risks nor an adjuster sent for the purpose of investigating the loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment, & as the policy in question specially required it, there could be no waiver unless by indorsement in writing upon the policy signed as therein specified.—*COMMERCIAL UNION ASSURANCE CO. v. MARGESON* (1899), 29 S. C. R. 601.—CAN.

d. Time for bringing action—Party under legal disability.]—*TALLMAN v. MUTUAL FIRE INSURANCE CO. OF CLINTON* (1867), 27 U. C. R. 100.—CAN.

e. ——— Condition unreasonable.]—*PEORIA SUGAR REFINING CO. v. CANADA FIRE & MARINE INSURANCE CO.* (1885), 12 A. R. 418.—CAN.

f. ———.]—A provision in a policy that action shall be brought within six months after the occurrence of the loss is unjust & unreasonable.—*STRONG v. CROWN FIRE INSURANCE CO.* (1913), 23 O. W. R. 701; 4 O. W. N. 584; 10 D. L. R. 42.—CAN.

g. Proof that goods actually on

**Sect. 10.—Adjustment of loss: Sub-sect. 2.]****SUB-SECT. 2.—AMOUNT RECOVERABLE.**

**2716. Limited owners.]—**CASTELLAIN *v.* PRESTON, No. 2562, *ante*.

**2717. Goods in possession of bailee—Whether limited to bailee's interest.]—**WATERS *v.* MONARCH LIFE ASSURANCE CO., No. 2568, *ante*.

**2718. ———.]—**Pltfs., common carriers, insured goods against fire, in an insurance co. of which deft. was treasurer. By a condition indorsed on the policy "goods held in trust, or on commission," were "to be insured as such, otherwise the policy" would "not extend to cover such property." By the policy, £15,000 was declared to be insured "on goods their" (pltfs.) "own & in trust as carriers" in a certain warehouse; & it was stipulated that the funds of the insurance co. were to be "liable to pay, reinstate, or make good" "to the" "assured" "all damage & loss which the" "assured" should "suffer by fire, on the property" therein "particularised." Another of the conditions indorsed ran thus: "In every case of loss duly proved, the co. will either reinstate the property, or the assured shall receive satisfaction to the amount thereof, without discount or deduction":—*Held*: to the named amount, the whole value of goods in the warehouse, in pltfs.' possession as carriers, was insured by it, & not merely pltfs.' interest as carriers in such goods.—LONDON & NORTH WESTERN RY. CO. *v.* GLYN (1859), 1 E. & E. 652; 28 L. J. Q. B. 188; 33 L. T. O. S. 199; 5 Jur. N. S. 1001; 7 W. R. 238; 120 E. R. 1054.

*Annotations*:—*Distd.* North British Insce. *v.* Moffatt (1871), L. R. 7 C. P. 25. *Refd.* Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596. *Mentd.* Martineau *v.* Kitching (1872), L. R. 7 Q. B. 436.

**2719. Increase in value after insurance.]—**Defts., agreed with pltfs. that goods of pltfs. arriving in deft.'s ships should be warehoused by defts. at a weekly rental which was to cover fire insurance. The agreement did not specify any sum for which the goods were to be insured, but from time to time as goods arrived & were warehoused the customs entries relating to the goods which showed the cost price of the goods in London, were handed to defts. A fire occurred in defts.' warehouse & some of pltfs.' goods were destroyed. The value of these goods at the time of their deposit in the warehouse & as shown by the customs entries was £1,125, but at the date of the fire the goods had increased in value & were worth £1,968. In an action by pltfs. to recover the latter sum:—*Held*: (1) it was the duty of pltfs. under the agreement to declare to defts. the value to be placed on the goods for the purpose of insurance & as the only value made known to defts. was that shown in the customs entries defts. liability was limited to that amount; (2) an average clause must be implied in the contract for insurance between the parties.—CARRERAS *v.*

*premises.*]—In an action upon policies of fire insurance there must be affirmative evidence from which it may reasonably be inferred that the goods insured were actually in the house at the time of the fire.—PACIFIC COAST REALTY CO. *v.* GERMAN AMERICAN INSURANCE CO. (1917), 24 B. C. R. 95.—CAN.

**h. Production of accounts & invoices under statutory condition—Whether condition precedent.]—**A statutory condition of a fire insurance policy that the insured shall in support of his claim, if required & if practicable, produce books of account & furnish invoices & other vouchers, does not

make the procuring & production of copies of invoices a condition precedent to his right of action.—KIBZCY *v.* HOME INSURANCE CO., [1918] 2 W. W. R. 541.—CAN.

**k. Notice of change of ownership.]—**MINUCOE *v.* LONDON, LIVERPOOL & GLOBE INSURANCE CO., LTD. (circa 1923), 42 N. S. W. W. N. 140; 31 Argus L. R. 417.—AUS.

**l. ———.]—**Penalty for breach prescribed by insurers.]—The insurers, having set forth the only penalty which the mtgees. must suffer for a failure to notify the insurers of a change of ownership which comes to their know-

CUNARD S.S. Co., [1918] 1 K. B. 118; 87 L. J. K. B. 824; 118 L. T. 106; 34 T. L. R. 41.

**2720. ———.]—**Policy renewed annually—Whether increase before or after last renewal.]—*Re* WILSON & SCOTTISH INSURANCE CORPN., No. 2664, *ante*.

—Alteration of risk clause.]—See Sect. 9, sub-sect. 2, C., *ante*.

**2721. Insurance against loss of "profits"—What are "profits"—Whether profits from temporary premises brought into account.]—**By a Lloyd's policy dated Nov. 22, 1919, made on a "Profits Insurance" form, the underwriters agreed, subject to the conditions & definitions expressed in &/or endorsed on the policy, to pay the loss of profits, valued at £100 per working day, for each working day—limited to 325 working days—that work might be wholly stopped on the insured premises owing to a fire, or a proportionate part of that sum if work was partially stopped owing to the fire. The expression "profits" was defined in the policy as meaning "the net profit of the business added to certain standing charges." Among the conditions were: (a) "If the standing charges shall be reduced or cease to be paid, the amount of loss hereunder shall be reduced accordingly;" & (b) "The assured shall use due diligence & do & concur in doing all things reasonably practicable to minimise any interruption of or interference with the business & to avoid or diminish the loss." During the currency of the policy a fire occurred on the insured premises which resulted in their partial destruction, & work was partially stopped there for the full period covered by the policy. The assured secured temporary premises elsewhere, where they continued the business. The assured brought an action claiming from the underwriters a partial loss under the policy:—*Held*: if "standing charges" were reduced or ceased to be paid in consequence of the fire they must be accounted for against the basis figure of £100 per working day & the loss payable by the underwriters reduced accordingly. But there was no implied term that the profits made at the temporary premises should be brought into account in diminution of the loss payable by the underwriters.—CITY TAILORS, LTD. *v.* EVANS (1921), 91 L. J. K. B. 379; 126 L. T. 439; 38 T. L. R. 230. C. A.

**2722. ———.]—**Effect of reduction of standing charges.]—CITY TAILORS, LTD. *v.* EVANS, No. 2721, *ante*.

**2723. ———.]—**Provision in policy as to assessment of loss by auditors—How far assessment conclusive.]—By a policy of insurance against fire on business premises an insurance co. agreed to pay to the insured in the event of damages by fire to their property on account of annual net profit an agreed percentage on the amount by which the turnover in each month after the fire should in consequence of the fire be less than the turnover for the corresponding month of the year

ledge, viz. that the mtgees. must, if there is an increased hazard by reason thereof, pay an increased rate, are limited to that penalty.—LONDON LOAN & SAVINGS CO. OF CANADA *v.* UNION INSURANCE CO. OF CANTON, LTD., [1925] 56 O. L. R. 590.—CAN.

**PART III. SECT. 10, SUB-SECT. 2.**

**m. General rule.]—**Pltf.'s right to recover under a policy of fire insurance is governed, regulated, & limited to the actual value of the goods destroyed, & the measure of damages is not the cost of reinstatement.—JACKSON *v.* CANADA ACCIDENT & FIRE ASSURANCE CO. (1924), 52 N. B. R. 33.—CAN.



preceding the fire. The policy further provided that the amount of all losses under the policy should be assessed by the insured's auditors. During the currency of the policy property of the insured was damaged by fire. The auditors gave certificates stating the difference between the turnover for the months after & the corresponding months in the year before the fire, & the percentage payable. An arbn. was held to determine the amount payable under the policy. The auditors' certificates were put in evidence & a member of the firm of auditors was called as a witness by the insured & stated that when he gave the certificates he was satisfied that the losses of turnover stated therein were in fact sustained in consequence of the fire:—*Held*: the assessments of the auditors were conclusive evidence of the amount of the loss recoverable under the policy unless it were shown that the auditor had misdirected himself in point of law or had omitted to take into consideration some material fact; & the auditor might be cross-examined & the insurance co. might call direct evidence, to show that the auditor had omitted to take into consideration the fact that the losses of turnover were wholly or in part due to other causes than the fire, but not to show that the auditor's conclusions of fact were erroneous.—*RECHER & CO. v. NORTH BRITISH & MERCANTILE INSURANCE CO.*, [1915] 3 K. B. 277; 84 L. J. K. B. 1813; 113 L. T. 827, D. C.

**2724. At what time ascertained—Insurers entering into occupation—Loss occurring during occupation.**—Where an insurance co., acting under powers contained in the policy, have taken possession of a building, which has been damaged by fire, in order to minimise the damage by salvage operations, they will be held liable for damage done during their occupation of the premises, the loss falling to be determined at the time when they give up possession to the owner, not at the moment when the fire was extinguished.—*AHMEDBHOY HABBIBHOY v. BOMBAY FIRE & MARINE INSURANCE CO.* (1912), 107 L. T. 668; 29 T. L. R. 96; 6 B. W. C. C. N. 71, P. C.

**2725. Premises subject to several mortgages—Separate insurances by mortgagees—Loss paid to prior mortgagees—Rights of subsequent mortgagees.**—Pursuers having a heritable security by bond on certain premises insured them against fire in defender's office for £900. Prior securities had been given by the owner upon the same premises to other creditors, & those creditors had insured in other offices. The premises having been in part destroyed by fire, the prior encumbrancers

recovered from & were paid by the offices in which they were insured an amount sufficient for the re-instatement of the premises, & for the payment of the rent during the period of reinstatement, but the premises were not in fact re-instated. It appeared that immediately before the date of the fire the value of the premises was sufficient to cover the prior bonds & that of pursuers, but in consequence of the fire the value of the premises was so reduced that they were not sufficient to meet the balance remaining due to the prior creditors, & pursuers' bond was left entirely uncovered:—*Held*: (1) pursuers were entitled, notwithstanding the amount paid to the other creditors, to recover to the full extent of their loss; (2) pursuers were not entitled to recover anything in respect of the loss of rent of the premises after they had been damaged by fire; (3) *Seem*: Fires Prevention (Metropolis) Act, 1774 (c. 75), s. 83, relating to the application of insurance money on houses destroyed by fire, does not extend to Scotland.—*WESTMINSTER FIRE OFFICE v. GLASGOW PROVIDENT INVESTMENT SOCIETY* (1888), 13 App. Cas. 699; 59 L. T. 641; 4 T. L. R. 779, H. L.

*Annotations*:—As to (3) *Reid*. *Griffiths v. Fleming*, [1909] 1 K. B. 805; *Sinnott v. Bowden*, [1912] 2 Ch. 414.

**2726. Insured with limited interest.**—*CASTEL-LAIN v. PRESTON*, No. 2562, *ante*.

**2727. Evidence of value—Customs declaration.**—*CARRERAS v. CUNARD S.S. CO.*, No. 2719, *ante*.

**2728. Premises insured by mortgagees as well as insured.**—Pltfs. effected an insurance with defts. against loss or damage by fire on pltfs.' mills, subject to a condition that if at the time of any loss or damage by fire happening to any building or other property thereby insured there should be any other subsisting insurance or insurances, whether effected by the assured or by any other person, covering the same, defts. should not be liable to pay or contribute more than their ratable proportion of such loss or damage. Pltfs. had mortgaged the mills under an agreement which incorporated certain rules of the mtgees.' assocn., by which the mtgees were to insure the mills at the cost of pltfs., & any moneys recovered under such an insurance were to be applied in discharge of the mtge. debt, or, at the option of the mtgees., in repairing the damage, & in pursuance of the agreement a policy had been effected in the names of certain trustees for the mtgees. with another insurance co.:—*Held*: in an action against defts. to recover the full amount of the loss under the policy, pltfs. could not recover more than a ratable proportion from defts., for, in effect, by

**2724 i. At what time ascertained—Insurers entering into occupation—Loss occurring during occupation.**—*ATLAS ASSURANCE CO., LTD. v. AHMEDBHOY HABBIBHOY* (1908), 1 L. L. R. 34 Bom. 1.—*IND*.

**2728 i. Premises insured by mortgagees as well as insured.**—Where there is separate insurance in different cos. in favour of mtgee. & mtgor., the latter, in an action on the policy effected by him, is not bound by a settlement of the amount of the loss between mtgee. & his insurers, although assented to by mtgor.—*PRITTE v. CONNECTICUT FIRE INSURANCE CO.* (1896), 23 A. R. 449.—*CAN*.

**n. Reinstatement after loss—Second fire during reinstatement—Insurers liable for second loss.**—*SMITH v. COLONIAL MUTUAL FIRE INSURANCE CO.* (1880), 6 V. L. R. 200.—*AUS*.

**o. Partial insurance.**—Where a person insures his house or goods for a part only of their value, & suffers a

loss equal to the full amount insured, that sum, unless the policy be specially framed, must be paid, & not merely such a proportion of it as would correspond with the proportion between the sum insured & the whole value of the property.—*THOMPSON v. MONTREAL INSURANCE CO.* (1850), 6 U. C. R. 319.—*CAN*.

**p. Amount recoverable limited—By insurers' rules.**—*TUCKER v. PROVINCIAL INSURANCE CO.* (1859), 7 Gr. 122.—*CAN*.

**q. — — — — —**—*KING v. PRINCE EDWARD COUNTY MUTUAL INSURANCE CO.* (1868), 19 C. P. 134.—*CAN*.

**r. — — — — —**—*AMERICAN FOOTWEAR CO. v. LANCASHIRE & GENERAL ASSURANCE CO.* (1925), 57 O. L. R. 305.—*CAN*.

**t. — — — — —**—*For total loss—Condition inapplicable to partial loss.*—*EACRETT v. GORE DISTRICT MUTUAL INSURANCE CO.* (1903), 24 C. L. T. 7; 6 O. L. R.

592; 2 O. W. R. 1009.—*CAN*.

**a. — — — — —**—*Provision for concurrent insurance.*—An insurance policy insured "against all direct loss or damage by fire" to the property "to an amount not exceeding \$2,500." It contained a provision "Total concurrent insurance including this policy permitted to 75 per cent of the actual cash value of the property insured." There was no concurrent insurance. The property was totally destroyed by fire. Its value at the time of the fire was fixed at \$2,928.17:—*Held*: insured was entitled to be paid \$2,500; the purpose of the concurrent insurance clause appeared to be to limit the total liability only when there was concurrent insurance; it should not be construed as limiting under every circumstance the liability to the percentage of loss therein specified.—*FARMERS FIRE & HAIL INSURANCE CO. v. PHILIP*, [1924] 2 W. W. R. 205.—*CAN*.

**b. — — — — —**—*Specific rent payable for*



**Sect. 10.—Adjustment of loss: Sub-sects. 2, 3, 4 & 5.**  
**Sub-sect. 11 & 12.]**

the agreement between the mtgors. & mtgees., the policy effected by the other co. covered the interest of pltf., the mtgors.—**NICHOLS & Co. v. SCOTTISH UNION & NATIONAL INSURANCE Co.** (1885), 2 T. L. R. 190.

**SUB-SECT. 3.—ARBITRATION CLAUSES.**

See Part I., *ante*.

**SUB-SECT. 4.—AVERAGE AND THE AVERAGE CLAUSES.**

**2729. Policy "subject to average"—No average clause attached—Whether average clause implied.]—ACME WOOD FLOORING Co., LTD. v. MARTEN,** No. 2614, *ante*.

**2730. — Right of insured to marshal.]—ACME WOOD FLOORING Co., LTD. v. MARTEN,** No. 2614, *ante*.

**2731. Whether average clause implied.]—CARRERAS v. CUNARD S.S. Co.,** No. 2719, *ante*.

**SUB-SECT. 5.—ENFORCEMENT OF CLAIMS—PRACTICE.**

**2732. Whether claim liquidated demand—Within R. S. C., Ord. 3, r. 6.]—A claim on a fire policy having been made against an insurance co. for unliquidated damages, pltf., a judgment creditor of the assured for £127, duly served an *ex p.* garnishee order, under R. S. C., Ord. 45, r. 1, on the co., attaching all debts owing or accruing from**

them to the assured. The co. did not appear to show cause against it, & the order was made absolute. An award on the claim was afterwards made of £248 due to the assured, who assigned it to trustees for his creditors. Pltf. demanded payment under his garnishee order of £127 out of the sum payable by the co., & threatened them with execution, & the trustees claiming the £248, the co. took out an interpleader summons on which an order was made directing the sum of £127 to be paid into ct., & an issue to be tried as to whether that sum was the property of pltf. or the trustees:—**Held:** although no attachable debt was in existence at the date of the garnishee order, yet it, not having been set aside, entitled pltf. to issue execution for £127, & the interpleader order was wrong.

It is clear that the claim of the judgment debtor L. against the insurance co., which resulted in an award in his favour on Dec. 14, 1883, for £248 2s. 11d., was not at the date of the garnishee order in Apr. 1883, an attachable debt. It was not a debt either present or accruing. It was a mere claim for unliquidated damages & was not the subject of attachment in the hands of the insurance co. (**WILLIAMS, J.**).—**RANDALL v. LITHGOW** (1884), 12 Q. B. D. 525; 53 L. J. Q. B. 518; 50 L. T. 587; 32 W. R. 794, D. C.

**Annotations:—****Refd.** *Vinall v. De Pass*, [1892] A. C. 90. **Mentd.** *Harris v. Beauchamp* (1894), 63 L. J. Q. B. 480.

**2733. — — —.]—NATIONAL BRITISH & IRISH MILLERS' INSURANCE Co. v. MARTIN** (1911), cited Yearly Practice of Supreme Court for 1926, p. 21.

**2734. Discovery—Action on policy by trustee in bankruptcy—Whether ordered against.]—A manufacturer effected a policy of insurance against fire upon his factory, machinery, & stock-in-trade. The factory & its contents were burnt down, & soon afterwards the manufacturer became bkpt.**

*specific period—Period less than specified—Proportionate payment.]—BUCHANAN, ETC. v. LIVERPOOL & LONDON & GLOBE INSURANCE Co.* (1884), 11 R. (Ct. of Sess.) 1032; 21 Sc. L. R. 696.—**SCOT.**

**c. Two-thirds cash value.]—WILLIAMSON v. GORE DISTRICT MUTUAL FIRE INSURANCE Co.** (1866), 26 U. C. R. 145.—**CAN.**

**d. —.]—Where a separate insurance is effected on separate properties, the co. only to pay as if they had insured two-thirds of the actual cash value, the insured can recover two-thirds only of the particular property injured.—McCULLOCH v. GORE DISTRICT MUTUAL FIRE INSURANCE Co.** (1872), 32 U. C. R. 610.—**CAN.**

**e. —.]—FORSYTH v. WALPOLE FARMERS MUTUAL FIRE ASSURANCE Co.** (1918), 43 O. L. R. 236; 43 D. L. R. 503.—**CAN.**

**f. Claim for sum insured—Liability acknowledged by agent of insurers—Actual loss less than liability acknowledged—Amount acknowledged payable.]—THOMSON v. LIVERPOOL, LONDON & GLOBE INSURANCE Co.** (1871), N. B. Dig. 434.—**CAN.**

**g. Insurance of stock in trade—Part only remaining in specie—Stock renewed & increased.]—In an action on a policy for \$1,000 on stock in trade, it appeared that when the fire occurred only \$667 worth of the original goods remained in specie, but other goods had been purchased in the course of business, & the stock was then really worth \$2,800:—**Held:** pltf. was entitled to recover the full amount of the policy.—**BUTLER v. STANDARD FIRE INSURANCE Co.** (1879), 4 A. R. 391.—**CAN.****

**h. — Goods in trust—Right of assured to cover loss—Regardless of depositor's claims.]—DALGLEISH v.**

**BUCHANAN** (1854), 16 Dunl. (Ct. of Sess.) 332; 26 Sc. Jur. 160.—**SCOT.**

**k. By tenant for life.]—The measure of damages recoverable by tenant for life of insured premises is the full value of such premises to the extent of the sum insured.—CALDWELL v. STADACONA FIRE & LIFE INSURANCE Co.** (1883), 11 S. C. R. 212.—**CAN.**

**l. Damages resulting from salvage of property.]—**Held:** pltf. was entitled to recover under a policy of insurance against fire, damages resulting from *bond fide* efforts to save the insured property by removal.—**MCLAREN v. COMMERCIAL UNION ASSURANCE Co.** (1885), 12 A. R. 279.—**CAN.****

**m. Interest on amount due.]—In an action upon fire insurance policies, a referee was directed to inquire, ascertain, & report the amount of the loss:—**Held:** the referee had authority to allow interest on the amount of the loss as ascertained by him.—**A.-G. v. AETNA INSURANCE Co.** (1890), 13 P. R. 159.—**CAN.****

**n. Amount claimed greater than value of property.]—Where the insurance policy is claimed to be for a larger amount than the value of the property insured, the judgment in the absence of fraud, will be in favour of pltf. for the value, with a reference to the clerk to ascertain such value.—**HOFFMAN v. CALGARY FIRE INSURANCE Co.** (1909), 2 Alta. L. R. 1.—**CAN.****

**o. Premises insured by lessor & lessee—Insurance recovered by lessor—Full compensation of lessee by lessor—Lessee no rights on policy.]—**BROWN v. LONDON MUTUAL FIRE INSURANCE Co.** (1914), 29 W. L. R. 711.—**CAN.****

**p. Value—How calculated.]—**Held:** the proper legal basis on which to fix the value of the buildings under the policies, was, not the "replace-**

ment value," i.e. the cost of erecting a similar building less a reasonable allowance for depreciation, but the actual value of the property to be insured at the time of the loss, having regard to all the conditions & circumstances then existing.—**COLONSAY HOTEL Co. v. CANADIAN NATIONAL FIRE INSURANCE Co.**, [1923] 3 D. L. R. 1001; [1923] S. C. R. 688; 2 W. W. R. 1170; *reversy.*, 70 D. L. R. 367; 16 Sask. L. R. 146.—**CAN.**

**q. — — —.]—VANCE v. FORSTER** (1841), Ir. Cir. Rep. 47.—**IR.**

**r. Insurance by poorhouse managers—Covering servant's property—Right of assured to total insurance money.]—**FERGUSON v. ABERDEEN PARISH COUNCIL**, [1916] S. C. 715.—**SCOT.****

**PART III. SECT. 10, SUB-SECT. 4.**

**t. Average clause in one policy—Condition that second policy subject to average.]—Where a policy of fire insurance contained the condition "that if the assured held any policy subject to average on property covered by this insurance, this policy should in like manner be subject to average," & the assured did hold another policy upon the same property, which contained the usual three conditions of average:—**Held:** the three conditions of average must be imported into the first-named policy.—**MCGRATH v. SOUTH BRITISH INSURANCE Co.** (1884), 3 S. C. 81.—**S. AF.****

**PART III. SECT. 10, SUB-SECT. 5.**

**a. Where defence of fraud.]—Where in actions upon fire insurance policies the questions in issue between the parties were not confined to matters of mere account, but debts, disputed their liability, & issues of fraud, misrepresentation, & conceal-**

The insurance co. disputed the claim on the ground that it was fraudulent & excessive. The trustee in bkpcy. brought an action against the co. on the policy, & the co. thereupon filed a bill against the trustee & the manufacturer to obtain discovery & to restrain the action till full discovery had been made:—*Held*: the bill could not be sustained, inasmuch as the manufacturer was merely a witness over whom pltf. in the action at law had no control, & as it was not proved that any discovery for the purpose of the defence could be got from the trustee.—*MANCHESTER FIRE ASSURANCE CO. v. WYKES* (1875), 33 L. T. 142; 23 W. R. 884, L. J.J.

*See, generally*, DISCOVERY, Vol. XVIII., pp. 42 *et seq.*

**2735. Particulars—Of cause of fire—Whether ordered—At instance of insurers.]**—A policy of insurance effected with defts. against fire provided that the policy should not cover loss or damage by fire occasioned by or happening through earthquakes. In an action upon the policy defts. pleaded that the loss was caused by earthquake & not by fire. Upon the application of defts., pltf. were ordered to give particulars as to the cause of the fire; & it was ordered that unless the particulars were delivered within six weeks all further proceedings should be stayed until delivery thereof, & pltf. were not to be precluded from giving evidence at the trial of any matter not disclosed in their particulars provided it came to their knowledge subsequently. The plaintiffs appealed, alleging that there were several theories as to the origin of the fire:—*Held*: the information asked for was not the proper subject matter for particulars, interrogatories being the proper method of obtaining the information.—*YOUNG (G. & W.) & CO., LTD. v. SCOTTISH UNION & NATIONAL INSURANCE CO., SAME v. NORTH BRITISH & MERCANTILE INSURANCE CO.* (1907), 24 T. L. R. 73, C. A.

*See, generally*, PLEADING; PRACTICE.

**2736. Interpleader — When allowed.]** — Interpleader may be in favour of an insurance co. against the landlord of premises which have been burnt down, but insured by him & the tenant of the premises, under an agreement for a lease, & claiming therefore a right to have the money laid out in rebuilding the premises.—*PARIS v. GILHAM, JONES v. PARIS* (1813), Coop. G. 56; 35 E. R. 476. *Annotation*:—*Refd.* Sun Insce. Office v. Galinsky, [1914] 2 K. B. 545.

**2737. ——— Necessity for adverse claims —Premises reinstated by lessee.]**—In pursuance of a lessee's covenant to insure against fire a policy of insurance on the demised premises was effected in the names of the lessors & the lessee. A fire having occurred, the insurance money was adjusted at a certain sum. The lessors served notice on the insurance co. under Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, requesting them to cause the insurance money to be laid out in rebuilding & reinstating the premises. The lessee began to do the work of rebuilding & reinstating himself, & informed the co. that he would not ask for payment of the insurance money until the work was completed. The insurance co. having taken out a summons for an order calling upon the lessee & the lessors to appear & maintain their respective claims:—*Held*: the insurance co. were not entitled to an interpleader order

L.J.), because there were not "two or more parties making adverse claims" within the meaning of R. S. C., Ord. 57, r. 1 (a), the lessee not having made any claim at all (BUCKLEY, L.J., & KENNEDY, L.J.), because, assuming that the lessee had made any claim at all, the lessors & the lessee were not "making adverse claims" with regard to any "debt, money, goods or chattels," but were making inconsistent claims as to the nature of the obligation owed by the co.—*SUN INSURANCE OFFICE v. GALINSKY*, [1914] 2 K. B. 545; 83 L. J. K. B. 633; 110 L. T. 358, C. A.

*See, generally*, INTERPLEADER, pp. 446 *et seq.*

**2738. Appeals—Grounds of—Whether ground allowed.]**—Where a writ & declaration alleged that deft. had been guilty of wilful deceit, & had fraudulently effected a transference of fire insurance in his books after a fire had occurred, from a co. of which he was agent, to applts., of whom he was also agent, with a specific fraudulent purpose, & such charges of fraud & deceit failed:—*Held*: applts. could not be allowed in final appeal to contend for the first time that the pleadings & evidence disclosed such negligence or breach of duty by resp. as their agent as is in law sufficient to infer his liability for the amount paid by them under the insurance so transferred. Fraud was of the essence of the declaration, & the evidence of resp. directed to that issue cannot be accepted as representing all that he would have brought forward to rebut a charge of negligence; nor had the points connected with that issue been submitted to the cts. below.—*CONNECTICUT FIRE INSURANCE CO. v. KAVANAGH*, [1892] A. C. 473; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21; 8 T. L. R. 752, P. C.

*Annotations*:—*Consd.* Yorkshire Insce. v. Craine, [1922] 2 A. C. 541. *Refd.* Banbury v. Bank of Montreal, [1918] A. C. 620; North Staffordshire Ry. v. Edge, [1920] A. C. 254.

*See, generally*, PRACTICE.

## SECT. 11.—REINSURANCE.

*See, generally*, Part I., Sect. 8, *ante*.

**2739. Reinsurance contract incorporating terms of policy—Whether inapplicable terms incorporated.]**—In a contract of re-insurance which was engrafted on an ordinary printed form of fire insurance policy, & incorporated all its terms, there was a clause which purported to prohibit an action thereon unless commenced within twelve months next after the fire:—*Held*: having regard to the true construction of the contract, which carelessly purported to include many conditions inapplicable to re-insurance, the above clause must also be regarded as inapplicable. Such a clause is reasonable in the original policy where the assured can sue immediately on incurring loss; it cannot apply where the insured is unable to sue until the direct loss is ascertained between parties over whom he has no control.—*HOME INSURANCE CO. OF NEW YORK v. VICTORIA-MONTREAL FIRE INSURANCE CO.*, [1907] A. C. 59; 76 L. J. P. C. 1; 95 L. T. 627; 23 T. L. R. 29, P. C.

## SECT. 12.—CONTRIBUTION.

**2740. Where principle applies—Insurance of same interests in same subject-matter.]**—By floating

ment of facts were raised upon the pleadings:—*Held*: an order referring all the issues in the action to a referee for inquiry & report was improperly

made, & pltf. was entitled to have a trial in the ordinary way.—*CLARRY v. BRITISH AMERICA ASSURANCE CO.* (1887), 12 P. R. 357.—CAN.

## PART III. SECT. 12.

**2740 i. Where principle applies—Insurance of same interests in same subject-matter.]**—*SCOTTISH AMICABLE*



**Sect. 12.—Contribution.** **Sect. 13: Sub-sects. 1 & 2, A. & B.]**

policies of insurance effected by B. & Co., wharfingers, they insured against loss or damage by fire, in the sums named, grain & seed, the assured's own or on commission, for which they were responsible, subject to conditions of average, & to this condition, that "if at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, the co. shall not be liable to pay or contribute more than its ratable proportion of such loss or damage." While these policies were subsisting a fire destroyed a quantity of grain stored with B. & co., part of which belonged to R. & co., who had also effected policies, called merchants' policies, on the grain thus destroyed, including also grain stored elsewhere, which policies contained the like conditions as the wharfingers' policies. B. & co., were paid in full by the several insurance cos. In a suit to determine the liability of the cos. *inter se*:—**Held**: (1) the grantors of the merchants' policies were not liable to contribute to the loss; (2) B. & co. were primarily liable, but, being indemnified by the grantors of the wharfingers' policies, the latter were ultimately liable; (3) the condition as to double insurance only applied to cases where the same property was the subject-matter of insurance, & where the interests were the same.—**NORTH BRITISH & MERCANTILE INSURANCE CO. v. LONDON, LIVERPOOL & GLOBE INSURANCE CO.** (1877), 5 Ch. D. 569; 46 L. J. Ch. 537; 36 L. T. 629, C. A.

**Annotations**:—As to (2) **Appld.** *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560. As to (3) **Refd.** *American Surety Co. of New York v. Wrightson* (1910), 103 L. T. 663. **Generally, Refd.** *Castellain v. Preston* (1882), 8 Q. B. D. 613. **Mentd.** *West of England Fire Insco. v. Isaacs* (1896), 66 L. J. Q. B. 36; *Engel v. Lancashire & General Assee.* (1925) 41 T. L. R. 408.

**2741. — Whether between insurers of bailee & insurers of bailor.]—NORTH BRITISH & MERCANTILE INSURANCE CO. v. LONDON, LIVERPOOL, & GLOBE INSURANCE CO., No. 2740, ante.**

### SECT. 13.—RIGHTS AND DUTIES OF INSURERS AFTER LOSS.

#### SUB-SECT. 1.—ENTRY ON PREMISES AND SALVAGE.

*See, generally, Part I., ante.*

**2742. Insurer remaining in possession unreasonable time.]—Semble**: an action may be maintained by a person insured from fire against the insurers for taking & keeping possession, for an unreasonable time, of his premises, & the salvage after a fire.—**OLDFIELD v. PRICE (SECRETARY OF GENERAL FIRE ASSURANCE CO.)** (1860), 2 F. & F. 80.

**HERITABLE SECURITIES ASSOCN. v. NORTHERN ASSURANCE CO.** (1883), 11 R. (Ct. of Sess.) 287; 21 Sc. L. R. 189.—**SCOT.**

**b. Lapsing of concurrent policies—No notice to remaining insurer—Whether abatement allowed.]—HORDERN v. COMMERCIAL UNION ASSURANCE CO.** (1884), 5 N. S. W. L. R. (L.) 309; 1 N. S. W. W. N. 7, 30.—**AUS.**

**c. Limitation of amount recoverable.]—FIRST UNITARIAN CONGREGATION OF TORONTO TRUSTEES v. WESTERN ASSURANCE CO.** (1866), 26 U. C. R. 175.—**CAN.**

**d. —.]—By bye-laws printed on the policy defts.' liability was limited to two-thirds of the actual loss**

sustained, & the amount to be taken on one risk was restricted to \$2,000. Pltf.'s loss was \$2,200 & the other insurance co. paid the full amount of their liability, \$1,000:—**Held**: pltf. was entitled to recover two-thirds of the balance of his loss after deducting the amount of the other insurance.—**MCINTYRE v. EAST WILLIAMS MUTUAL FIRE INSURANCE CO.** (1889), 18 O. R. 79.—**CAN.**

**e. —.]—NATHANSON v. COMMERCIAL INSURANCE CO.** (1886), 4 S. C. 461.—**S. AF.**

#### PART III. SECT. 13, SUB-SECT. 1.

**1. Expenses of salvage.]—An allowance of \$200 was made to defts.**

**2743. Damage occurring during insurer's occupation.]—AHMEDBOHOY HABBIBHOY v. BOMBAY FIRE & MARINE INSURANCE CO., No. 2724, ante.**

**2744. Insurer entering into possession before particulars of loss delivered—Failure to deliver particulars in specified time.]—YORKSHIRE INSURANCE CO. v. CRAINE, No. 2703, ante.**

#### SUB-SECT. 2.—REINSTATEMENT.

##### A. In General.

**2745. Right of insurer to reinstate.]—Where a policy of fire insurance contains a clause that the insurance co. may, if it thinks fit, reinstate or replace property damaged or destroyed instead of paying the amount of the loss or damage, the co. may, if the property insured has been merely damaged, elect to reinstate it, i.e. to repair it & restore it to its former condition; or, if the property has been destroyed, to replace it by an equivalent. If by reason of the destruction of the locality in which was placed the property insured, consisting of chattels or things in the nature of chattels, or by reason of the assured not being able legally to return there, he could not have possession of the goods if reinstated in the same locality, the co. may still elect to reinstate the property, but the assured may require them to do so within a reasonable distance of the former locality. Pltf. insured certain trade fixtures & plant with defts. by a policy containing a clause as above mentioned. He had previously mortgaged the premises on which the property insured was, but that property did not pass under the mtge. Prior to the insurance pltf. had made default under the mtge., & become tenant on sufferance to the mtgees., & also having again made default, the mtgees. had commenced an action of ejectment against him. A fire occurred whereby the premises & the property insured were damaged, & the property insured could not be reinstated until the building was restored. The building was restored by defts., who, in due course of time, elected to reinstate the property, & did so there within a reasonable time in that behalf, but after the mtgees. had obtained possession of the premises under the action in ejectment. In an action under the policy by pltf. claiming to be paid the amount of the damage in money:—**Held**: pltf. was not entitled, inasmuch as defts. had exercised their option in accordance with the policy, though it might be that he would have a claim against them in another action if they had so dealt with the property, by arrangement with the mtgees. or otherwise, that he would not be able to get possession of it.—**ANDERSON v. COMMERCIAL UNION ASSURANCE CO.** (1885), 55 L. J. Q. B. 146; 34 W. R. 189; 2 T. L. R. 191, C. A.**

under a condition that in case of the removal of property to save it defts. would contribute ratably with the assured & other cos. interested, to the expenses of salvage, & the damages sustained by the removal.—**KERR v. HASTINGS MUTUAL FIRE INSURANCE CO.** (1877), 41 U. C. R. 217.—**CAN.**

#### PART III. SECT. 13, SUB-SECT. 2.—A.

**2745 i. Right of insurer to reinstate.]—HOME DISTRICT MUTUAL INSURANCE CO. v. THOMPSON** (1847), 1 E. & A. 247.—**CAN.**

**g. Election by insurer to reinstate—Impossibility of reinstatement.]—If, through want of title in the insured,**



**2746. Election by insurer to reinstate—Impossibility of reinstatement—Under Fire Prevention (Metropolis) Act, 1774 (c. 78).]**—A house, which had been erected before the above Act, being consumed by fire, the officers of the co. with whom it was insured, instead of paying the sum at which it was insured, elected to rebuild the premises; the above Act, however, prevented them from re-erecting the house in exactly the same manner in which it was before the fire, & particularly from making the site & the building project into the street beyond the line of the adjacent houses:—*Held*: the insured were entitled to maintain a bill in equity against the directors for the time being of the insurance co., for a compensation for the injury which they had sustained by reason of the inferior value of the premises erected by the insurance office, instead of the old premises. The amount of the damage, in respect of which compensation is due, will be ascertained by means of an issue.—*ALCHORNE v. FAVILL* (1825), 4 L. J. O. S. Ch. 47.

**2747. — Premises condemned as dangerous structure—Condition not caused by fire.]**—If one of the parties to a contract stipulates for the option of performing his part in one of two lawful ways, he is, after having once made his election, bound by such election; & if the performance be impossible & not illegal, he is liable to damages for not being able to perform it. In an action on a policy of insurance against fire, which contained a condition, by which the society reserved to itself the right of reinstatement in preference to the payment of claims, defts. pleaded that having elected to reinstate the insured premises, they were proceeding with the reinstatement thereof, when, by order of the Comrs. of Sewers lawfully acting in that behalf, the premises were taken down as being in a dangerous condition, such condition not being caused by the fire; & that if the said premises had been so taken down, they would have proceeded with the reinstatement, & would have restored them to the condition they were in before the fire:—*Held*: such plea was bad.—*BROWN v. ROYAL INSURANCE CO.* (1859), 1 E. & E. 853; 28 L. J. Q. B. 275; 33 L. T. O. S. 134; 5 Jur. N. S. 1255; 7 W. R. 479; 120 E. R. 1131.

*Annotation*:—*Reid. Matthey v. Curling*, [1922] 2 A. C. 180.

**2748. — Determination of insurer's term.]**—*ANDERSON v. COMMERCIAL UNION ASSURANCE CO.*, No. 2745, *ante*.

*See, generally*, CONTRACT, Vol. XII., pp. 368 *et seq.*

**2749. Sufficiency of reinstatement.]**—An insurance co. who had insured a house from fire, with an option to reinstate it, having elected in the event of a fire, to reinstate it, employed deft., a builder, to reinstate it, who used the old walls so far as they remained; & when he had finished all but a little of the painting, gave one of the insured a small sum to complete it, & got him to sign a certificate that the work was complete, & received payment from the co. The old walls, not bearing the weight of the new work, "bulged." The assured sued the co. for not duly reinstating

the house, & they defended the action, without deft.'s authority, & the assured recovered damages. The co. then sued the builder on his contract, the breach being an insufficient & imperfect reinstating, & also for fraudulent representation; & for the costs. The judge told the jury that deft. was only bound to put the building as nearly as possible in the same state as before the fire; & they found that he had done so, & that the building was not less secure than before. At the close of the case pltf. relied on the omission of the painting; but the jury found that the value was nominal, & that in getting the certificate there was no fraud. The verdict was entered for deft., the judge telling the jury that, in the absence of any express authority to defend the former action, the co. could not recover costs:—*Held*: the direction was right, & pltf. were not entitled to a verdict, even for nominal damages; & no amendment could be allowed.—*TIMES FIRE ASSURANCE CO. v. HAWKE* (1859), 28 L. J. Ex. 317; 33 L. T. O. S. 285.

**2750. —]**—*ANDERSON v. COMMERCIAL UNION ASSURANCE CO.*, No. 2745, *ante*.

**2751. Duty of insured to reinstate.]**—An insurance co., by the terms of their policies, have the option, in case of fire, of reinstating or paying the money to the assured. A fire having occurred & a claim having been made, the co. exercise their option & pay the money. Although there would be no implied promise on the part of the assured to lay out the money in reinstating, as being without consideration, & therefore a mere *nudum pactum*; *secus* where he has made an express promise, although only by parol.—*QUEEN INSURANCE CO. v. VEY* (1867), 16 L. T. 239.

**Omission of lessee to reinstate—Rights & liabilities of landlord.]**—*See LANDLORD & TENANT.*

### B. Statutory Provisions.

*See Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83.*

**2752. Application of statute—Whether local or general.]**—Bill by lessor of premises against an insurance co., averred an agreement between lessor & lessee, that the latter should insure the premises let, from fire: that an insurance was accordingly effected: that premises were burnt down: that lessor, on making inquiry of the secretary of the insurance co. whether such insurance had been effected, informed the secretary of the agreement: that the said secretary then stated that the co. considered the destruction of the houses a suspicious case: that the lessor thereupon informed the secretary that "he claimed to be entitled, as owner or lessor of the premises, to the benefit of the policy; & to have the same either laid out or expended in or towards the rebuilding" of the premises, "or paid to pltf. for that purpose": that pltf., at the conclusion of such interview stated he relied on the co. paying nothing to the lessee & that deft. assented thereto: that, notwithstanding the co. had compromised with the lessor, & obtained a discharge of all liability under the policy from him, that pltf. had rebuilt the

or from other cause, the insurer, after electing to reinstate, finds it impossible to do so, he is not bound by his election.—*BANK OF NEW SOUTH WALES v. ROYAL INSURANCE CO.* (1880), 2 N. Z. L. R. 337 (S. C.).—N.Z.

**2749 i. Sufficiency of reinstatement.]**—Where a policy of insurance contains a provision that it may be reinstated, the insurer is entitled to reinstatement upon the original terms, & not upon

changed ones.—*SUSSEX v. AETNA LIFE ASSURANCE CO.* (1917), 38 O. L. R. 365; 33 D. L. R. 549.—CAN.

**h. Election to make money payment—Insurer debarred from reinstating.]**—Where certain fire insurance offices had transacted with the insured on the footing that a money payment, to be fixed by arbn., was to be made by them in respect of a loss by fire which had occurred:—*Held*: they were

debarred from afterwards exercising an option of reinstating the premises stipulated for in the policies.—*SCOTTISH AMICABLE HERITABLE SECURITIES ASSOCN. v. NORTHERN ASSURANCE CO.* (1883), 11 R. (Ct. of Sess.) 287; 21 Sc. L. R. 189.—SCOT.

**k. Arbitration clause not ousted.]**—*JORDAAN v. SCOTTISH ASSURANCE CORPN., LTD.*, [1922] O. P. D. 129.—S. AF.

**Sect. 13.—Rights and duties of insurers after loss:**  
**Sub-sect. 2, B. Sects. 14 & 15. Part IV.**  
**Sect. 1.]**

premises; & prayed payment of the policy money in respect of such rebuilding. On demurrer for want of equity:—*Held*: (1) no sufficient request within Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, was alleged; (2) even if there had been *pltf.*'s right was to have the money applied by the co. in rebuilding, not to rebuild himself, & charge the co. with the expense; (3) *pltf.*'s remedy was by *mandamus*. *Qu.*: whether the sect., applies to property without the bills of mortality.—*SIMPSON v. SCOTTISH UNION INSURANCE CO.* (1863), 1 Hem. & M. 618; 1 New Rep. 537; 32 L. J. Ch. 329; 8 L. T. 112; 9 Jur. N. S. 711; 11 W. R. 459; 71 E. R. 270.

*Annotations*:—*As to* (2) *Consd.* Sun Insee. Office v. Galinsky, [1914] 2 K. B. 545. *Refd.* Coward v. Gregory (1866), L. R. 2 C. P. 153; Matthey v. Curling, [1922] 2 A. C. 180. *Generally, Refd.* Castellain v. Preston (1883), 11 Q. B. D. 380.

**2753.** ———.]—(1) Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, by which the governors & directors of insurance offices are authorised, upon the request of any persons entitled to any house or other buildings, which may be burnt down or damaged by fire, or upon any grounds of suspicion that the owners or occupiers or other parties effecting the insurance have been guilty of fraud or incendiarism, to cause the insurance money to be laid out in rebuilding, etc., is a general enactment, & is not limited in its operation in the metropolitan district.

(2) Trade fixtures, put up by a tenant, being removable by him, are not comprised in the expression "house or other buildings" in the statute. Therefore where such fixtures are separately insured & destroyed by fire during the tenancy, the landlord is not entitled to have the insurance money laid out under the Act; & a covenant by the tenant to deliver up the fixtures at the determination of the tenancy, was held, as conferring a mere personal right resting in contract, to make no difference in this respect.—*Re BARKER, Ex p. GORELY* (1864), 4 De G. J. & Sm. 477; 5 New Rep. 22; 34 L. J. Bcy. 1; 11 L. T. 319; 10 Jur. N. S. 1085; 13 W. R. 60; 46 E. R. 1003, L. C.

*Annotations*:—*As to* (1) *Consd.* Westminster Fire Office v. Glasgow Provident Investment Soc. (1888), 13 App. Cas. 699. *Folld.* Sinnott v. Bowden, [1912] 2 Ch. 414. *Refd.* Rayner v. Preston (1881), 50 L. J. Ch. 472.

**2754.** ———.]—(1) Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, is, notwithstanding the doubt expressed by LORD WATSON in *Westminster Fire Office v. Glasgow Provident Investment Society*, No. 2725, *ante*, of general as opposed to local application. (2) The same sect. notwithstanding the doubt expressed by LORD SELBORNE in *Westminster Fire Office v. Glasgow Provident Investment Society*, No. 2725, *ante*, applies as between *mtgor.* & *mtgee.*, & a *mtgee.* may therefore, under the sect. require the money to be spent in rebuilding, etc.—*SINNOTT v. BOWDEN*, [1912] 2 Ch. 414; 81 L. J. Ch. 832; 107 L. T. 609; 28 T. L. R. 594; 6 B. W. C. C. N. 157.

*Annotation*:—*As to* (1) *Refd.* Matthey v. Curling, [1922] 2 A. C. 180.

**2755.** ——— **Whether Scotland included.]**—*WESTMINSTER FIRE OFFICE v. GLASGOW PROVIDENT INVESTMENT SOCIETY*, No. 2725, *ante*.

**2756.** ——— **Whether fixtures included.]**—*Re BARKER, Ex p. GORELY*, No. 2753, *ante*.

**2757.** ——— **Whether chattels included.]**—*Re QUICKE'S TRUSTS, POLTIMORE v. QUICKE*, No. 2760, *post*.

**2758.** **Right to have money applied in rebuilding—Sufficiency of request.]**—*SIMPSON v. SCOTTISH UNION INSURANCE CO.*, No. 2752, *ante*.

**2759.** ——— **Who may enforce—Lessee.]**—Premises in the occupation of *pltf.*'s which were insured by S., *pltf.*'s lessor, with *defts.*, having been destroyed by fire, *defts.* agreed with S. the amount of indemnity for the loss & obtained a bond, without sureties, from him that that amount should be laid out by him in reinstating the premises. Neither *pltf.*'s nor S. desired the premises to be rebuilt as they formerly existed; but they were unable to agree what should be built. On an application by *pltf.*'s for a *mandamus* to compel *defts.* to lay out the money in reinstating the premises:—*Held*: (1) a *mandamus* must be refused on the grounds (a) that the obligation under the statute could not be imperative; (b) that there was no power which would enable *defts.* to enter upon the land for the purpose of rebuilding; (2) the proper remedy was an injunction to restrain *defts.* from paying S. without obtaining sufficient security.—*WIMBLEDON PARK GOLF CLUB, LTD. v. IMPERIAL INSURANCE CO., LTD.* (1902), 18 T. L. R. 815.

*Annotation*:—*As to* (1) *Refd.* Sun Insee. Office v. Galinsky, [1914] 2 K. B. 545.

**2760.** ——— **Remainderman under settlement.]**—During the minority of a life tenant of settled estates in D. the trustees, acting under Conveyancing & Law of Property Act, 1881 (c. 41), s. 42, & Trustee Act, 1893 (c. 53), s. 18, insured (a) the mansion house & (b) certain settled chattels & furniture against fire. The policies were taken out in the names of the trustees & the premiums were paid out of income. The house & chattels were for the most part destroyed by fire & the trustees recovered £7,000 on the house policy & £1,244 on the chattels policy. The trustees, the infant life tenant, aged twenty, & the remaindermen all desired the house to be rebuilt & refurnished, but the infant life tenant who was not bound to insure, claimed that as the premiums had been paid out of his income the policy moneys in the hands of the trustees were his, & that he was entitled to a charge for any amount expended. The remaindermen appeared but took no part in the argument:—*Held*: (1) under Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, the remaindermen were entitled to have the £7,000 recovered on the house policy applied in rebuilding & the infant life tenant was not entitled to a charge; (2) the infant life tenant was entitled to the £1,244 recovered on the chattel policy to which the sect. did not apply.—*Re QUICKE'S TRUSTS, POLTIMORE v. QUICKE*, [1908] 1 Ch. 887; 77 L. J. Ch. 523; 98 L. T. 610; 24 T. L. R. 23.

**2761.** ——— **Mortgagee.]**—*SINNOTT v. BOWDEN*, No. 2754, *ante*.

**2762.** ——— **How enforced.]**—*SIMPSON v. SCOTTISH UNION INSURANCE CO.*, No. 2752, *ante*.

**2763.** ———.]—*WIMBLEDON PARK GOLF CLUB, LTD. v. IMPERIAL INSURANCE CO., LTD.*, No. 2759, *ante*.

**PART III. SECT. 13, SUB-SECT. 2.—B.**

**2761 i.** **Right to have money applied in rebuilding—Who may enforce—Mortgagee.]**—Where a *mtge.* contains no covenant on the part of *mtgor.* to insure, but he does insure, & a loss by fire occurs whereby the insur-

ance money becomes payable, the *mtgee.* is entitled, under 14 Geo. 3, c. 78, s. 83, to have the insurance money laid out in rebuilding.—*STINSON v. PENNOCK* (1868), 14 Gr. 604.—*CAN.*

**i.** ———.]—*RANDOLPH v. RAN-*

*DOLPH* (1907), 4 E. L. R. 17; 3 N. B. Eq. Rep. 578.—*CAN.*

**m.** **Variation of statutory provision.]**—*McCoy v. NATIONAL BENEFIT, LIFE & PROPERTY ASSURANCE CO., LTD.*, [1918] 1 W. W. R. 466; 25 B. C. R. 162.—*CAN.*



**2764.** — Whether right to rebuild & reclaim included.]—*SIMPSON v. SCOTTISH UNION INSURANCE Co.*, No. 2752, *ante*.

**2765.** — Right disputed—Remedy of insurer.]—*SUN INSURANCE OFFICE v. GALINSKY*, No. 2737, *ante*.

— Trust property.]—See *Trustee Act*, 1925 (c. 19), s. 20 (5); *TRUSTS & TRUSTEES*.

— Mortgaged property.]—See *MORTGAGE*.

**2766.** Effect of application—Whether settled premises subject to charge—In favour of tenant for life—Premiums paid out of income.]—*Re QUICKE'S TRUSTS*, *POLTIMORE v. QUICKE*, No. 2760, *ante*.

See, generally, *SETTLEMENTS*.

#### SECT. 14.—REMEDIES AGAINST THIRD PARTIES.

**2767.** Action for damages—By insured—On what terms allowed.]—The owner of a building insured it against fire, but not to the full value. The building was burnt by what was said to be the negligence of the servants of a municipal corp'n.; & the owner brought an action for damages against the corp'n.:—*Held*: the owner undertaking to sue for the whole amount of damage, would be allowed to conduct the action without the interference of the insurers, but would be subject to liability for anything done by him in violation of any equitable duty towards the insurers.—*COMMERCIAL UNION ASSURANCE Co. v. LISTER* (1874), 9 Ch. App. 483; 43 L. J. Ch. 601, L. JJ.

*Annotations*:—*Refd.* *North British & Mercantile Insce. v. London, Liverpool & Globe Insce.* (1876), 45 L. J. Ch. 548; *Law Fire Assce. v. Oakley* (1888), 4 T. L. R. 309.

See, also, No. 2534, *ante*.

**2768.** — Whether prosecution condition precedent.]—*MIDLAND INSURANCE Co. v. SMITH*, No. 2644, *ante*.

See, generally, *ACTION*, Vol. I., pp. 60 *et seq.*

— By insurers—After claim admitted or paid.]—See Sect. 2, *ante*.

#### SECT. 15.—THE POLICY MONEYS.

**2769.** Right to—Claim by former lessee—Under agreement for new lease.]—A lessee insured his house. The lease expired & he contracted for a new lease & the house was burned down:—*Held*: the insurance co. was liable, as equity treated things agreed to be done as actually performed.—*CALLAWAY v. WARD* (1730), cited in 1 Ves. at p. 318; *Sugden's Vendors & Purchasers*, 14th ed., p. 175; 27 E. R. 1055, H. L.

*Annotation*:—*Refd.* *Trotter v. Watson* (1869), L. R. 4 C. P. 434.

— In respect of settled property—As between tenant for life & remainderman.]—See *SETTLEMENTS*.

**2770.** Receipt for payment—By whom signed—Premises mortgaged by lessee.]—A lessee who had covenanted to insure against fire in the joint names of himself & his lessor, with a proviso that the policy moneys should be expended in reinstating the premises, assigned them by way of mtgee., with a power of sale under which the mtgee. sold. The mtgee. deed did not notice the policy. The premises were subsequently damaged by fire & were reinstated by the mtgee. On a claim filed by the mtgee. & his vendee, the mtgor. was decreed to deliver up the policy & join with the lessor in signing the receipt to the insurance office to enable the mtgee. to receive the money payable under the policy. A lessee in possession is not entitled as against his mtgee. to a lien on the policy moneys for repairs done by him after a fire.—*GARDEN v. INGRAM* (1852), 23 L. J. Ch. 478; 20 L. T. O. S. 17, L. C.

*Annotations*:—*Consd.* *Lees v. Whiteley* (1866), L. R. 2 Eq. 143. *Expld.* *Rayner v. Preston* (1881), 18 Ch. D. 1.

**2771.** Whether subject to lien—Repairs done by mortgagor in possession.]—*GARDEN v. INGRAM*, No. 2770, *ante*.

Application in reinstatement of premises destroyed.]—See Sect. 13, sub-sect. 2, *ante*.

Adjustment of loss, generally, see Sect. 10, *ante*.

## Part IV.—Life Insurance.

### SECT. 1.—NATURE OF CONTRACT.

**2772.** Whether contract of indemnity—Insurance on life of another—Creditor & debtor.]—A creditor may insure the life of his debtor to the extent of his debt: but such a contract is substantially a contract of indemnity against the loss of the debt; & therefore, if, after the death of debtor, his exors. pay the debt to the creditor, the latter cannot afterwards recover upon the policy; although debtor died insolvent, & the exors. were furnished with the means of payment by a third party.—*GODSALL v. BOLDERO* (1807), 9 East, 72; 103 E. R. 500.

*Annotations*:—*Consd.* *Patterson v. Ritchie* (1815), 4 M. & S. 393; *Henson v. Blackwell* (1845), 4 Hare, 434. *Overd.* *Dalby v. India & London Life Assce.* (1854), 15 C. B. 365. *N.F.* *Law v. London Indisputable Life Policy Co.* (1855), 1 K. & J. 223; *Re Stories Trusts* (1859), 1 Giff. 94. *Refd.* *Bainbridge v. Neilson* (1808), 10 East, 329; *Puller v. Stanforth* (1809), 11 East, 232; *Tunno v. Edwards* (1810), 12 East, 488; *Williams v. London Assce.* (1813), 1 M. & S. 318; *Brotherston v. Barber* (1816), 5 M. & S. 418; *Re Emnett, Ex p. Andrews* (1816), 1 Madd. 573; *M'Iver v.*

*Henderson* (1816), 4 M. & S. 576; *Ashley v. Ashley* (1829), 3 Sim. 149; *Barber v. Morris* (1831), 1 Mood. & R. 62; *Drysdale v. Piggott* (1856), 22 Beav. 238; *Martin v. West of England Life & Fire Insce.* (1858), 4 Jur. N. S. 158; *Knox v. Turner* (1869), 39 L. J. Ch. 207; *Rankin v. Potter* (1873), L. R. 6 H. L. 83; *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333; *Macaure v. Northern Assce.*, [1925] A. C. 619.

**2773.** — — — Employer & employee.]—*HEBDON v. WEST*, No. 2810, *post*.

**2774.** —.]—(1) Where a party effects an insurance on the life of another, Life Assurance Act, 1774 (c. 48), permits him, after the death, to recover from the insurance office so much of the sum insured, & no more, as his interest in the life extended to at the time of effecting the policy; & it is no ground for refusing payment that the interest had ceased during the life.

(2) A policy of insurance on life is not a contract to indemnify against loss like a fire or a marine policy, but is a contract to pay a definite sum in consideration of an annuity paid during the life.

The contract commonly called life assurance,

### PART III. SECT. 14.

n. Action for damages—By insured—Right of insurers to join as co-plaintiffs.]—An insurance co. by whom a fire loss has been paid has no *locus standi* as co-pltf. in an action by the

assured against the wrongdoer whose negligence had caused the fire.—*WRAILLEANS v. CANADA SOUTHERN RY. Co.* (1894), 21 A. R. 297; *reversd.* on another point, 24 S. C. R. 309.—*CAN.*

### PART IV. SECT. 1.

o. Not a contract of indemnity.]—A life insurance is not necessarily a contract of indemnity, but in each case the real question is, what was the actual contract of the parties.—*GAGGIN v.*



**Sect. 1.—Nature of contract. Sects. 2, 3 & 4 : Subsect. 1.]**

when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of his life, & when fixed it is constant & invariable (PARKE, B.).

(3) At common law, wager policies, which were not contrary to the policy of the law, were legal contracts, but they are now forbidden by Life Assurance Act, 1774 (c. 48).—DALBY v. INDIA & LONDON LIFE ASSURANCE CO. (1854), 15 C. B. 365; 3 C. L. R. 61; 24 L. J. C. P. 2; 24 L. T. O. S. 182; 18 Jur. 1024; 3 W. R. 116; 139 E. R. 465, Ex. Ch.

*Annotations*:—As to (1) *Refd.* Hebden v. West (1863), 3 B. & S. 579. As to (2) *Folld.* Law v. London Indisputable Life Policy Co. (1855), 1 K. & J. 223. *Consd.* Pritchard v. Merchants & Tradesman's Mutual Life Assce. Soc. (1858), 3 C. B. N. S. 622; Knox v. Turner (1870), L. R. 9 Eq. 155. *Apld.* Bradburn v. G. W. Ry. (1874), L. R. 10 Exch. 1. *Consd.* Gould v. Curtis, [1912] 1 K. B. 635. *Refd.* Rankin v. Potter (1873), L. R. 6 H. L. 83; Burnand v. Rodocanachi (1882), 7 App. Cas. 333; *Re* Harrison & Ingram, *Ex p.* Whinney, [1900] 2 Q. B. 710. As to (3) *Refd.* Waters v. Monarch Life Assce. (1856), 5 E. & B. 870. *Generally, Mentd.* Archer v. James (1862), 2 B. & S. 67.

**2775.** —.]—LAW v. LONDON INDISPUTABLE LIFE POLICY CO., No. 2787, *post*.

**SECT. 2.—DEFINITIONS.**

**2776. What constitutes "life assurance"—Policy securing deferred payments at fixed periods—Provision for payment on death before benefits accrued.]**—A co. was incorporated under the Cos. Acts, 1862 to 1900. Its objects as stated in its memorandum of assocn. were, *inter alia*, "to carry on & transact every kind of insurance & guarantee business in all branches, except the business of life insurance, & it was thereby expressly provided that nothing herein contained shall empower the co. to carry on the business of life assurance or the granting of annuities within Life Assurance Companies Act, 1870 (c. 61)." The co. had issued a number of investment policies which were all in one or other of two forms. The first form, called policy form A. was therein described as an investment policy at a weekly premium of 6d. to secure £22 10s. namely £6 at the end of five years, £7 10s. at the end to ten years, & £9 at the end of fifteen years. The policy charged the assets of the co. with the payment to the assured or his representatives or assigns of the sums aforesaid, & provided that in the event of the death of the assured before the fifth year all premiums paid would be returned in full, & after the fifth & tenth years all premiums paid since the last payments made by the co. would be returned. The second form called policy form B. differed slightly from policy form A. The policy purported to secure the payment of a certain sum at the end of a fixed term in consideration of a weekly premium & charged the funds of the co.

UPTON (1859), Drury temp. Nap. 427.—IR.

**PART IV. SECT. 2.**

**2778 i. Surrender value—Definition.]**—The ascertainment of the present value of the reversion in the sum assured by the policy at the decease of the life insured is a matter of simple calculation from the ordinary life insurance tables; the premium actually paid by the insured has nothing to do with

the calculation.—*Re* MERCHANTS LIFE ASSN. OF TORONTO, VERNON CLAIMS (1901), 22 C. L. T. 19; 2 O. L. R. 682.—CAN.

**p. What constitutes total disability—Disability to work for living.]**—In an action to recover insurance payable for "total disability":—*Held*: total disability to work for a living was what was intended to be insured against, & disability from old age was not excluded.—DODDS v.

with its payment, & provided that if the assured should die before the date on which the sum became payable a percentage of the premiums received on account should be payable to the representatives or assigns of the assured. The co. had not deposited £20,000 as required by sect. 2, of the Assurance Companies Act, 1909 (c. 49).—*Held*: (1) both forms of policies were policies of insurance on human life, & the co. was therefore carrying on the business of life assurance contrary to the provisions of the memorandum of assocn., & the issue of the policies was accordingly *ultra vires* the co.; (2) the co. was carrying on "life assurance business" within Assurance Companies Act, 1909 (c. 49), s. 1, & inasmuch as it had not made the deposit of £20,000 required by sect. 2 of the Act, the policies were illegal.—JOSEPH v. LAW INTEGRITY INSURANCE CO., LTD., [1912] 2 Ch. 581; 82 L. J. Ch. 187; 107 L. T. 538; 20 Mans. 85, C. A.

*Annotation*:—As to (1) *Apld.* Gould v. Curtis, [1913] 3 K. B. 84.

— **Under Assurance Companies Act, 1909 (c. 49).]**—*See* COMPANIES, Vol. X., pp. 1071 *et seq.*

**2777. Participating policies—Whether absolute right to profits conferred.]**—The Standard Life Assurance Co. issued two kinds of policies, one with & the other without participation in profits. The holder of a policy expressed to be with participation in profits paid a higher premium than the holder of a policy expressed to be without participation in profits:—*Held*: the holder of a policy expressed to be with participation in profits could only claim the benefit of any distribution of profits which the directors in the exercise of their discretion considered proper to make; whether there should be a distribution of profits or not was a matter entirely within the discretion of the directors; & therefore, an action by the holder of a policy expressed to be with participation in profits was not maintainable to compel the co. to set aside any part of its profits for the purpose of being distributed among the holders of such policies.—BAERLEIN v. DICKSON (1909), 25 T. L. R. 585.

*Annotation*:—*Consd.* Anderson v. Equitable Life Assce. Soc. of the United States (1925), 42 T. L. R. 123.

**2778. Surrender value—Definition.]**—As to the meaning of the actual expression "surrender value" there can be no doubt. Surrender value in general means that value or consideration which a co. has contracted or is prepared to pay at any particular time during the currency of the contract in consideration of being relieved as from that time of the liability dependent on the continuance of premiums paid (*per cur.*).—EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. REED, [1914] A. C. 587; 83 L. J. P. C. 195; 111 L. T. 50; 30 T. L. R. 415, P. C.

**SECT. 3.—FORMATION OF CONTRACT.**

**2779. Incorporation of terms—Prospectus issued by Insurers.]**—To a declaration on a policy of assurance, deft. pleaded that the policy was made

CANADIAN MUTUAL AID ASSOCN. (1890), 19 O. R. 70.—CAN.

**PART IV. SECT. 3.**

**q. What constitutes completed contract.]**—The initialling of an application for insurance by officers of an insurance co., though indicating acceptance of the risk, does not, without communication of the fact to appct., constitute any contract with him. If a policy is afterwards prepared, &

upon the terms of a previous proposal, & upon the express condition, that, if any statement in the proposal was untrue, the policy should be void, & that a particular statement was untrue. Replication on equitable grounds; that, before the policy was made, defts. issued a prospectus containing a statement, that all policies effected by them should be indisputable, except in cases of fraud, & that pltf. effected the policy on the faith of such representation. Rejoinder: that the policy was made on the basis of the proposal; & that there was not before or at the time of the making of the policy, any promise by defts. that the policy should be indisputable except in cases of fraud, except that, before the proposal defts. issued the prospectus containing such statement:—*Held*: the rejoinder was bad, & the replication was, on equitable grounds, a good avoidance of the plea.—*WOOD v. DWARRIS* (1856), 11 Exch. 493; 25 L. J. Ex. 129; 26 L. T. O. S. 225; 4 W. R. 262; 156 E. R. 925.

*Annotations*:—*Consd.* *Wheelton v. Hardisty* (1857), 8 F. & B. 232; *Joel v. Law Union & Crown Insce.*, [1908] 2 K. B. 431. *Refd.* *Reis v. Scottish Equitable Life Assee. Soc.* (1857), 2 H. & N. 19. *Mentd.* *Hunter v. Gibbons* (1856), 1 H. & N. 459; *Luce v. Izod* (1856), 2 Jur. N. S. 573.

**2780. ——— Not brought to notice of insured.]**

—*WHEELTON v. HARDISTY*, No. 2845, *post*.

**Capacity to contract.]**—*See, generally*, CONTRACT, Vol. XII., pp. 40 *et seq.*

**Knowledge of agent.]**—*See* Part I., Sect. 14, sub-sect. 5, *ante*.

**Authority of agent.]**—*See* Part I., Sect. 14, sub-sect. 3, *ante*.

**Representations & concealment.]**—*See* Sect. 9, *post*.

## SECT. 4.—INSURABLE INTEREST.

### SUB-SECT. 1.—IN GENERAL.

*See* Life Assurance Act, 1774 (c. 48).

Insurable interest generally, *see* Part I., Sect. 4, *ante*.

**2781. Application of statute—Insurance on own life—For benefit of another—Premiums not found by insured.]**—(1) Where A., having no interest in the life of B., induces him to cause a policy of insurance to be effected in his, B.'s, name, A. finding the funds for the premiums, & intending by assignment or otherwise to get the benefit of the policy himself, so that it is substantially the policy of A., such policy is void, as a fraudulent evasion of Life Assurance Act, 1774 (c. 48), ss. 1, 2.

(2) Every man is presumed to have an interest in his own life, & in every part of it, therefore an exor. suing on a policy effected by his testator

on two years of his life, is not bound to show that such testator had any special reason for making such limited insurance.

It is contended for defts. that a person effecting an insurance upon his own life for a limited time is bound to show that he had some particular interest in the continuation of life up to that period; although it is admitted this would not be so in the case of an insurance for the whole term of life: but I am not aware of this distinction having been ever taken, & it does not appear to me there is any force in it (LORD ABINGER, C.B.).—*WAINWRIGHT (OR WAINWRIGHT) v. BLAND* (1835), 1 Mood. & R. 481; *subsequent proceedings* (1836), 1 M. & W. 32.

*Annotations*:—*As to* (1) *Consd.* *M'Farlane v. Royal London Friendly Soc.* (1886), 2 T. L. R. 755. *Refd.* *Hodson v. Observer Life Insce.* (1857), 3 Jur. N. S. 1125; *Shilling v. Accidental Death Insce.* (1857), 2 H. & N. 42; *Evans v. Bignold* (1869), 38 L. J. Q. B. 293. *As to* (2) *Consd.* *Griffiths v. Fleming*, [1909] 1 K. B. 805.

**2782. ——— Whether necessarily illegal—Question of fact.]**—There is nothing to prevent a person *bona fide* insuring his own life as many times as he likes for his own benefit, even though at the time he has the intention of assigning the policies to another person. But if *ab initio* the policy is really & substantially intended for the benefit of another person only, & that fact is kept back, the case is within Life Assurance Act, 1774 (c. 48).—*M'FARLANE v. ROYAL LONDON FRIENDLY SOCIETY* (1886), 2 T. L. R. 755, D. C.

*Annotation*:—*Refd.* *Griffiths v. Fleming*, [1909] 1 K. B. 805.

**2783. ———.]**—*GRIFFITHS v. FLEMING*, No. 2826, *post*.

**Policy originally valid—Effect of assignment.]**—*See* No. 2988, *post*.

**Statutory exceptions—Assurance Companies Act, 1909 (c. 49).]**—*See* Nos. 2814–2817, *post*.

**2784. Sufficiency of interest—Must be pecuniary—Insurance on son's life.]**—*HALFORD v. KYMER*, No. 2792, *post*.

**2785. ——— Policy on life of insured—Whether for whole life or limited period.]**—*WAINWRIGHT (OR WAINWRIGHT) v. BLAND*, No. 2781, *ante*.

**Amount recoverable.]**—*See* Sect. 6, *post*.

**2786. Effect of interest ceasing.]**—*DALBY v. INDIA & LONDON LIFE-ASSURANCE CO.*, No. 2774, *ante*.

**2787. ———.]**—(1) A. being entitled to receive a sum of money when B., in his twenty-ninth year, should attain the age of thirty, insured B.'s life for two years. B. attained the age of thirty, & A. received the money. B. then died before the expiration of the two years:—*Held*: A. was entitled to recover on the policy.

(2) A life assurance differs from a fire or marine

appet. informed that it is ready for him, this will constitute an acceptance of the original application, & such policy may be properly antedated as of the date of the application.—*ARMSTRONG v. PROVIDENCE SAVINGS LIFE ASSURANCE SOCIETY* (1901), 22 C. L. T. 13; 2 O. L. R. 771.—*CAN.*

**r. ———.]**—A contract of life insurance is complete on delivery of the policy to the insured & payment of the first premium.—*PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK v. MOWAT* (1902), 32 S. C. R. 147.—*CAN.*

**t. ———.]**—*ROBINSON v. LONDON LIFE INSURANCE CO.* (1918), 42 O. L. R. 527; 14 O. W. N. 63; 42 D. L. R. 699.—*CAN.*

**a. ———.]**—*ROSE v. MEDICAL INVALID LIFE ASSURANCE SOCIETY* (1848), 11 Dunl. (Ct. of Sess.) 151; 20 Sc. Jur. 534.—*SCOT.*

**b. Date of policy.]**—The date of a policy of life insurance is the date which appears upon the face of the policy as the date when it is issued, & is not changed by the delivery of the policy on a date subsequent to that which it bears upon its face.—*NOVA SCOTIA TRUST CO. v. MUTUAL LIFE INSURANCE CO. OF N. Y.*, [1925] 2 D. L. R. 224; 58 N. S. R. 27.—*CAN.*

### PART IV. SECT. 4, SUB-SECT. 1.

**c. Application of statute—Waiver by insurers.]**—Life Assurance Act, 1774 (c. 48), which makes null a policy of insurance on the life of any person for behoof of a person who has no insurable interest in such life, affords a defence to an insurance co. against a claim on such a policy; but if the insurance co. waives this defence, the question to whom the policy belongs may be determined as if the Act did

not exist.—*HADDEN v. BRYDEN* (1899), 1 F. (Ct. of Sess.) 710; 36 Sc. L. R. 524; 6 S. L. T. 362.—*SCOT.*

**2786 i. Effect of interest ceasing.]**—Two brothers joined in a bond to an insurance co. for £500. In security of this loan, an insurance for £1,000 on the life of the younger brother was effected with the co. in name of the elder brother. The elder brother paid the premiums, as they fell due, out of funds remitted to him by the younger, & took the receipts in his own name:—*Held*: the elder brother had no insurable interest in the life of the younger beyond the sum borrowed.—*LINDSAY v. BARMCOTTE* (1851), 13 Dunl. (Ct. of Sess.) 718; 23 Sc. Jur. 315.—*SCOT.*

**d. Effect of insurance without interest.]**—A policy may be made payable to a person or beneficiary who is without any insurable interest in the

**Sect. 4.—Insurable interest: Sub-sects. 1, 2, 3, 4, 5, 6, 7 & 8.]**

assurance, inasmuch as it is not a contract of indemnity, but a contract to pay a certain definite sum at a future time in consideration of certain annual payments in the meantime.

(3) A policy of assurance is not void under Life Assurance Act, 1774 (c. 48), s. 3, by reason of the interest in the life assured ceasing before the expiration of the policy.

(4) Where, by a policy of assurance, it was provided that no members of the co. should, in their individual capacity, be held to be liable to any personal responsibility for any sum to become due by virtue of the policy, & that all persons having claims against the co. by virtue of the policy should only be entitled to make such claims effectual against the proper funds of the co.:—*Held*: a claimant under the policy was entitled to relief in a ct. of equity, there being no adequate remedy at law.

(5) The amount which a person is entitled to insure by a policy on the life of another, is the full value of his expectant benefit when it shall accrue, & not merely the present value of such benefit at the time of effecting the insurance.—*LAW v. LONDON INDISPUTABLE LIFE POLICY CO.* (1855), 1 K. & J. 223; 3 Eq. Rep. 338; 24 L. J. Ch. 196; 24 L. T. O. S. 208; 19 J. P. 100; 1 Jur. N. S. 178; 3 W. R. 154; 69 E. R. 439.

*Annotations*:—As to (4) *Consd. Re Athenaeum Life Assce. Soc., Re Prince of Wales Life Assce. Soc.* (1858), John. 80; *Robson v. McCreight* (1858), 25 Beav. 272; *Re Athenaeum Life Assce., Ex p. Prince of Wales Life Assce. Soc.* (1859), John. 633; *Re State Fire Insee.* (1863), 1 De G. J. & Sm. 634; *Re Sovereign Life Assce.*, [1892] 3 Ch. 279. *Reid. Re Security Mutual Life Assce., Ex p. Harding* (1858), 31 L. T. O. S. 94; *Simpson v. Scottish Union Insee.* (1863), 1 Hem. & M. 618; *Kearns v. Leaf, Aldebert v. Kearns* (1864), 1 Hem. & M. 681; *Re Alliance Soc.* (1885), 28 Ch. D. 559. *Generally, Reid. Stokoe v. Cowan* (1861), 29 Beav. 637.

**2788. Effect of insurance without interest—Whether premiums recoverable.]**—*HOWARD v. REFUGE FRIENDLY SOCIETY*, No. 3329, *post*.

**2789.** ———.]—The agent of defts., an insurance co., in good faith & believing his statement to be true, represented to pltf. that an insurance effected by him on the life of his mother would be a valid insurance, & pltf., relying upon that representation, effected such an insurance & paid premiums thereunder. In an action to recover back the premiums:—*Held*: assuming the policy to be illegal & void for want of an insurable interest, the representation having been innocently made by the agent, the parties were in *pari delicto*, & the premiums could not be recovered back.—*HARSE v. PEARL LIFE ASSURANCE CO.*, [1904] 1 K. B. 558; 73 L. J. K. B. 373; 90 L. T. 245; 52 W. R. 457; 20 T. L. R. 264; 48 Sol. Jo. 275, C. A.

*Annotations*:—*Folld. Elson v. Crookes* (1911), 106 L. T. 462; *Phillips v. Royal London Mutual Insee.* (1911), 105 L. T. 136. *Apld. Evanson v. Crooks* (1911), 106 L. T. 264. *Consd. Howarth v. Pioneer Life Assce.* (1912), 107 L. T. 155; *Hughes v. Liverpool Victoria Legal Friendly Soc.*, [1916] 2 K. B. 482. *Apld. Goldstein v. Salvation Army*

life of the insured.—*Re MCGREGOR* (1909), 18 Man. L. R. 432.—CAN.

**g. No stipulation as to interest in policy.]**—Where pltf. effected an insurance upon the life of another, & the policy contained no stipulation as to pltf.'s interest in the life insured:—*Held*: in declaring upon such policy it was not necessary for pltf. to aver an interest in the life insured.—*BRITISH ASSURANCE CO. v. MAGEE* (1834), Cooke & Al. 182.—IR.

**PART IV. SECT. 4, SUB-SECT. 3.**

**27921. Parent insuring child—General**

*rule.*]—An insurance effected by a mother on the life of her child under age, is valid.—*WAKEMAN v. METROPOLITAN LIFE INSURANCE CO.* (1899), 30 O. R. 705.—CAN.

**279211.** ———.]—A father has an insurable interest in his son's life.—*CARMICHAEL v. CARMICHAEL'S EXECUTRIX*, [1920] S. C. (H. L.) 195; 57 Sc. L. R. 547; [1920] 2 S. L. T. 285; *reversg.*, [1919] S. C. 636.—SCOT.

**1. Foster-parent.]**—*GLASGOW PARISH COUNCIL v. MARTIN*, [1910] S. C. (J.)

*Assce. Soc.*, [1917] 2 K. B. 291. *Reid. Hermann v. Charlesworth* (1905), 21 T. L. R. 368; *Kettlewell v. Refuge Assce.* (1907), 97 L. T. 896; *Griffiths v. Fleming*, [1909] 1 K. B. 805; *Tofts v. Pearl Life Assce.* (1913), 110 L. T. 190.

**2790.** ———.]—*ELSON v. CROOKES*, No. 2983, *post*.

**2791.** ———.]—*HOWARTH v. PIONEER LIFE ASSURANCE CO., LTD.*, No. 210, *ante*.

*See, generally, GAMING & WAGERING*, Vol. XXV., p. 403.

**Representations by agent to insured—As to interest.]**—*See Part I., Sect. 14, sub-sect. 6, ante*.

**SUB-SECT. 2.—HUSBAND AND**

*See HUSBAND & WIFE*, Vol. XXVII., p. 149, Nos. 1207, 1208.

**SUB-SECT. 3.—PARENT AND CHILD.**

**2792. Parent insuring child—General rule.]**—

In order to render a policy valid within Life Assurance Act, 1774 (c. 48), the party for whose benefit it is effected must have a pecuniary interest in the life or event insured; & therefore a policy effected by a father in his own name, on the life of his son, he not having any pecuniary interest therein, was void. A father, merely as such, has not an insurable interest in the life of his son, within Life Assurance Act, 1774 (c. 48).—*HALFORD v. KYMER* (1830), 10 B. & C. 724; 8 L. J. O. S. K. B. 311; 109 E. R. 619.

*Annotations*:—*Consd. Griffiths v. Fleming*, [1909] 1 K. B. 805. *Reid. Heddon v. West* (1863), 3 B. & S. 579.

**2793.** ———.]—*WORTHINGTON v. CURTIS*, No. 3058, *post*.

**2794.** ———.]—*A.-G. v. MURRAY*, No. 3059, *post*. *See, also*, No. 2787, *ante*.

**2795. Child insuring parent.]**—*HOWARD v. REFUGE FRIENDLY SOCIETY*, No. 3329, *post*.

**2796.** ———.]—*ELSON v. CROOKES*, No. 2983, *post*.

**2797. Step-child insuring step-parent—Child maintained by step-parent.]**—*GREENSLADE v. LONDON & MANCHESTER INDUSTRIAL INSURANCE CO., LTD.* (1913), 48 L. Jo. 330.

**SUB-SECT. 4.—BROTHERS AND SISTERS.**

**2798. General rule.]**—*EVANSON v. CROOKS* (1911), 106 L. T. 264; 28 T. L. R. 123.

*Annotation*:—*Mentd. Hughes v. Liverpool Victoria Legal Friendly Soc.*, [1916] 2 K. B. 482.

*See, also*, No. 2822, *post*.

**SUB-SECT. 5.—DEBTOR AND CREDITOR.**

**2799. General rule.]**—*ANDERSON v. EDIE* (1795), 2 Park's Marine Insurances, 8th ed. p. 914.

*Annotations*:—*Reid. Ex p. Day* (1802), 7 Ves. 301; *Ex p. Granger* (1805), 10 Ves. 349.

102; 47 Sc. L. R. 773; 2 S. L. T. 121; 6 Adam, 276.—SCOT.

**PART IV. SECT. 4, SUB-SECT. 5.**

**g. Proof of interest—Parol evidence.]**—Where policy moneys are payable to a creditor as his interest may appear parol evidence is admissible to show what that interest is.—*ROBINSON v. IMPERIAL LIFE ASSURANCE CO.* (1910), 9 E. L. R. 164.—CAN.



**2800.** —.]—*GODSALL v. BOLDERO*, No. 2772, *ante*.

**2801.** —.]—If A. being indebted to B., die, & C. agree to pay the debt by instalments, in five years, A. has an insurable interest in the life of C. for those five years.—*VON LINDENAU v. DESBOROUGH* (1828), 3 C. & P. 353, N. P.

*Annotation* :—*Mentd.* *Wainwright v. Bland* (1836), 1 M. & W. 32.

**2802.** What debts create interest—*Gambling debt.*—*DWYER v. EDIE* (1788), 2 Park's Marine Insurances, 8th ed. p. 914.

**2803.** — Assignment of interest contingent on survivorship.]—*Re EMMETT, Ex p. ANDREWS*, No. 2824, *post*.

**2804.** — Post obit bond—If not voidable.]—*FREME v. BRADE*, No. 3044, *post*.

**2805.** — Liability under joint obligation.]—A. & B. jointly executed a bond as a collateral security for the repayment of £300 & interest. A. effected policy of insurance on B.'s life :—*Held* : the policy was not void within Life Assurance Act, 1774 (c. 48), B. being, for the purposes of the policy, A.'s debtor to the extent of half the debt secured by the bond.—*BRANFORD v. SAUNDERS* (1877), 25 W. R. 650.

**2806.** Creditor insuring debtor's wife—Debt secured by assignment of chose in action of wife.]—*HENSON v. BLACKWELL*, No. 3061, *post*.

— Creditor an executor or trustee.]—*See* Sub-sect.

Promise by creditor not to enforce debt.]—*See* No 2810, *post*.

Rights of creditor in policy.]—*See* Sect. 14, sub-sect. 1, A., *post*.

#### SUB-SECT. 6.—DEBTOR AND SURETY.

**2807.** Interest of surety in life of principal debtor.]—If A. effects a policy of assurance upon the life of B., to cover a debt due to him from B., or if A. effects a policy in the name of B., in whose life he has no interest, the representatives of B.'s estate can have no claim upon it.

But where there is a presumption, from the dealings & transactions between the parties that the policy was effected with the privity & concurrence & on account of B., for the purpose of securing a debt due by B. to a third party for which A. is surety, the *onus* is thrown upon A. of rebutting that presumption.

A. borrowed £300, & B., his solr. joined in securing it. About the same time B. insured A.'s life in his own name, after communications with A. A. having died soon after, the policy was claimed by B., who was his exor., & by the representatives of A. The evidence was unsatisfactory, but, from the nature of the transaction, the ct. thought that the *onus* of proving his title was thrown on B., & he having failed on a *viva voce* examination, to rebut the presumption that the policy was effected to secure the debt, the ct. held that it belonged to A.'s estate.—*LEA v. HINTON* (1854), 5 De G. M. & G. 823; 24 L. T. O. S. 101; 43 E. R. 1090, L. J.J. *Annotations* :—*Consd.* *Freme v. Brade* (1858), 2 De G. & J. 582; *Courtenay v. Wright* (1860), 2 Giff. 337; *Knox v. Turner* (1870), 39 L. J. Ch. 750; *Preston v. Neele* (1879), 12 Ch. D. 760. *Reid.* *Drysdale v. Pliggott* (1856), 8 De G. M. & G. 546.

#### SUB-SECT. 7.—TRUSTEE OR EXECUTOR.

**2808.** Executor—Insuring debtor to estate—Annuity granted by debtor.]—An exor. in trust

has a sufficient interest to enable him to make assurance in his own name, on the life of a person who has granted an annuity to testator.—*TIDSWELL v. ANKERSTEIN* (1792), Peake, 204, N. P.

**2809.** Trustee—Name of cestui que trust inserted in policy.]—(1) If upon a proposal & agreement for life insurance a policy be drawn up by the insurance office in a form which differs from the terms of the agreement, & varies the rights of the parties assured, equity will interfere & deal with the case on the footing of the agreement, & not on that of the policy.

(2) Life Assurance Act, 1774 (c. 48), does not prohibit a policy of life insurance from being granted to one person in trust for another where the names of both persons appear upon the face of the instrument; nor does the effecting of such an insurance in any way contravene the policy of the statute.

(3) An insurance co. having had the chance of a contract of life insurance turning out in their favour cannot afterwards be permitted, on the ground of the inconsistency of the contract with their rules, to escape from it.—*COLLETT v. MORRISON* (1851), 9 Hare, 162; 21 L. J. Ch. 878; 68 E. R. 458.

*Annotations* :—*As to* (1) *Consd.* *Wood v. Dwarries* (1856), 11 Exch. 493. *Reid.* *Griffiths v. Fleming*, [1909] 1 K. B. 805; *Re Bradley & Essex & Suffolk Accident Indemnity Soc.*, [1912] 1 K. B. 415. *As to* (2) *Reid.* *Martin v. West of England Insee.* (1858), 6 W. R. 377. *Generally, Mentd.* *Childers v. Childers* (1857), 30 L. T. O. S. 3.

#### SUB-SECT. 8.—EMPLOYER AND EMPLOYEE.

**2810.** Interest of employee in life of employer—

*Employment for stated period.*—In 1855, pltf. having been for twenty years clerk in a bank of which P. was the managing partner, his salary was increased from £200 to £600 a year, & was to continue at that amount for seven years. Before this pltf. had received advances from the bank to the amount of £4,700. P. had told him that, during his, P.'s, life, he should never be called upon for the money; & in 1856, he being desirous to secure himself, in the event of P.'s death, with his permission insured his life, with a certain insurance co., for £5,000; & in 1857, his debt having increased to £6,000, he, with the consent of P., effected a further policy of insurance for £2,500 in another insurance co. P. died on Mar. 21, 1861; the bank stopped payment in the same year, & inspectors were appointed, to whom pltf. paid the £5,000 which he received on the first policy. In an action on the second policy :—*Held* : (1) pltf. had not an insurable interest in the life of P. within 14 Geo. 3, c. 48, s. 1, by reason of the bare promise of P. that he would not, during his life, enforce payment of the debt due to the bank from pltf.; (2) pltf. had an insurable interest in the life of P., within that statute, arising from the engagement by P. to employ him for seven years at a salary of £600 a year to the extent of as much of the period of seven years as remained at the time the policy was effected; (3) payment of £5,000 on the first policy was a bar to pltf.'s claim by virtue of Life Assurance Act, 1774 (c. 48), s. 3. Where a man has an insurable interest in another's life, & he insures such interest in several policies, & recovers on one to the full amount of such interest, he cannot afterwards recover anything upon the other policies.—*HEBDON v. WEST* (1803), 3 B. & S. 579;

#### PART IV. SECT. 4, SUB-SECT. 8.

*Interest of employer in life of employee.*—*SCOTT v. ROOSE* (1841), Long. & T. 54; 3 L. Eq. R. 170.—*IR.*

**Sect. 4.—Insurable interest: Sub-sects. 8, 9 & 10.**  
**Sects. 5 & 6.]**

1 New Rep. 431; 32 L. J. Q. B. 85; 7 L. T. 854;  
 9 Jur. N. S. 747; 11 W. R. 422; 122 E. R. 218.

*Annotation:—As to (1) & (2) Refd. Griffiths v. Fleming,*  
 [1909] 1 K. B. 805.

#### SUB-SECT. 9.—MORAL OBLIGATIONS.

**2811. Promise not to enforce payment of debts during life — Promise without consideration.]—**  
**HEBDON v. WEST, No. 2810, ante.**

**2812. Promise to mother to maintain child—**  
**Interest of promisor in child's life.]—**In an action to recover the amount of a policy of insurance upon the life of a child, pltf.'s step-sister, evidence was given of a promise by pltf. to the mother of the child to take care of the child & help to maintain it. No objection was taken on behalf of defts. that pltf. had not in fact incurred any expenditure in respect of the child:—*Held*: pltf. had an insurable interest in the child's life, & was entitled, in the absence of any objection as to the amount in fact expended by her, to recover the amount of the policy.

I see no reason why pltf., having incurred & incurring such expense, has not a primary insurable interest. To the extent of each sum of money as it was successively expended by her for the child's benefit (A. L. SMITH, J.).—**BARNES v. LONDON, EDINBURGH & GLASGOW LIFE INSURANCE CO.,** [1892] 1 Q. B. 864; 8 T. L. R. 143; 36 Sol. Jo. 125, D. C.

*Annotations:—Consd. Harse v. Pearl Life Assce.,* [1903] 2 K. B. 92. *Refd. Griffiths v. Fleming,* [1909] 1 K. B. 805; *Tofts v. Pearl Life Assce.* (1913), 110 L. T. 190.

**2813. Policy to meet funeral expenses of assured.]—**The fact that a person will at some future date be under a moral, though not a legal, obligation to pay for the funeral expenses of a relative is not sufficient to create an insurable interest in that relative's life.—**HARSE v. PEARL LIFE ASSURANCE CO.,** [1903] 2 K. B. 92; 72 L. J. K. B. 638; 89 L. T. 94; 19 T. L. R. 474, D. C.; *reversd.* on other grounds, [1904] 1 K. B. 558, C. A.

*Annotations:—Refd. Griffiths v. Fleming,* [1909] 1 K. B. 805; *Tofts v. Pearl Life Assce.* (1913), 110 L. T. 190. *Mentd. Hermann v. Charlesworth* (1905), 21 T. L. R. 368; *Kettlewell v. Refuge Assce.* (1907), 79 L. T. 896; *Elson v. Crookes* (1911), 106 L. T. 462; *Evanson v. Crookes* (1911), 106 L. T. 264; *Phillips v. Royal London Mutual Insce.* (1911), 105 L. T. 136; *Howarth v. Pioneer Life Assce.* (1912), 107 L. T. 155; *Hughes v. Liverpool Victoria Legal Friendly Soc.,* [1916] 2 K. B. 482; *Goldstein v. Salvation Army Assce. Soc.,* [1917] 2 K. B. 291.

**2814. — Assurance Companies Act, 1909 (c. 49), s. 36—Effect of retrospective provisions—Policies induced by fraud.]—**In 1902 pltf. effected two policies with defts. on the lives of his father & mother respectively to cover his expenses for mourning in the event of their deaths. He was induced to do so by the fraudulent misrepresentation of defts.' agent that such policies would be valid, whereas the agent knew they were in fact invalid for want of insurable interest. In 1909 the above Act was passed. Sect. 36 (2) of that Act validated certain policies, within which the policies in question came, effected before the Act, which, apart from the Act, would have been void for want of insurable interest:—*Held*: the sub-sect. did not validate policies which would otherwise come within its meaning, if such policies had

been obtained by fraud.—**TOFTS v. PEARL LIFE ASSURANCE CO., LTD.,** [1915] 1 K. B. 189; 84 L. J. K. B. 286; 112 L. T. 140; 31 T. L. R. 29; 59 Sol. Jo. 73, C. A.

**2815. — Insurance in excess of expenses — Amount recoverable.]—**Where a person effects several policies of insurance with different insurance cos. against any funeral expenses he may incur on the death of his mother &, on the mother's death, is paid by one or more of such cos. the full amount of such funeral expenses, he cannot maintain a further claim against another of the cos. which has failed to pay him the amount of the policy he has effected therewith. Neither can he, in the absence of fraud or mistake of fact, obtain the return of the premiums he has paid to this latter co., the co. having been under a risk during the whole of the currency of the policy. *Semble*: policies issued under Assurance Companies Act, 1909 (c. 49), s. 36 (1), are policies of indemnity.—**WOLENBERG v. ROYAL CO-OPERATIVE COLLECTING SOCIETY** (1915), 84 L. J. K. B. 1316; 112 L. T. 1036, D. C.

*Annotation:—Folld. Goldstein v. Salvation Army Assce. Soc.,* [1917] 2 K. B. 291.

**2816. — Claim for return of premiums.]—****WOLENBERG v. ROYAL CO-OPERATIVE COLLECTING SOCIETY, No. 2815, ante.**

**2817. — What are funeral expenses—Whether cost of tombstone.]—****GOLDSTEIN v. SALVATION ARMY ASSURANCE SOCIETY, No. 2986, post.**  
*See, also, No. 214, ante.*

*Compare BURIAL, Vol. VII., pp. 522, 523, 525, 526; EXECUTORS, Vol. XXIII., p. 318, Nos. 3820–3823; Vol. XXIV., p. 694, Nos. 7185, 7186.*

#### SUB-SECT. 10.—RIGHTS OF ASSIGNEE.

**2818. Policy on own life—Assignment by assured for nominal consideration—Subsequent assignment for valuable consideration.]—**A. insured his life, & afterwards assigned the policy to B. for a nominal consideration. B.'s exors. then sold & assigned the policy to D. for valuable consideration, & then D.'s exors. sold it to E.:—*Held*: they could make a good title to the policy, & E. was bound to complete his purchase.

This policy was good at the time it was effected. Subsequently, some person became entitled to bring an action, on the policy, in the name of the assured; & if such an action had been brought, there is not a word in the Act of Parliament to defeat it (**SHADWELL, V.-C.**).—**ASHLEY v. ASHLEY** (1829), 3 Sim. 149; 57 E. R. 955.

*Annotation:—Refd. Dalby v. India & London Life Assce.* (1851), 18 L. T. O. S. 186.

**Assignment of life policies.]—***See, generally, Sect. 13, post.*

#### SECT. 5.—INSERTION IN POLICY OF NAMES OF PERSONS INTERESTED.

*See Life Assurance Act, 1774 (c. 48), s. 2.*

**2819. General rule.]—****HODSON v. OBSERVER LIFE ASSURANCE SOCIETY, No. 3324, post.**

**2820. Insurance by trustee—Name of cestui qui trust inserted.]—****COLLETT v. MORRISON, No. 2809, ante.**

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**2819 l. General rule.]—**Where the name of a person interested in a policy of insurance is not inserted therein, but is set out in the application therefor, which is made part of the policy &

incorporated therewith it is sufficient.—**WAKEMAN v. METROPOLITAN LIFE INSURANCE CO.** (1899), 30 O. R. 705.  
**—CAN.**

**k. Insurance for benefit of wife & children—Second wife's name substi-**

**tuted.]—****JONES v. MCNEIL** (1899), 25 V. L. R. 434.—**AUS.**

**l. Insurance for benefit of two children named—Effect of.]—**A policy was taken out by H. on his own life but expressed on the face of it to be



**2821. Insurance by husband on life of wife—To secure surety on behalf of infant wife—Wife's name only inserted.]**—Pltf.'s wife being entitled under a will to £200 on attaining her majority, the trustees of the will agreed to advance the £200 to pltf. on his obtaining a surety for the repayment in the event of the wife dying under twenty-one. A person became surety on condition that insurance was effected on the life of the wife. The £200 was advanced, & an insurance effected by pltf. in the name of the wife on her own life:—*Held*: as pltf. was primarily interested in the policy, it was illegal & void by force of Life Assurance Act (c. 48), s. 2, which renders it unlawful to make a policy without inserting the names of the persons interested therein.—*EVANS v. BIGNOLD* (1869), L. R. 4 Q. B. 622; 10 B. & S. 621; 38 L. J. Q. B. 293; 20 L. T. 659; 17 W. R. 882.

**2822. Insurance on life of sister—Name of assured only inserted.]**—Pltf. insured the life of his sister with deft. co., but the policy purported to be signed by the sister only & his name did not appear in that document. On a claim to recover the amount of the policy:—*Held*: the name of pltf., who admittedly was the person interested in the policy, not appearing in the policy, the action could not be maintained.—*FORGAN v. PEARL LIFE ASSURANCE CO.* (1907), 51 Sol. Jo. 230, D. C.

#### SECT. 6.—AMOUNT RECOVERABLE.

See Life Assurance Act, 1774 (c. 48), s. 3.

**2823. Amount of interest.]**—*GODSALL v. BOLDERO*, No. 2772, *ante*.

**2824. —.]**—Contingent interest assigned to secure in part a debt exceeding the value of the interest: the assignee insurers against the contingency, & upon its taking effect, receives the sum assured. Upon the bkpcy. of his debtor:—*Held*: the sum so recovered must be deducted from his proof.

Here the insured had an insurable interest, subject to all the jealousy with which the ct. regards a trustee acting on the property for his own benefit. They never could have insured, unless the property had been assigned to them. The means therefore of acquiring the sum received from the insurance office originate with the bkpt. & his wife. Being allowed what they have expended, including the premium, the surplus must be deducted from the proof (*PLUMER, V.-C.*).—*Re EMMETT, Ex p. ANDREWS* (1816), 2 Rose, 410.

*Annotations*:—*Refd.* *Henson v. Blackwell* (1845), 14 L. J. Ch. 329; *Dobson v. Land* (1850), 8 Hare, 216.

**2825. —.]**—*BARNES v. LONDON, EDINBURGH & GLASGOW LIFE INSURANCE CO.*, No. 2812, *ante*.

**2826. — Insurance by husband on life of wife.]**—A policy of insurance effected by a husband on the life of his wife may be enforced by him without affirmative evidence of any insurable interest therein. The interest is presumed to the extent of the amount insured by the policy.

I find it difficult, however, to see what pecuniary interest, in the sense of pecuniary loss arising from the loss of some legal interest, a man can be said to lose in his own death. . . . An insurance by a man on his own life is not within the mischief of the Act. A man does not gamble

for the benefit of his two children, J. & A.:—*Held*: the policy was for the benefit of J. & A. as joint tenants.—*Re HEWITT* (1906), 2 Tas. L. R. 88.—*AUS.*

**m. Insurance for benefit of wife—Contingent interest in insured's representatives.]**—By a policy on the life of the husband, effected by him for pltf., his wife, deft. co. agreed to pay the sum assured to pltf. or her exors., etc., & in case of her death in his lifetime, to his exors., etc.:—*Held*: pltf. could not maintain an action on the policy in her own name.—*ABBINETT v. NORTH-WESTERN MUTUAL LIFE INSURANCE CO.* (1881), 21 N. B. R. 216.—*CAN.*

**n. — Wife predeceasing insurer.]**—The co. insured the life of G. for the sum of \$1,000 payable "to his wife A. G. if alive & if not then to insured's exors., etc.":—*Held*: the addition of the words dealing with the situation which would arise if the first wife predeceased G. did not prevent the policy being for the benefit of the second wife.—*Re GOATBE*, [1923] 4 D. L. R. 1165; 53 O. L. R. 118.—*CAN.*

**o. — —.]**—*Re LIDDELL*, [1924] 1 D. L. R. 673; 53 O. L. R. 477.—*CAN.*

**p. — Effect of wife's divorce.]**—B. obtained a policy of insurance on his life, payable to his wife by name. Some time after the date of the policy, she obtained a divorce:—*Held*: when she obtained the divorce she ceased to be in law B.'s wife, & so ceased to be within the preferred class; & B. might, at his will, divert to one not of the preferred class, & so effectively exclude the wife.—*Re BANKS* (1918), 42 O. L. R. 64; 13 O. W. N. 407.—*CAN.*

**q. — Subsequent declaration in case of her predecease.]**—If a life insurance policy names the insured's wife as the beneficiary he may before her death declare in the policy that in case of her predeceasing him the moneys be payable to his estate.—*EXECUTORS & ADMINISTRATORS TRUST CO. v.*

*MACKENZIE*, [1920] 3 W. W. R. 110.—*CAN.*

**r. —.]**—A married man insured his life, the policy being made payable "to his wife, S., her exors., etc.":—*Held*: the policy was for the benefit of the wife absolutely, the words of limitation having no effect.—*Re EATON* (1893), 23 O. R. 593.—*CAN.*

**t. Insurance on own life—Contingent interest in insured's father.]**—*MUMFORD v. MUMFORD* (1886), 19 N. S. R. (7 R. & G.) 210; 7 C. L. T. 325.—*CAN.*

**a. — Wife subsequently named—Wife predeceasing insured.]**—Where a husband insured his life for the benefit of his wife, not naming her, & the name of his then wife was afterwards inserted & she subsequently predeceased him:—*Held*: the benefit of the policy reverted to the husband.—*ANCELL v. GOVERNMENT INSURANCE COMR.* (1900), 19 N. Z. L. R. 231.—*N.Z.*

**b. Insurance for benefit of sons.]**—Insured was asked "In event of death of beneficiaries," his three daughters, "do you desire that the assurance shall be made payable to your exors., etc.?" He answered: "No; to my two sons." The policy was payable in instalments:—*Held*: the intention of the insured was certainly to eke out the amount insured, for the benefit of his daughters if alive at the date of payment, & if not, for the benefit of his sons who might survive the deceased daughters.—*Re MCKELLAR* (1901), 21 C. L. T. 381.—*CAN.*

**c. Insurance for benefit of mother—Not expressed to be for value.]**—A person having effected an insurance on his life in favour of his mother as beneficiary, the policy not expressly stating that she was a beneficiary for value, subsequently transferred the benefit of it to his wife alone:—*Held*: the wife was entitled to the policy moneys.—*POTTS v. POTTS* (1900), 31 O. R. 452.—*CAN.*

**d. Name omitted in error.]**—Where

through error & unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy he is, nevertheless, entitled to the benefit of the insurance.—*CORNWALL v. HALIFAX BANKING CO.* (1902), 32 S. C. R. 442.—*CAN.*

**e. Insertion of name subject to power of revocation.]**—The designation of a beneficiary in an Ontario contract of insurance can be revoked & the benefit diverted to another only within the limits laid down by statute.—*LINTS v. LINTS* (1903), C. L. T. 242; 6 O. L. R. 100.—*CAN.*

**f. Insurance for benefit of step-mother—Described in subsequent will as mother.]**—*Re RUTHERFORD* (1917), 40 O. L. R. 266.—*CAN.*

**g. Insurance by minor—Beneficiary not one contemplated by statute.]**—An employee of a railway co. under the age of twenty-one effected an insurance on his life & by indorsement directed that the policy should be payable to pltf. who was not one of those named in Ontario Insurance Act, s. 169 (9):—*Held*: sect. 169 (9) did not stand in the way of pltf.'s recovery.—*WRIGHT v. WALKER* (1923), 53 O. L. R. 553.—*CAN.*

**h. Right of persons named—To sue on policy.]**—The policy insured V., "loss, if any, payable to E. & M." (pltf.). The covenants of defts. were with assured:—*Held*: pltf. could not sue upon such policy, the contract being with V., & the averment in the declaration of an insurable interest in them was immaterial.—*EVERY v. PROVINCIAL INSURANCE CO.* (1860), 10 C. P. 20.—*CAN.*

**k. Alteration of beneficiary.]**—*Re DICKIE*, [1925] 4 D. L. R. 527; 5 C. B. R. 864.—*CAN.*

#### PART IV. SECT. 6.

**l. How calculated.]**—*SCHON v. NEW YORK LIFE INSURANCE CO.* (1922), 63 D. L. R. 475; 55 N. S. R. 137.—*CAN.*



**Sect. 6.—Amount recoverable. Sects. 7, 8 & 9:**  
**Sub-sect. 1, A. & B.]**

on his own life to gain a Pyrrhic victory by his own death (KENNEDY, L.J.).—GRIFFITHS v. FLEMING, [1909] 1 K. B. 805; 78 L. J. K. B. 567; 100 L. T. 765; 25 T. L. R. 377; 53 Sol. Jo. 340, C. A.

**Annotation:—***Mentd. Re Bradley & Essex & Suffolk Accident Indemnity Soc., [1912] 1 K. B. 415.*

**2827. — Whether limited to interest at date of policy.]—DALBY v. INDIA & LONDON LIFE-ASSURANCE CO., No. 2774, ante.**

**2828. — —.]—LAW v. LONDON INDISP-UTABLE LIFE POLICY CO., No. 2787, ante.**

**2829. — Several policies taken out upon one life—Payment of amount of insurable interest under one policy.]—HEBDON v. WEST, No. 2810, ante.**

**— Under policy to meet funeral expenses.]—See Nos. 2815, 2816, ante.**

**— What constitutes interest.]—See Part I., Sect. 4, sub-sect. 2, ante.**

**2830. Effect of interest ceasing before policy matures.]—DALBY v. INDIA & LONDON LIFE-ASSURANCE CO., No. 2774, ante.**

**2831. —.]—LAW v. LONDON INDISP-UTABLE LIFE POLICY CO., No. 2787, ante.**

#### SECT. 7.—INDISP-UTABLE POLICIES.

**2832. Condition that policy shall be indisputable except for fraud—Condition in prospectus—Innocent misstatement in declaration—Policy conditional on truth of declaration.]—WOOD v. DWARRIS, No. 2779, ante.**

**2833. — — No evidence that insurance was induced by prospectus.]—WHEELTON v. HARDISTY, No. 2845, post.**

**2834. — Condition in policy—Innocent misstatement.]—ANSTEY v. BRITISH NATURAL PREMIUM LIFE ASSOCN., LTD., No. 2895, post.**

**2835. — — Want of statutory insurable interest—Condition of no avail.]—A condition in a policy of life insurance that, provided the premiums have been regularly paid, it shall, after a year, be “incontestable,” does not override the enactment of the legislature that “the insured must have an insurable interest in the life upon which the insurance is effected.”—ANCTIL v. MANUFACTURERS’ LIFE INSURANCE CO., [1899] A. C. 604; 68 L. J. C. P. 123; 81 L. T. 279, P. C.**

#### PART IV. SECT. 7.

**2832 i. Condition that policy shall be indisputable except for fraud—Condition in prospectus—Innocent misstatement in declaration—Policy conditional on truth of declaration.]—ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO. v. SARAT CHANDRA CHATTERJI (1895), 1 L. R. 20 Bom. 99.—IND.**

**m. Condition that policy shall be indisputable—Effect on limitation of action.]—Where there is an absolute promise to pay in a life-insurance policy, & it is expressly provided therein that the payment of the sum insured shall not be disputed, a statutory period of limitation does not apply.—DUFFIELD v. MUTUAL LIFE INSURANCE CO. (1914), 26 O. W. R. 588; 6 O. W. N. 646; 32 O. L. R. 299; 20 D. L. R. 467.—CAN.**

**n. — After three years—Breach within three years—Objection after third year.]—A policy provided that, after being in force for three years, it should be indisputable. The insured violated a condition that would have avoided the policy but for this clause:—*Held*: the policy was indisputable three days**

**before the insured died & the provision as to indisputability covered a breach of condition made during the three years.—NORTH AMERICAN LIFE ASSURANCE CO. v. ELSON (1903), 33 S. C. R. 383; ELSON v. NORTH AMERICAN LIFE ASSURANCE CO., 9 B. C. R. 474.—CAN.**

#### PART IV. SECT. 9, SUB-SECT. 1.—A.

**2836 i. General rule.]—DALGETY & CO., LTD. v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY, [1908] V. L. R. 481.—AUS.**

**2836 ii. —.] — CONFEDERATION LIFE ASSURANCE CO. v. MILLER (1887), 14 S. C. R. 330.—CAN.**

**2836 iii. —.] — Misrepresentations upon an application for life insurance found to be material will avoid the policy notwithstanding that they may have been made in good faith & in the conscientious belief that they were true.—JORDAN v. PROVINCIAL PROV-IDENT INSURANCE CO. (1887), 14 S. C. R. 330.—CAN.**

**2836 iv. —.]—FINN v. IN (1850), 15 L. T. O. S. 262.—IR.**

**2836 v. —.]—*Held*: according to**

#### SECT. 8.—AGENCY.

**See, generally, Part I., sect. 14.**

#### SECT. 9.—REPRESENTATION, CONCEALMENT AND WARRANTIES.

**SUB-SECT. 1.—CONTRACT UBERRIMÆ FIDEI: REPRESENTATION AND CONCEALMENT.**

##### A. In General.

**As to misrepresentation & concealment in general.]—See Part I., Sect. 9, ante.**

**As to concealment by insurance agent.]—See Part I., Sect. 14, ante.**

**2836. General rule.]—In making a proposal for life assurance, the party is required to state all material facts within his knowledge; & if he conceals anything which may influence the grant of the assurance or the rate of premium, although he does not know it, it is fraud, & vitiates the policy.**

**Deft., in making a proposal for assurance, concealed the fact that his life had been declined by other offices:—*Held*: such a concealment of a material fact, that the co. were entitled to have an agreement to grant an assurance set aside.—LONDON ASSURANCE v. MANSEL (1879), 11 Ch. D. 363; 48 L. J. Ch. 331; 41 L. T. 225; 43 J. P. 604; 27 W. R. 444.**

**Annotations:—***Expld. Joel v. Law Union & Crown Insee., [1908] 2 K. B. 863. Refd. Hambrough v. Mutual Life Insee. of New York (1895), 72 L. T. 140; Seaton v. Heath, Seaton v. Burnand, [1899] 1 Q. B. 782.*

**2837. Truth of representation—Question for jury.]—JARVIS v. MARINE & GENERAL MUTUAL LIFE ASSURANCE SOCIETY (1889), 5 T. L. R. 648, C. A.**

**2838. Onus of proof.]—Declaration on a policy of insurance alleged that the same was effected in pursuance of a declaration by pltf., averring, amongst other things, that the party whose life was insured was not accustomed to any habits prejudicial to health & was in a sound state of health, & the policy was to be void in case of misrepresentation. Pleas: first, that the party was accustomed to habits prejudicial to health, to wit, of drunkenness; second, that the party was in a bad & unsound state of health. Replication *de injuria*:—*Held*: deft. was entitled to begin.**

**The cases on this subject furnish me so little assistance in deciding the question, that I am**

**the true construction of the contract between the parties, a statement made in or about the obtaining of the policy must be not only false, but also material to the insurance, in order to vitiate the policy.—ANDERSON v. FITZGERALD (1851), 1 L. C. L. R. 251; *reversd.*, 4 H. L. Cas. 484; 17 Jur. 995.—IR.**

**2837 i. Truth of representation—Question for jury.]—BRIDGMAN v. LONDON LIFE ASSURANCE CO. (1879), 44 U. C. R. 536.—CAN.**

**2838 i. Onus of proof.]—Where a statement as to age is found to be material & untrue, an avoidance of the contract follows, unless that result is prevented by its being made to appear that the statement was made in good faith & without intent to deceive; & it must lie upon the person seeking to uphold the contract to make proof of it.—DILLON v. MUTUAL RESERVE FUND LIFE ASSOCN. (1904), 23 C. L. T. 86; 5 O. L. R. 434; 2 O. W. N. 78; 4 O. W. R. 351.—CAN.**

**2838 ii. —.]—SEERY v. FEDERAL LIFE ASSURANCE CO. OF CANADA (1908), 5 E. L. R. 406.—CAN.**

**o. Misstatements made in good faith.]—A Canadian benefit assocn., in**

obliged to rely on my own judgment as applied to the peculiar allegations in these pleadings; &, on the whole, I think that the burden of proof is on deft. (TINDAL, C.J.).—POLE v. ROGERS (1840), 2 Mood. & R. 287, N. P.

*Annotation*:—Mentd. Mercer v. Whall (1845), 5 Q. B. 447.

2839. Right to begin.]—POLE v. ROGERS, No. 2838, ante.

2840. —.]—If in an action on a life policy defts. plead that at the time of the declaration of health & the policy the habits of the person whose life was insured were immoderate & intemperate, & that he was addicted to excessive drinking; replication: that his habits were moderate & temperate, & not immoderate & intemperate, & that he was not addicted to excessive drinking:—*Held*: on these pleadings pltf. should begin, as there was an affirmative on both sides.—CRAIG v. FENN (1841), Car. & M. 43, N. P.

2841. —.]—By a policy of insurance on life, it was stipulated to be void, if anything stated by the assured to the directors of the assurance co. previous to the execution of the policy, should be untrue. A party desiring to be assured made a statement to the directors, that he had not been afflicted with a number of specified diseases (*inter alia*), rupture, or any other disorder which tends to the shortening of life. At his death his exors. sued on the policy, & in their declaration averred the truth of the statement made by the assured. Plea, that the statement was untrue, to wit, in this, that the assured, at the time of the making thereof, was afflicted with rupture; concluding, not to the country, but with a verification. Pltfs. replied *de injuria*:—*Held*: pltfs. were entitled to begin at the trial; &, the judge having ruled the contrary at *nisi prius*, a new trial was ordered.—ASHBY v. BATES (1846), 15 M. & W. 589; 4 Dow. & L. 33; 15 L. J. Ex. 349; 7 L. T. O. S. 232; 153 E. R. 984; *previous proceedings*, 6 L. T. O. S. 523.

**Admissibility of evidence—Declarations by insured.**—See EVIDENCE, Vol. XXII., p. 98, Nos. 686, 687.

#### B. Materiality of Representation and Concealment.

2842. Materiality question for jury—Representation as to residence—Assured in prison at date of proposal.]—The conditions of a life insurance required a declaration of the state of the health of the assured, & the policy was to be valid only if the statement were free from all misrepresentation & reservation; the declaration described the assured as resident at F. She was then a prisoner in the county gaol there:—*Held*: it was a question for the jury, whether the imprisonment were a material fact & ought to have been communicated.—HUGUENIN v. RAYLEY (1815), 6 Taunt 186; 128 E. R. 1005.

*Annotations*:—*Reid*. Morrison v. Muspratt (1827), 12 Moore, C. P. 231; Lindenau v. Desborough (1828), 8 B. & C. 586.

which assured held certificates of insurance, transferred its assets & business to an American assocn., who new certificates. Claimants to prove claims on the certificates. Misrepresentations as to age had been made & as the contracts were with a friendly society previous to Insurance Corpns. Act, 1892, claimants were held not entitled to the benefit of s. 34 under which misstatements as to age made in good faith do not avoid the act:—*Held*: there was a new contract between the American assocn. & assured, after the above Act, & as the assocn. were validly doing business

in Canada claimants were entitled to the benefit of ss. 33 & 34 of the Act.—MASON v. MASSACHUSETTS BENEFIT LIFE ASSOCN., ALLEN'S CASE, O'DEA'S CASE (1899), 30 O. R. 716.—CAN.

p. Material facts—Duty to disclose—Habits of life.]—Where a judge directed the jury to consider whether a question regarding habits remained unanswered, & if so, whether this did not imply a waiver, or abandonment of the inquiry:—*Held*: he should have told the jury, that such implied abandonment or waiver did not relieve the assured from making a disclosure of

2843. — Misstatement as to health—Pulmonary disease.]—MORRISON v. MUSPRATT, No. 2881, post.

See, also, No. 2848, post.

2844. — By parol—Policy voidable on misrepresentation to written questions.]—WAINWRIGHT (OR WAINWRIGHT) v. BLAND, No. 2848, post.

Representations made basis of contract.]

See Sub-sect. 2, A., post.

2845. — As to health—Whether amounting to warranty.]—Count. For that, by a deed poll sealed by defts., directors of the W. Life Insurance Assocn., after reciting that pltfs., being interested in the life of J. had caused to be delivered into the office of the Assocn. "a proposal for assurance in writing," "whereby it was declared that" (*inter alia*) J. had not had any fit since childhood, " & that the Assocn. had thereupon undertaken the proposed assurance, subject to the terms & conditions therein & thereunder expressed." Usual covenant to pay if J. died. Breach, non-payment. The conditions were set out, & contained no further warranty than above that J. had not had fits. Plea A. fraud. Pleas B. & C. that the policy was obtained by false statements & false concealments of material facts. Plea D., that the "declaration in the policy & in the declaration in this cause mentioned," that J. had not had any fit since childhood, was untrue. Issue was taken on these pleas. On the trial it was proved that the proposal in fact signed referred to the answers of J., his ordinary medical attendant & a friend to whom he had referred, rendered to another insurance co.; & that it concluded with a declaration "that we believe the above particulars & statements are true." The jury found that statements made by J., his usual medical attendant, & his private referee, including a statement that he had not had fits since childhood, were false, & that there was fraud on their part against defts., but no fraud on the part of the pltfs.:—*Held*: (1) the life insured, the medical referee, & the private referee, were not the agents of the assured, so as to make their fraud, misrepresentation, or concealment that of the assured; & the pltfs. were entitled to the verdict on the issues joined on pleas A., B. & C.; (2) plea D. referred to the statement recited in the policy, & was proved, & defts. were entitled to the verdict & judgment thereon; (3) there was no warranty of the truth of the matters recited in the policy to have been declared in the proposal, or anything in the nature of the contract, as set out on the record, showing an intention that the truth of these matters should be the basis of the contract; & consequently the plea, not averring a *scienter*, was bad, & pltfs. entitled to judgment on it *non obstante veredicto*. (4) There was also a replication on equitable grounds to plea D.: that, before the policy was entered into, defts. circulated a prospectus,

every fact material to be known.—FORBES & Co. v. EDINBURGH LIFE ASSURANCE Co. (1832), 10 Sh. (Ct. of Sess.) 451; 7 Fac. Coll. 351.—SCOT.

q. — — —.]—SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY v. BUIST (1878), 5 R. (Ct. of Sess.) 64; 5 Sc. L. R. 386, H. L.—SCOT.

#### PART IV. SECT. 9, SUB-SECT. 1.—B.

r. Materiality question for jury.]—FERGUSON v. PROVINCIAL PROVIDENT INSTITUTION (1893), 15 P. R. 366.—CAN.

t. — Except where parties have



**Sect. 9.—Representation, concealment and warranties: Sub-sect. 1, B. & C.; sub-sect. 2, A. (a).]**

whereby they undertook that their policies should be unquestionable, except on the ground of fraud; & that plffs. were induced to enter into the policy on the faith thereof. Issue thereon. On the trial it appeared that such a prospectus was issued; but no express proof was given that plffs. saw it or were induced by it to make the policy. The jury found for plffs.:—*Held*: there was no sufficient evidence to warrant this finding.—**WHEELTON v. HARDISTY** (1858), 8 E. & B. 232, 285; 27 L. J. Q. B. 241; 31 L. T. O. S. 303; 5 Jur. N. S. 14; 6 W. R. 539; 120 E. R. 106, Ex. Ch.

*Annotations*:—As to (2) *Refd.* Behn v. Burness (1863), 2 New Rep. 184. As to (3) *Expld. & Distd.* Macdonald v. Law Union Insee. (1874), L. R. 9 Q. B. 328. *Refd.* Liverpool Borough Bank v. Eccles (1859), 4 H. & N. 139; Roper v. London (1859), 28 L. J. Q. B. 260; Beachey v. Brown (1860), 24 J. P. 518; Joel v. Law Union & Crown Insee., [1908] 2 K. B. 863; Yorke v. Yorkshire Insee., [1918] 1 K. B. 662. As to (4) *Refd.* Ryder v. Wombwell (1868), L. R. 4 Exch. 32; Hall v. Jupe (1880), 49 L. J. Q. B. 721. *Generally, Mentd.* Blackman v. L. B. & S. C. Ry. (1869), 17 W. R. 769.

**2846. — Gout—What amounts to misrepresentation.**—A person proposing to insure his life was asked, "Have you ever been afflicted with gout?" & answered, "No"; & being asked "Has your life been proposed at any other office, & if so, has it been accepted, & at what rate?" answered, "It has been proposed & accepted at the ordinary rate." It appeared that it had been proposed at one office & declined, & at another office, where he had been examined & approved by the medical man, but nothing further had been done. It also appeared that before the proposal he had had a slight attack of suppressed gout:—*Held*: this answer was not untrue if he had not been sensibly afflicted with gout, but merely had some symptoms which a medical man could detect as denoting the presence of gout in the system: but, *semble*: the other answer was untrue, or at all events was a suppression of a material fact.—**FOWKES v. MANCHESTER & LONDON ASSURANCE ASSOCN.** (1862), 3 F. & F. 440, N. P.; *subsequent proceedings* (1863), 3 B. & S. 917.

*Annotation*:—*Expld.* Hemmings v. Sceptre Life Assocn., [1905] 1 Ch. 365.

**2847. — Acute rheumatism with heart disease.**—**BRITISH EQUITABLE INSURANCE CO. v. MUSGRAVE** (1887), 3 T. L. R. 630.

**2848. — As to object of insurance.**—A party, on insuring her life, made false representations as to her object in effecting the insurance, & also as to her having obtained similar insurances from other offices, both of which facts were found by the jury at the trial to be material to be known by the insurance co.:—*Held*: the policy was thereby avoided although such false representations were in answer to parol inquiries not comprised in the list of printed questions required by the regulations of the office to be asked of the assured; & although the policy, as framed, was only to be void on false answers being given to such printed questions.—**WAINWRIGHT (OR WAINWRIGHT) v. BLAND** (1836), 1 M. & W. 32; 1 Gale, 406; Tyr. & Gr. 417; 5 L. J. Ex. 147; 150 E. R.

*agreed the same.*—**BALDWIN v. MUTUAL ASSURANCE SOCIETY OF VICTORIA** (1890), 8 N. Z. L. R. 662.—N.Z.

**2851 i. Suppression—Former proposals for insurance.**—**DONOVAN v. EXCELSIOR LIFE INSURANCE CO.** (1915), 43 N. B. R. 325.—CAN.

**2855 i. — State of health.**—**MUTUAL RELIEF SOCIETY OF N. S. v.**

**334; previous proceedings** (1835), 1 Mood. & R. 481, N. P.

*Annotations*:—*Refd.* Griffiths v. Fleming, [1909] 1 K. B. 805. *Mentd.* Brown v. Thornton (1836), 1 My. & Cr. 243; Hodson v. Observer Life Insee. (1857), 3 Jur. N. S. 1125; Shilling v. Accidental Death Insee. (1857), 2 H. & N. 42; Hebden v. West (1863), 3 B. & S. 579; Evans v. Bignold (1869), 38 L. J. Q. B. 293; M'Farlane v. Royal London Friendly Soc. (1886), 2 T. L. R. 755.

**2849. Representations not made basis of contract—Test of materiality.**—When statements made by an insured person upon his application for a policy of life insurance are not made the basis of the contract but are to be treated merely as representations, an inaccurate statement is material so as to vitiate the policy if the matters concealed or misrepresented, had they been truly disclosed, would have influenced a reasonable insurer to decline the risk, or to have stipulated for a higher premium; it is not sufficient that they would merely have caused delay in issuing the policy while further inquiries were being made.—**MUTUAL LIFE INSURANCE CO. OF NEW YORK v. ONTARIO METAL PRODUCTS CO., LTD.**, [1925] A. C. 344; 94 L. J. P. C. 60; 132 L. T. 652; 41 T. L. R. 183, P. C.

**2850. Suppression—Question not directly asked—Insanity of relations.**—**DUFF v. GANT** (1852), 20 L. T. O. S. 71.

**2851. — Former proposals for insurance.**—**WAINWRIGHT (OR WAINWRIGHT) v. BLAND**, No. 2848, *ante*.

**2852. — — — — —**—**FOWKES v. MANCHESTER & LONDON ASSURANCE ASSOCN.**, No. 2846, *ante*.

**2853. — — — — — Evasive answer.**—D. applied, through R., an insurance agent, to an office to insure an invalid life, informing them of the fact. The office wrote asking if the life had been refused by any office, & if so, to name it. There had been numerous refusals, & negotiations with other offices were pending, which afterwards resulted in refusals. R. replied that he had been & still was corresponding with other offices, as the amount to be insured was large. The office granted the policy:—*Held*: to be such an intentional suppression of the facts as to vitiate the contract.—*Re* **GENERAL PROVINCIAL LIFE ASSURANCE CO., LTD.**, *Ex p.* **DAINTREE** (1870), 18 W. R. 396.

**2854. — — — — —**—**LONDON ASSURANCE v. MANSEL**, No. 2836, *ante*.

*See, also*, No. 203, *ante*.

**2855. — State of health.**—A party effecting a life insurance is bound to disclose every material fact within his knowledge, whether he believes such fact to be material or not.

In answer to questions it was stated by one of appcts.' physicians, & agents that he was hindered in the faculty of speaking, in consequence of a sustained inflammation in his chest. The other said he was not afflicted with any such disease, but had a dimness of sight upon his left eye. He was also hindered in the faculty of speaking occasioned by an inflammation in the chest. To the question "Do you believe he is now quite free from any disease or symptoms of disease & in perfect health?" one of them answered that "with the exception of those just-mentioned complaints I consider him to be at this moment quite free from all other diseases, as also free from

**WEBSTER** (1889), 16 S. C. R. 718.—CAN.

**2855 ii. — — — — —**—Pltf. warranted that he was free from disease, whereas he had tuberculosis, which, though undeveloped by physical signs, were existing:—*Held*: these statements & concealments were material & constituted a breach of the warranty; & therefore the policy was void.—

**SMITH v. GRAND ORANGE LODGE OF BRITISH AMERICA** (1903), 24 C. L. T. 16; 6 O. L. R. 588; 2 O. W. R. 985.—CAN.

**2855 iii. — — — — —**—**SELICK v. NEW YORK LIFE INSURANCE CO.** (1920), 48 O. L. R. 416; 57 D. L. R. 222; 19 O. W. N. 260.—CAN.

**2855 iv. — — — — —**—**KIERNAN v. METROPOLITAN LIFE INSURANCE CO.**,



all & every symptoms of disease, & can consequently call the state of his health perfectly good." The other said, "In this present moment, there is not to be perceived an illness, & he consequently can be said to be in perfect health." "Are his habits sober & temperate, or otherwise?" "His habits are sober & regular in the highest degree, & he follows rigidly his medical advice." "Are you acquainted with any circumstances having a tendency to the shortening of his life, or which can make an insurance upon his life more than usually hazardous?" "Such circumstances I do not know as far as human knowledge may go, & such apprehension may be of less value in his person than of any other person, considering the great attention to preserve his health." In fact, the state of appct.'s intellect was such, that he was really quite in the hands of his attendants & the medical men. He hardly on any occasion exercised a will of his own; he was quite unable to give an answer to a question; & he was unable to speak. His valet had never heard him utter a single word. When ministers put any questions to him upon state affairs, he gave no answer, but if he approved of the measure, he signified his assent by tapping the minister's cheek:—*Held*: these were circumstances material to be disclosed to the office for them to judge of, the withholding of which rendered the policy void.

Whether a policy be upon ship or upon life, or against fire, the underwriter has a right to expect that everything material known to the party making the application, shall be communicated to him; & it is at the peril of the assured, if that communication is not made. The question is, whether the thing not communicated is in fact material or not, & not whether it is believed by the person who ought to make the communication to be material or not.—*LINDENAU v. DESBOROUGH* (1828), 8 B. & C. 586; 108 E. R. 1160; *sub nom.* *VON LINDENAU v. DESBOROUGH*, 3 C. & P. 353; 3 Man. & Ry. K. B. 45; 7 L. J. O. S. K. B. 42.

*Annotations*:—*Expld.* *Wheulton v. Hardisty* (1857), 8 E. & B. 232. *Consd.* *London Assco. v. Mansel* (1879), 11 Ch. D. 363; *Joel v. Law Union & Crown Insee.* (1908), 77 L. J. K. B. 1108. *Refd.* *Everett v. Desborough* (1829), 5 Bing. 503; *Wainwright v. Bland* (1836), 1 M. & W. 32; *Jones v. Provincial Insee.* (1857), 3 C. B. N. S. 65; *Yorke v. Yorkshire Insee.*, [1918] 1 K. B. 662.

#### C. Misrepresentation by Insurance Company.

**2856. Representation amounting to warranty—Representation in prospectus—Bonuses declared in accordance with rules of company.**—Case lies for false representations as to the affairs of an insurance co., whereby pltf. was induced to effect an insurance with the co., although no actual pecuniary damage has been sustained, beyond the pay-

[1925] 4 D. L. R. 439; [1925] S. C. R. 600.—CAN.

**2855 v.** ——. *HUTCHISON v. NATIONAL LOAN FUND LIFE ASSURANCE CO.* (1845), 7 Dunl. (Ct. of Sess.) 467; 17 Sc. Jur. 253.—SCOT.

**a.** ——. *Materiality must be known to applicant.*—*Held*: the failure of assured to disclose a material fact was not a ground for reduction of the policy, in respect that she did not know it to be material, & that persons without medical knowledge could not be expected to know that it was so.—*LIFE ASSOCN. OF SCOTLAND v. FORSTER* (1873), 11 Macph. (Ct. of Sess.) 351; 45 Sc. Jur. 240.—SCOT.

**b.** *Voluntary misstatement—May be material.*—In a proposal for a life insurance the question "Have any of your near relatives died of consumption or been afflicted with insanity?" was answered, "No, all still living." Prior to the proposal a brother of

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assured had, with his knowledge, died:—*Held*: the statement "all still living" though not in answer to any question was material & being untrue within assured's knowledge, the policy was thereby rendered invalid.—*GRAHAM v. WRIGHT* (1872), 3 V. R. (Law) 79.—AUS.

**c.** *Misrepresentation—As to health—Cause of death of relatives.*—Action on a policy dismissed on the grounds that insured had made misrepresentations as to other insurance, state of health & cause of death of other members of her family.—*DUPERE v. LONDON & LANCASHIRE LIFE ASSURANCE CO.* (1909), 6 E. L. R. 232.—CAN.

#### PART IV. SECT. 9, SUB-SECT. 1.—C.

**d.** *By officer of company—Estoppel.*—Where the representation made by the co.'s superintendent was calculated to have the effect of leading a

ment of premiums. In an action for misrepresentation as to the proceedings of an insurance co., the declaration set forth several rules & regulations of the co., & alleged that deft. fraudulently represented that these rules & regulations had been complied with, knowing the fact to be otherwise. A plea, stating that these rules & regulations had been so fully complied with as was necessary for the maintenance of the co., & of such insurances as had been, or might be, effected, was held bad.—*PONTIFEX v. BIGNOLD* (1841), 9 Dowl. 860; 3 Man. & G. 63; 3 Scott, N. R. 390; 10 L. J. C. P. 259; 133 E. R. 1058.

#### SUB-SECT. 2.—WARRANTIES: THE DECLARATION.

##### A. Declaration stipulated to be Basis of Contract.

###### (a) In General.

**2857. Whether answers made basis of contract—Additional questions put by medical referee.**—*DELAHAYE v. BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.* (1897), 13 T. L. R. 245, C. A.

**2858.** ——. *One R. effected with deft.* an insurance upon her life in pursuance of a proposal in which she made certain statements, the truth of which was not disputed. She signed a declaration that the statements so made were to the best of her knowledge & belief true, & by which she agreed that "this proposal & declaration" should "be the basis of the contract" between her & deft. Subsequently to the proposal, but before the execution of the policy, certain questions contained in a printed form were put to her by the doctor, who was instructed by defts. to put these questions with any necessary explanation & fill in her answers thereto, & to report upon her health, & these questions were answered by her. Many of these questions related to matters of health, the answers as to which could only be matter of opinion, even if given by a medical expert. Among these questions she was asked to give the names of any medical men consulted by her, & to state when & for what she consulted them; & whether, among other complaints, she had ever suffered from mental derangement. The answer to the last-mentioned question was in the negative, whereas in fact she had, though not aware of the fact, been in confinement for acute mania; & in the answer to the first-mentioned question, as filled in by the doctor, the name of one Dr. K. whom she had consulted for nervous breakdown following influenza, was not mentioned. She signed a second declaration, contained in the before-mentioned form, wherein

reasonable & prudent man not to pay the premium, & the representation had been believed & acted upon, all the elements of estoppel were present, & pltf. was entitled to recover.—*PARKER v. CAPITAL LIFE INSURANCE CO.* (1915), 48 N. S. R. 404; *affd.*, 51 S. C. R. 462.—CAN.

**e.** *By agent—Fraudulent—Necessity for applicant to be deceived.*—*HOWARTH v. PIONEER LIFE ASSURANCE CO., LTD.* (1912), 46 I. L. T. Jo. 329.—IR.

**f.** ——. *Benefit estimated—Not guaranteed—Whether sufficient to avoid contract.*—*BOYD v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY* (1910), 29 N. Z. L. R. 41.—N.Z.

#### PART IV. SECT. 9, SUB-SECT. 2.—A. (a).

**g.** *Whether answers made basis of contract.*—*SCANLON v. SCEALS* (1841), 5 I. L. R. 139.—IR.

**Sect. 9.—Representation, concealment and warranties: Sub-sect. 2, A. (a) & (b).]**

she declared, "with reference to the proposal for assurance" on her life & her previous declaration, that the answers to the foregoing questions were all true. This declaration did not state that the answers were to form part of the basis of the contract. The policy did not refer to the proposal or either of the declarations. The assured subsequently committed suicide.

An action having been brought on the policy by the extrix. of the assured, defts. resisted pltf.'s claim upon the ground that the accuracy of the answers to the above-mentioned questions was made a condition precedent to the validity of the policy, & upon the ground of misstatement & non-disclosure of material facts by the assured. The doctor who put the questions to the assured was not called as a witness at the trial. The jury found in answer to the following questions as follows:—Q. Did the assured fraudulently conceal from defts. that she had consulted Dr. K. for nervous depression? A. She foolishly, but not fraudulently, concealed this fact. Q. Was the fact that she had consulted Dr. K. for nervous breakdown material for the co. to know in considering whether they would insure the assured's life? A. Yes. Upon these answers judgment was entered for defts.:—*Held*: (1) although the terms of the first declaration signed by the assured did not exclude the possibility of the truth of her answers to the questions referred to in the second declaration being material to the validity of the policy, yet, having regard to the nature & purpose of those questions, the truth of the answers to them was not, on the true construction of the documents, made part of the basis of the contract; (2) under the circumstances of the case, without the evidence of the doctor who put the questions to the assured as to what took place when he put the questions to her, & what explanation of them he gave to her, the second declaration signed by the assured as above mentioned was not *per se* sufficient evidence to prove that there had been any such non-disclosure of material facts by the assured as would, in the absence of fraud, render the policy voidable.—*JOEL v. LAW UNION & CROWN INSURANCE CO.*, [1908] 2 K. B. 863; 77 L. J. K. B. 1108; 99 L. T. 712; 24 T. L. R. 898; 52 Sol. Jo. 740, C. A.

*Annotations*:—As to (1) *Refd.* *Re Bradley & Essex & Suffolk Accident Indemnity Soc.*, [1912] 1 K. B. 415; *Yorke v. Yorkshire Insee.*, [1918] 1 K. B. 662; *Condogianis v. Guardian Assce.*, [1921] 2 A. C. 125; *Horne v. Poland*, [1922] 2 K. B. 364; *Glicksman v. Lancashire & General Assce.* (1925), 41 T. L. R. 434. *Generally*, *Etherington & Lancashire & Yorkshire Accident Insee.*, [1909] 1 K. B. 591.

**2859. Truth of statements as condition precedent—Materiality of representation immaterial.]—F.** applied to an insurance office to effect a policy on his life. He received a form of proposal containing questions requiring to be answered. Among these were the following: "Did any of the party's near relations die of consumption or any other

pulmonary complaint?" & "Has the party's life been accepted or refused at any office?" To each of these questions F. answered "No." The answers were false. F. signed the proposal, & a declaration accompanying them, by which he agreed "that the particulars mentioned in the above proposal should form the basis of the contract." The policy mentioned several things which were "warranted" by F. The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the co. in or about the obtaining or effecting of this insurance," the policy should be void, & the moneys paid should be forfeited. In an action on the policy:—*Held*: it was a misdirection to leave it to the jury to say whether the answers to the two questions were material as well as false, & if not material, pltf. was entitled to the verdict. The representation being part of the contract, its truth, not its materiality, was in question.—*ANDERSON v. FITZGERALD* (1853), 4 H. L. Cas. 484; 21 L. T. O. S. 245; 17 Jur. 995; 10 E. R. 551, H. L.

*Annotations*:—*Apld.* *Wheelton v. Hardisty* (1857), 8 E. & B. 285; *Perrins v. Marine, etc. Insee. Soc.* (1859), 2 E. & B. 317. *Distd.* *Towle v. National Guardian Assce. Soc.* (1861), 3 Giff. 42. *Consd.* *Re Universal Non-Tariff Fire Insee., Forbes' Claim* (1875), L. R. 19 Eq. 485. *Apld.* *London Assce. v. Mansel* (1879), 11 Ch. D. 363. *Consd.* *Thomson v. Weems* (1884), 9 App. Cas. 671; *Joel v. Law Union & Crown Insee.*, [1908] 2 K. B. 863. *Distd.* *Stebbing v. Liverpool & London & Globe Insee.* (1917), 86 L. J. K. B. 1155. *Consd.* *Dawsons v. Bonnin*, [1922] 2 A. C. 413. *Refd.* *Stokes v. Cox* (1856), 1 H. & N. 533; *Cazenove v. British Equitable Assce.* (1859), 6 C. B. N. S. 437; *Re Etherington & Lancashire & Yorkshire Accident Insee.*, [1909] 1 K. B. 591; *Condogianis v. Guardian Assce.*, [1921] 2 A. C. 125. *Mentd.* *Gregory v. Cotterell* (1855), 5 E. & B. 571; *McMahon v. Lennard* (1858), 6 H. L. Cas. 970; *Mersey Dock Board v. Penhallow* (1861), 7 H. & N. 329; *A.-G. v. Sillem* (1863), 2 H. & C. 581.

**2860. — Representations false but not fraudulent—Policy to be void on false & fraudulent statements.]—SCOTTISH PROVIDENT INSTITUTION v. BODDAM** (1893), 9 T. L. R. 385; 37 Sol. Jo. 426.

**2861. — Statement not known to be untrue to declarant.]—A** policy of insurance on the life of another person, who, at the time of the insurance, is in a good state of health, is not vitiated by the non-communication by such person of the fact of his having, a few years before, been afflicted with a disorder tending to shorten life, if it appear that the disorder was of such a character as to prevent the party from being conscious of what had happened to him while suffering under it.—*SWETE v. FAIRLIE* (1833), 6 C. & P. 1, N. P.

*Annotation*:—*Refd.* *Wheelton v. Hardisty* (1857), 8 E. & B. 232.

**2862. — Construction of** M., being about to insure a life, signed a document which stipulated that if the declaration signed by M. as the basis of insurance was not in every re-

**28591. Truth of statements as condition precedent—Representations false but not fraudulent—Statement not known to be untrue to declarant.]—MINER v. EXCELSIOR LIFE ASSURANCE CO.** (1911), 16 W. L. R. 698.—CAN.

**2859 II. —**—The "personal statement" signed by deft. contained a declaration that such statement with the proposal should form the basis of the contract. Deft. gave answers that were untrue in material respects to some of the questions in the personal statement, & signed such

statement without reading it over:—*Held*: the untrue answers given by deft. although not fraudulently given, avoided the contract.—*COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD. v. DE BRUYN* (1911), C. P. D. 103.—S. AF.

**h. —**—A policy, having lapsed, was renewed upon a declaration by deceased, which was agreed to be taken as the basis of such renewal, that she was then "in good health." During the previous year she had been told several times by her medical ad-

viser that an operation would be necessary:—*Held*: judgment should be entered for deft. co.—*NATIONAL MUTUAL LIFE ASSOCN. OF AUSTRALASIA, LTD. v. KIDMAN* (1905), 3 C. L. R. 180.—AUS.

**k. — Negligence of agent of insurer.]—BALLANTYNE v. MUTUAL LIFE INSURANCE CO. OF NEW YORK** (1891), 17 V. L. R. 520.—AUS.

**l. — Representations false & fraudulent.]—The** application contained a number of questions & answers, & at the foot was a declaration, signed



spect true, then the insurance would be void. This declaration alleged that the life had never been offered to or declined by another insurance office, which was untrue, though M. did not know it:—*Held*: the contract guaranteed the absolute truth of the declaration, & M. could not recover on the policy.—**MACDONALD v. LAW UNION INSURANCE CO.** (1874), L. R. 9 Q. B. 328; 43 L. J. Q. B. 131; 30 L. T. 545; 38 J. P. 485; 22 W. R. 530.

*Annotations*:—**Consd. Re Universal Non-Tariff Fire Insce., Forbes' Claim** (1875), L. R. 19 Eq. 485; **Howarth v. Pioneer Life Assce.** (1912), 107 L. T. 155.

**2863.** ———.]—**JOEL v. LAW UNION & CROWN INSURANCE CO.**, No. 2858, *ante*.

*See, also*, Sub-sect. 2, C., *post*.

**2864.** ——— **Fraudulent misrepresentations by agent of insured—Acquiescence of insured.**]—**HAMBROUGH v. MUTUAL LIFE INSURANCE CO. OF NEW YORK** (1895), 72 L. T. 140; 11 T. L. R. 190; 39 Sol. Jo. 231, C. A.

*Annotations*:—**Refd. Ellinger v. Mutual Life Insce. of New York**, [1905] 1 K. B. 31; **Joel v. Law Union & Crown Insce.**, [1908] 2 K. B. 431; **Dawsons v. Bonnin**, [1922] 2 A. C. 413.

**2865.** ——— **Proposal form not signed by assured.**]—Pltf. effected with an insurance co. a policy of insurance under the seal of the co. upon the life of her husband, therein called the assured. The policy was expressed to be issued in consideration of pltf. having signed a proposal being the basis of the contract, & it being stipulated that if the proposal contained any untrue statement as to the state of health of the assured the policy should be void. Upon the death of the assured pltf., who had duly paid the premiums, claimed the amount insured. The co. resisted the claim on the ground that the proposal on which the policy has been issued contained misrepresentations as to the assured's health. At the hearing before justices of a complaint for non-payment of the sum insured pltf. satisfied the justices that a proposal produced by the co. & purporting to be signed by her was not signed by her or with her authority, & she further stated that no proposal at all had been signed by her or with her authority:—*Held*: the co. having issued the policy & received the premiums were estopped from contending that in consequence of the want of a proposal there was no contract; that the mere fact that pltf. instead of confining her evidence to the disproof of the proposal put forward by the co., made the admission, irrelevant to her own case, that there had been no proposal at all did not prevent her from taking the benefit of that estoppel; & the co. were liable on the policy.—**PEARL LIFE ASSUR-**

by the assured, that to the best of his knowledge & belief the foregoing statements & other particulars were true, & that the declaration should form the basis of the contract. It was found that these answers were untrue, & that the information was willfully withheld from & was material to be stated to the co.:—*Held*: these answers constituted a breach of the express contract between the parties, & therefore the policy was void.—**RUSSELL v. CANADA LIFE ASSURANCE CO.** (1882), 32 C. P. 256; *affd.* 8 A. R. 716.—**CAN.**

**m.** ———.]—**FITZRANDOLPH v. MUTUAL RELIEF SOCIETY OF N. S.** (1890), 17 S. O. R. 333.—**CAN.**

**n.** ———.]—**METROPOLITAN LIFE INSURANCE CO. v. MONTREAL COAL & TOWING CO.** (1904), 35 S. C. R. 266.—**CAN.**

**PART IV. SECT. 9, SUB-SECT. 2.—**  
**A. (b).**

**2867 i. Former proposals for insur-**

**ANCE CO. v. JOHNSON, SAME v. GREENHALGH**, [1909] 2 K. B. 288; 78 L. J. K. B. 777; 100 L. T. 483; 73 J. P. 216, D. C.

*Annotation*:—**Mentd. Tofts v. Pearl Life Assce.** (1913), 110 L. T. 190.

**2866.** ——— **Liability of re-insurer.**]—**AUSTRALIAN WIDOWS' FUND LIFE ASSURANCE SOCIETY, LTD. v. NATIONAL MUTUAL LIFE ASSOCN. OF AUSTRALASIA, LTD.**, No. 3131, *post*.

(b) *As to Particular Matters.*

**2867. Former proposals for insurance—Health of relatives.**]—**ANDERSON v. FITZGERALD**, No. 2859, *ante*.

**2868.** ———.]—**MACDONALD v. LAW UNION INSURANCE CO.**, No. 2862, *ante*.

**2869.** ———.]—In the proposal to an insurance co. for an insurance on his life, the assured had made certain statements as to his health & previous applications for insurance, & had also agreed that these statements were by him "warranted to be true, & were offered to the co. as a consideration of the contract." A policy was afterwards issued by the co. in consideration of the application for the policy, which was thereby made a part of the contract, & of the payment of the premium. In an action upon the policy by the administrator of the assured:—*Held*: by the agreement in the proposal, the truth of the statements, therein warranted, was a condition precedent, & the statements being in fact untrue, defts. were not liable under the policy.—**HAMBROUGH v. MUTUAL LIFE INSURANCE CO. OF NEW YORK** (1895), 72 L. T. 140; 11 T. L. R. 190; 39 Sol. Jo. 231, C. A.

*Annotations*:—**Consd. Ellinger v. Mutual Life Insce. of New York**, [1905] 1 K. B. 31; **Joel v. Law Union & Crown Insce.**, [1908] 2 K. B. 431. **Refd. Dawsons v. Bonnin**, [1922] 2 A. C. 413.

**2870. Former illness.**]—A policy of assurance effected by T. on his own life was subject to a condition that it was to be void "in case any fraudulent or untrue statement was contained in any of the documents deposited with the co. in relation to the assurance by the assured." Among such documents was one called the "personal statement," containing questions which T. was required to answer, with his answers. The first question related to certain specified diseases. The following are the other material questions & answers:—Q. Whether had since infancy any & what other disease requiring confinement? A. No. Q. How often has medical attendance been required? A. One year ago. Q. How long did such attendance continue? A. About a week.

**ance—Health of relatives.**]—Action on a life insurance policy, dismissed, on the grounds that insured had made misrepresentations as to other insurance, state of health & cause of death of other members of her family.—**DUPERE v. LONDON & LANCASHIRE LIFE ASSURANCE CO.** (1909), 6 E. L. R. 232.—**CAN.**

**2868 i.** ———.]—In regard to an insurance upon deft.'s own life:—*Held*: there was no contract, because the statement in the application that no co. had ever declined to assure deft.'s life was admittedly untrue, & this, under a provision contained in the application, avoided the policy.—**IMPERIAL LIFE ASSURANCE CO. OF CANADA v. AUDETT** (1912), 20 W. L. R. 372; 1 W. W. R. 819; 5 D. L. R. 354; 4 Alta. L. R. 204.—**CAN.**

**o. General state of health.**]—In an application for insurance, signed by appct., appct. declared that "to the best of my knowledge, information & belief, my health is good. I usually enjoy good health," & agreed that "such statements with this declara-

tion, shall form the basis of the contract for such assurance":—*Held*: these declarations did not constitute an absolute warranty, but were only statements to the best of the knowledge, information & belief of the assured.—**SAWYER v. MUTUAL LIFE ASSURANCE CO. OF CANADA** (1912), 22 W. L. R. 418; 8 D. L. R. 2; 2 W. W. R. 508; 22 Man. L. R. 613.—**CAN.**

**p.** ———.]—**HUTCHISON v. NATIONAL LOAN FUND LIFE ASSURANCE CO.** (1845), 7 Dunl. (Ct. of Sess.) 467; 17 Sc. Jur. 253.—**SCOT.**

**q. Age of insured.**]—In a case where an innocent misstatement of age has been made by an insured, insurers were permitted to deduct from the total amount due under the policy the amount of the difference of the premiums that would have been payable had the life been truly stated.—**MEADWAY v. RHODES** (1890), 16 V. L. R. 115.—**AUS.**

**r.** ——— **Proof.**]—Administratrix in



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Q. For what disease or diseases? A. Disordered stomach. Q. For what period confined to the house or the bed? A. A week. Q. How long is it since these circumstances occurred? A. One year. Q. Name & address of the medical attendant or attendants employed on occasion of such disease? A. Dr. R. The facts were that, subsequent to the occasion on which he was attended by Dr. R, & before he made the answers referred to, he had another & very dangerous disease, for which he was attended by three other medical men:—*Held*: the personal statement contained an untrue statement, & consequently, the policy was avoided.—*CAZENOVE v. BRITISH EQUITABLE ASSURANCE CO.* (1860), 29 L. J. C. P. 160; 1 L. T. 484; 6 Jur. N. S. 826; 8 W. R. 243, Ex. Ch.

**2871. Temperance.**—A. applied to an insurance office to effect a policy on his life. He received a printed form of proposal containing questions. Among these was the following:—Q. (a) Are you temperate in your habits? (b) And have you always been strictly so? A. (a) "Temperate;" (b) "Yes." Subjoined to the printed questions was a declaration, which A. signed, to the effect that the foregoing statements were true, & that the assured agreed that this declaration should be the basis of the contract, & that if any untrue averment, etc., was made the policy was to be absolutely void & all moneys received as premium forfeited. The policy recited the above declaration as the basis of the contract. After A.'s decease the insurance company refused payment of the policy on the ground that the above-mentioned answer was false in fact. In an action on the policy:—*Held*: the declaration of A., taken in connection with the policy, constituted an express warranty that the answer to the question was true in fact; & as the evidence clearly proved that A.'s averment as to his temperance was untrue, the policy was absolutely null & void.

The question must, in my opinion, be interpreted according to the ordinary & natural meaning of the words used, if that meaning be plain & unequivocal, & there be nothing in the context to qualify it. On the other hand, if the words used are ambiguous, they must be construed *contra proferentes* & in favour of the assured (LORD WATSON).—*THOMSON v. WEEMS* (1884), 9 App. Cas. 671, H. L.

*Annotations*:—*Consd.* *Yorke v. Yorkshire Insee.*, [1918] 1 K. B. 662; *Dawsons v. Bonnin*, [1922] 2 A. C. 413. *Apld.* *Paxman v. Union Assce. Soc.* (1923), 39 T. L. R. 424. *Reid.* *Ellinger v. Mutual Life Insee. of New York*, [1905] 1 K. B. 31; *Joel v. Law Union & Crown Insee.*, [1908] 2 K. B. 863; *Sparenborg v. Edinburgh Life Assce.*, [1912] 1 K. B. 195; *Australian Widows' Fund Life Assce. Soc. v. National Mutual Life Asscn. of Australasia*, [1914] A. C. 634; *Union Insee. Soc. of Canton v. Wills*, [1916] 1 A. C. 281; *Yorkshire Insee. v. Campbell* (1916), 86 L. J. P. C. 85; *Condogianis v. Guardian Assce.*, [1921] 2 A. C. 125.

*B. Construction of Particular Warranties.*

**2872. Life warranted good.**—Concealment of circumstances on a life insurance not so fatal, if the life be warranted good, as if it be a common insurance.—*ROSS v. BRADSHAW* (1761), 1 Wm. Bl. 312; 96 E. R. 175.

**2873. — Assured suffering from gout.**—

the proofs of death stated the age of the insured as being two years more than his own representation of his age in the application. Defts. pleaded misrepresentation of age by deceased, & relied on the claim papers as proving

it:—*Held*: pltf. was not bound by the statement in the claim papers.—*HAYES v. UNION MUTUAL LIFE ASSURANCE CO.* (1879), 44 U. C. R. 360.—*CAN.*

t. —.]—*ORIENTAL GOVERNMENT*

*WILLIS v. POOLE* (1780), 2 Park's Marine Insurances, 8th ed. p. 935.

**2874. — Statement as to information & belief only.**—*STACKPOLE v. SIMON* (1779), 2 Park's Marine Insurances, 8th ed. p. 932.

**2875. Disorder tending to shorten life.**—It is not to be concluded that a disorder with which a person is afflicted before he effects an insurance on his life, is a "disorder tending to shorten life" within the meaning of the declaration required by the insurance office, from the mere circumstance that he afterwards dies of it, if it be not a disorder which generally has that tendency.—*WATSON v. MAINWARING* (1813), 4 Taunt. 763; 128 E. R. 530.

**2876. — Affection of lungs.**—*Assumpsit* on a policy of assurance on life, one of the terms of which was, that it should be void if anything stated by the assured, in a declaration or statement given by him to the directors of the insurance co. before the execution of the policy, should be untrue. In this declaration the assured stated that "he was at that time in good health, & not afflicted with any disorder, nor addicted to any habit tending to shorten life; that he had not at any time been afflicted with insanity, rupture, gout, fits, apoplexy, palsy, dropsy, dysentery, scrofula or any affliction of the liver; that he had not had any spitting of blood, consumptive symptoms, asthma, cough or other affection of the lungs; & that one T. was at that time his usual medical attendant." The declaration in the cause averred the truth of this declaration & statement of the assured. Deft. pleaded pleas, respectively alleging, that the declaration & statement of the assured was untrue in this, that at the time of making it he had had spitting of blood, consumptive symptoms, an affection of the lungs, an affection of the liver, & a cough of an inflammatory & dangerous nature; that at that time he was affected with a disorder tending to shorten life; that he was not at that time in good health; & that he had falsely averred therein that T. was his usual medical attendant. Issues were joined on these pleas. Deft. proved at the trial, that, about four years before the policy was effected, the assured had spit blood, & had subsequently exhibited other symptoms usual in consumptive subjects; & that he died of consumption three years after the date of the policy. The judge, in summing up, read over the several issues to the jury, & in the course of it stated to them, that it was for them to say whether at the time of his making the statement set forth in the declaration, the assured had had such a spitting of blood, & such affection of the lungs & inflammatory cough, as would have a tendency to shorten his life:—*Held*: this was a misdirection; for that, although the mere fact of the assured having spit blood would not vitiate the policy, the assured was bound to have stated that fact to the insurance co., in order that they might make inquiry whether it was the result of the disease called spitting of blood.—*GEACH v. INGALL* (1845), 14 M. & W. 95; 15 L. J. Ex. 37; 9 Jur. 691; 153 E. R. 404.

*Annotations*:—*Reid.* *Ashby v. Bates* (1846), 15 M. & W. 589. *Mentd.* *Thom v. Bigland* (1853), 1 W. R. 290.

**2877. — Insanity of relations.**—*DUFF v.* (1852), 20 L. T. O. S. 71.

*SECURITY LIFE ASSURANCE CO. v. SARAT CHANDRA CHATTERJI* (1895) 1 L. R. 20 Bom. 99.—*IND.*

a. —.]—*SWEENEY v. PROMOTEI LIFE ASSURANCE CO.* (1863), 14 I. C. L. R. 476.—*IR.*

**2878. — Warranty that assured "not aware" of—Knowledge of disorder but not that it tended to shorten life.]**—Upon effecting a policy on his life, in Feb. 1855, the proposed assured signed a declaration, as the basis of the insurance, stating "that his age did not exceed twenty-nine years; that he had had the small-pox or cow-pox; that he had not had certain specified diseases; that no proposal to insure his life had been declined at any office; that he was then in good health, & did ordinarily enjoy good health; & that he was not aware of any disorder or circumstance tending to shorten his life, or to render an insurance on his life more than usually hazardous, unless anything stated in answer to certain questions which preceded the declaration might be so considered."

—In an action upon the policy, by the administrator of the assured, it appeared, that, in 1853 & 1854, deceased had had two severe bilious attacks. A medical man who had attended him on those occasions stated that there was nothing in those illnesses which tended to shorten his life or to render it less insurable, & that his state of health after them was as good as ever. Two other medical men, one of whom had seen him on the last occasion, stated, that, in their judgment, those illnesses did tend to shorten his life & to render him ineligible for insurance; but it did not appear that their opinions had ever been communicated to the assured. The judge told the jury, that, "if the assured honestly believed at the time he made the declaration, that the bilious attacks had no effect upon his health, & did not tend to shorten his life or to render an insurance upon it more than usually hazardous, the fact that he was aware that he had had those attacks, even though, without his knowledge, they had such a tendency, would not defeat the policy":—*Held*: this direction was correct.—*JONES v. PROVINCIAL INSURANCE CO.* (1857), 3 C. B. N. S. 65; 26 L. J. C. P. 272; 30 L. T. O. S. 102; 3 Jur. N. S. 1004; 5 W. R. 885; 140 E. R. 662.

*Annotations*:—*Appld.* *British Equitable Insce. v. G. W. Ry.* (1868), 38 L. J. Ch. 132. *Mentd.* *Horlor v. Carpenter* (1857), 3 C. B. N. S. 172; *Banbury v. Bank of Montreal*, [1918] A. C. 626.

**2879. — Intemperance.]**—In an action on a life policy, based upon answers by the assured to certain questions (*inter alia*). "If of sober & temperate habits?" "If aware of any disorder or circumstance tending to shorten life, etc.?" "Is there any other & what information touching the past or present state of health which the co. ought to be made acquainted with?" "Name & address of ordinary medical attendant." It appearing that the assured had in the year preceding that in which the policy was effected, & in the very same year, been attended for the effects of severe drinking; on the last occasion, a month or two before the policy, for delirium tremens, of which he in two years' time died; & that the medical man who had attended him for several years before the policy, & down to his death, was not mentioned as the ordinary medical attendant:—*Held*: this justified a verdict for defts., even though the answer to the later question was *bond fide*.—*HUTTON v. WATERLOO LIFE ASSURANCE CO.* (1859), 1 F. & F. 735, N. P.; *previous proceedings*, 33 L. T. O. S. 135.

**2880. —**—*JAY v. GRESHAM LIFE INSURANCE CO.* (1874), 38 J. P. Jo. 725.

**2881. Usual medical attendant.]**—A female, upon whose life it was proposed to effect an insurance, was represented to the insurers in Dec. 1822, by A., a medical man, as enjoying

ordinarily a good state of health. The same representation was repeated by A. in Mar., & the insurance was effected in Apr. 1823. Between Dec. 1822, & Mar. 1823, she had been ill with a pulmonary attack, & was attended by B., but no disclosure of these circumstances was made to the insurers. In Apr. 1824, she died of pulmonary disease. On motion for a new trial:—*Held*: the jury ought to have been called on to consider whether the illness in 1823, & the attendance of B., ought to have been disclosed to the insurers, & it was not sufficient to direct them generally, to consider whether or not there had been any misrepresentation.—*MORRISON v. MUSPRATT* (1827), 4 Bing. 60; 12 Moore, C. P. 231; 5 L. J. O. S. C. P. 63; 130 E. R. 690.

*Annotations*:—*Appld.* *Lindenau v. Desborough* (1828), 8 B. & C. 586. *Follid.* *Everett v. Desborough* (1829), 5 Bing. 503. *Refd.* *Wheulton v. Hardisty* (1857), 8 E. & B. 232.

**2882. —**—*EVERETT v. DESBOROUGH*, No. 2911, *post*.

**2883. —**—*HUCKMAN v. FERNIE*, No. 2913, *post*.

**2884. —**—*CAZENOVE v. BRITISH EQUITABLE ASSURANCE CO.*, No. 2870, *ante*.

**2885. —**—*HUTTON v. WATERLOO LIFE ASSURANCE CO.*, No. 2879, *ante*.

**2886. —**—*JAY v. GRESHAM LIFE INSURANCE CO.* (1874), 38 J. P. Jo. 725.

**2887. Not afflicted with, nor subject to, fits—Fit as result of accident.]**—Where a policy of insurance contains a warranty that the assured "has not been afflicted with, nor is subject to, gout, vertigo, fits," etc., such warranty is not broken by the fact of the assured's having had an epileptic fit in consequence of an accident. To vacate such policy it must be shown that the constitution of the assured was naturally liable to fits, or by accident or otherwise had become so liable.—*CHATTOCK v. SHAW* (1835), 1 Mood. & R. 498, N. P.

**2888. Sober & temperate.]**—In an action to recover the amount of a policy upon a life insurance, where the rules of the society stipulate that the insured shall be of sober and temperate habits, it is sufficient, upon a plea denying the sober & temperate habits of the insured, for defts. to show that his habits were intemperate, & it is no answer to this plea, that pltf. prove the intemperance not to have been to such a degree as to injure the health of the insured, or to shorten his life.—*SOUTHCORBE v. MERRIMAN* (1842), Car. & M. 286, N. P.

**2889. —**—*JAY v. GRESHAM LIFE INSURANCE CO.* (1874), 38 J. P. Jo. 725.

**2890. — "Strictly" temperate.]**—*THOMSON v. WEEMS*, No. 2871, *ante*.

**2891. —**—*DENNAN v. SCOTTISH WIDOWS' FUND LIFE ASSURANCE SOCIETY* (1886), 2 T. L. R. 525; *on appeal*, (1887), 3 T. L. R. 347, C. A.

**2892. Existence of previous disease.]**—*MORRISON v. MUSPRATT*, No. 2881, *ante*.

**2893. —**—*CAZENOVE v. BRITISH EQUITABLE ASSURANCE CO.*, No. 2870, *ante*.

**2894. — Gout.]**—*FOWKES v. MANCHESTER & LONDON ASSURANCE ASSOCN.*, No. 2846, *ante*.

**2895. — Miscarriage.]**—A life policy was granted in consideration of the premiums & of certain declarations made on the application for such policy which were made part of the policy, by which defts. agreed to pay a sum of money on the death of the assured "under the following terms and conditions. . . . (2) This policy, except as provided herein, will be indisputable from any cause (except fraud) after it shall have



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been continuously in force for two years." In the declaration the question was asked: "Have you ever had any . . . illness or infirmity . . . ?" & the answer of the assured was, "No." As a matter of fact, ten years before the policy was granted the assured had a miscarriage, & a doctor had to remove the foetus from the womb. The policy had been in force for three years before the death of the assured:—*Held*: a miscarriage was not an illness or infirmity within the meaning of the question, but that, even if it were, no fraud being alleged, the policy having been in force for two years it was indisputable, as the words "except as provided herein" only applied to the terms & conditions, & not to the whole policy.—*ANSTEY v. BRITISH NATURAL PREMIUM LIFE ASSOCN., LTD.* (1908), 99 L. T. 16; 24 T. L. R. 594; *affd.*, 99 L. T. 765.

**2896. — Insomnia & drug habit—Medical evidence as to materiality.]**—(1) A printed form of proposal, dated Dec. 12, 1916, for a policy of life insurance contained a number of questions including the following:—Q. "What illnesses have you suffered?" A. "None of any consequence." The intending assured also signed a declaration to the effect that the statements in the proposal were true & that the declaration & proposal should be the basis of the contract between him & the insurance co., & that if any material information had been withheld, or if any of the statements had not been made truly, the insurance should be void. A policy was issued which provided that the proposal & declaration should form the basis of the contract. After the death of the assured the insurance co. refused payment of the policy, & in an action on the policy defts., the insurance co., pleaded that the above answer & certain other answers were untrue & that the assured had failed to disclose that he suffered from heart trouble & insomnia & was addicted to the veronal habit. The jury found that the assured had suffered from an illness of consequence in 1911 but they found in favour of pltf's. as to the other matters alleged in the defence:—*Held*: the question as to what illnesses the assured had suffered was not ambiguous & the answer thereto was not a mere expression of opinion, & the untruth of the answer rendered the policy void.

The word "sober and temperate" in a proposal for life insurance refer only to the use & abuse of alcohol & are inappropriate to drug habits.

(2) The evidence of medical men as to the materiality of facts not disclosed by an assured, is admissible in an action on a policy of life insurance.—*YORKE v. YORKSHIRE INSURANCE CO.*, [1918] 1 K. B. 662; 87 L. J. K. B. 881; 119 L. T. 27; 34 T. L. R. 353; 62 Sol. Jo. 605.

**2897. Previous proposals for insurance.]**—*ANDERSON v. FITZGERALD*, No. 2859, *ante*.

**2898. —.]**—*SCOTTISH PROVIDENT INSTITUTION v. BODDAM* (1893), 9 T. L. R. 385; 37 Sol. Jo. 426.

**2899. —.]**—*HAMBROUGH v. MUTUAL LIFE INSURANCE CO. OF NEW YORK*, No. 2869, *ante*.

**2900. Description of residence — Temporary residence only.]**—In a form of proposal to an assurance office for a policy of life insurance, the residence of the proposer was stated to be "191, Great Ancots-st., Manchester."

The proposer was at the time temporarily staying at the address given, & really resided in Ireland, whither he returned three months after-

wards. The proposer agreed that, if anything contrary to the truth were stated in the proposal the policy to be granted in pursuance thereof should be absolutely void:—*Held*: in an action on a policy issued in accordance with the proposal, that the declaration of the assured as to residence was not, according to the true construction of the word in the form of proposal, untrue so as to render the policy void.—*GROGAN v. LONDON & MANCHESTER INDUSTRIAL ASSURANCE CO.* (1885), 53 L. T. 761; 50 J. P. 134; 2 T. L. R. 75, D. C.

**2901. Warranty against suicide whether sane or insane—Suicide during insanity.]**—*ELLINGER & CO. v. MUTUAL LIFE INSURANCE CO. OF NEW YORK*, No. 2955, *post*.

*C. Declaration and Policy to be Read Together.*

**2902. Declaration made basis of contract—Policy providing only against intentional misstatement—Innocent misstatement in declaration—As to previous illness.]**—A life policy of insurance was entered into with a co. on the life of H., which was founded on a written declaration of the assured agreed to be the basis of the contract between the parties, & contained a proviso that "if any statement in the declaration, which declaration should be considered as much a part of that policy as if the same had been actually set forth therein, was untrue, or if the assurance by the policy should have been effected by or through any wilful misrepresentation, concealment or false averment whatsoever, or if the said H. should go to any place beyond the limits of Europe, etc., the policy should be void, & all moneys paid in respect thereof should be forfeited to the said Association." The proposal & declaration contained the usual particulars, & proceeded as follows: "I do hereby declare that the above written particulars are correct & true throughout, & I do hereby agree that this proposal & declaration shall be the basis of the contract between me & the Manchester & London Life Assurance Association, & if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the money which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, & the policy granted in respect of such assurance shall be absolutely null & void":—*Held*: the policy & declaration must be read together, & so reading them the policy was not avoided by an untrue statement in the declaration, unless designedly untrue.—*FOWKES v. MANCHESTER & LONDON ASSURANCE ASSOCN.* (1863), 3 B. & S. 917; 2 New Rep. 112; 32 L. J. Q. B. 153; 8 L. T. 309; 11 W. R. 622; 122 E. R. 343; *previous proceedings* (1862), 3 F. & F. 440, N. P.

*Annotation*:—*Folld. Hemmings v. Sceptre Life Asscn.*, [1905] 1 Ch. 365.

**2903. — — — As to age of assured.]**—A policy of life assurance was granted upon the basis of a proposal which concluded with a declaration that the answers given in the proposal were true to the best of the proposer's knowledge & belief, & an agreement that the proposal & declaration should be the basis of the contract, & that if it should thereafter appear that the proposer had made any untrue statement therein the policy should be void & the premiums forfeited. In the proposal the assured made a mistake as to her age, & stated that she was three years younger than she was. The policy, after reciting the declaration & the statement by the assured as to her age, evidence of which the insurance co. required to be produced, provided for the payment by the co. of the policy moneys upon



proof of the death of the assured, or of her having attained the age of sixty years, & it contained a proviso for avoidance of the policy & forfeiture of the premiums in the event of the policy having been obtained by wilful misrepresentation. After discovery of the mistake as to the age of the assured the co. accepted two annual premiums:—*Held*: (1) the declaration was to be read with the policy, & the co. were not entitled to avoid the policy & forfeit the premiums unless the statement in the proposal was designedly untrue, although upon the discovery of the mistake they might have declined to continue the policy upon returning the back premiums; (2) by accepting premiums after knowledge of the facts they must be taken to have affirmed the policy as it stood, & consequently they were bound to pay the policy moneys upon the assured actually attaining the age of sixty years, & were not entitled to postpone payment until the assured had attained that age upon the assumption of her age at the date of the proposal having been as therein stated.—*HEMMINGS v. SCEPTRE LIFE ASSOCN., LTD.*, [1905] 1 Ch. 365; 74 L. J. Ch. 231; 92 L. T. 221; 21 T. L. R. 207.

*D. Declaration Deemed to Continue up to Completion of Contract.*

**2904. Change of medical attendant—Duty to communicate.**—In July, 1863, B. negotiated for the insurance of his life in pltf.'s office, & in filling up the usual declaration as to his health & habits of life, stated that he could not remember when he was last ill, & that he was then & always had been enjoying good health. After examination by the medical officer of the co., he was accepted as a first-class life. In Aug. preceding the completion of the contract, B. became alarmed about his health, & went to consult a physician other than his ordinary medical attendant, who warned him that he was in a dangerous state of health, & prescribed for him. B. never communicated this circumstance to the co. In Sept. the premium was paid & the policy effected. On the receipt for the premium was indorsed a condition that if any variation should have taken place in the health of the assured since the date of the medical examination & before actual payment of the premium, the receipt should be void. Eight months afterwards B. died; it was not proved satisfactorily of what disease:—*Held*: the non-communication to the co. of his change in health & visit to the physician was fraudulent & vitiated the policy.—*BRITISH EQUITABLE INSURANCE CO. v. GREAT WESTERN RY. CO.* (1869), 38 L. J. Ch. 314; 20 L. T. 422; 17 W. R. 561, L. J.J.

*Annotation*:—*Reid. Hoare v. Bremridge* (1872), L. R. 14 Eq. 522.

**2905. Material alteration of circumstances.**—*CANNING v. FARQUHAR*, No. 2906, *post*.

**2906. Material alteration in health.**—A promise to issue a policy of life insurance on payment of premium does not bind an insurance co. to accept the premium, if there is a material alteration in the circumstances of the assured at the time of the tender of the premium, from the circumstances at the time when the promise was made.

A proposal was made to an insurance co. for an insurance on the life of the proposer, who made, on a form issued by the co., statements as to his state of health & other matters, & a declaration that the statements were true & were to be taken as the basis of the contract. The proposal was accepted at a specified premium, but upon the terms that no insurance should take effect till the premium was paid. Before tender of the premium, there was a material alteration in the state of the

health of the proposer, & the co. refused to accept the premium or to issue a policy:—*Held*: the nature of the risk having been altered at the time of the tender of the premium there was no contract binding the co. to issue a policy. *Qu.*: whether if there had been no alteration in the risk, the co. would have been legally entitled to refuse to accept the premium & to issue a policy.—*CANNING v. FARQUHAR* (1886), 16 Q. B. D. 727; 55 L. J. Q. B. 225; 54 L. T. 350; 34 W. R. 423; 2 T. L. R. 386, C. A.

*Annotations*:—*Distd. Roberts v. Security Co.* (1896), 66 L. J. Q. B. 119. *Folld. Harrington v. Pearl Life Assce.* (1914), 30 T. L. R. 613. *Reid. Re Yager & Guardian Assce.* (1912), 108 L. T. 38; *Allis Chalmers Co. v. Fidelity & Deposit Co. of Maryland* (1913), 29 T. L. R. 506.

**2907.** ———.]—*HARRINGTON v. PEARL LIFE ASSURANCE CO., LTD.* (1914), 30 T. L. R. 613, C. A.

*E. Referees.*

**2908. Whether agent of insured.**—*WHEELTON v. HARDISTY*, No. 2845, *ante*.

**2909. Misrepresentation by referee—Whether within clause avoiding policy for fraud.**—*WHEELTON v. HARDISTY*, No. 2845, *ante*.

*F. Insurance for Benefit of Third Party.*

**2910. Whether life insured agent of assured—Misrepresentation by life insured—Innocence of assured.**—When an insurance is effected on the life of a third person, by a creditor, & misrepresentations are made by the party whose life is insured, of the state of his health; this will vitiate the policy, though the creditor for whose benefit the policy was effected, was ignorant of the representations being false, & though the party did not die of the disease he was then afflicted with.

Though the party here was an annuity creditor of the insured, yet, if he allowed the latter to make these representations when the policy was effected, he is bound by them; &, however hard it may be on pltf., the rules of law must be adhered to (*ABBOTT, C.J.*).—*MAYNARD v. RHODE* (1824), 1 C. & P. 360; 5 Dow. & Ry. K. B. 266; 3 L. J. O. S. K. B. 64.

*Annotations*:—*Folld. Everett v. Desborough* (1829), 5 Bing. 503. *Distd. Wheelton v. Hardisty* (1857), 8 E. & B. 232.

**2911.** ———.]—In an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, & must suffer if they are false, although he is unacquainted with the life insured, & the servant of the insurance office undertakes to do all that is required by his office. Pltf. effecting an insurance on the life of H., with whom he was unacquainted, desired the agent of the insurance office to do all that was requisite. The agent knew H. well, & made the usual enquiries. One of the terms of the contract was, a reference to the usual medical attendant of the life insured. H. having given a false reference:—*Held*: pltf. could not recover.

I think we may decide this point on the general rule of law, that the principal is responsible for any representations made by his agent relating to the business in hand (*BEST, C.J.*).—*EVERETT v. DESBOROUGH* (1829), 5 Bing. 503; 3 Moo. & P. 190; 7 L. J. O. S. C. P. 223; 130 E. R. 1155.

*Annotation*:—*Distd. Wheelton v. Hardisty* (1857), 8 E. & B. 232.

**2912.** ———.]—*WHEELTON v. HARDISTY*, No. 2845, *ante*.

**2913. ——— Non-disclosure by life insured.**—(1) In an action on a policy of insurance effected by pltf. on the life of his wife, the declaration

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averred that pltf. had made statements (*inter alia*), that the wife was not afflicted with any disorder which tended to shorten life, & that she had led, & continued to lead, a temperate life. Deft. pleaded, that before the making of the policy, & on divers times after that day, the wife had been & was afflicted with certain disorders, maladies, or diseases, to wit, delirium tremens & erysipelatous inflammation of the legs, all which pltf. before & at the time of the making of the policy well knew. It appeared that at the time the policy was effected, the wife had been examined at the insurance office, & answered several questions put to her, but did not apprise the co. of her having been affected with those complaints. The jury found that pltf. had not any knowledge of her having had these disorders:—*Held*: upon the issue raised on these pleadings, the wife not being the general agent of the husband to effect the policy, but only sent to answer particular questions, her knowledge was not in this respect the knowledge of the husband.

(2) The wife had for several years been attended by A. up to her marriage with pltf., & nearly to the time when the policy was effected. After her marriage, C., the medical attendant of her husband's family, had, on one or two occasions, when called in to the other members of the family, prescribed for her for a cold or some trifling matter. In answer to the question put to her at the office, "Who is your usual medical attendant?" she replied, "C.":—*Held*: the judge ought not to have left it to the jury on this evidence, to say which of the two was her usual medical attendant, but whether C. could be called her usual medical attendant at all.—**HUCKMAN v. FERNIE** (1838), 3 M. & W. 505; 1 Horn & H. 149; 7 L. J. Ex. 163; 2 Jur. 444; 150 E. R. 1245.

*Annotations*:—As to (1) *Refd.* **Wheelton v. Hardisty** (1857), 8 E. & B. 232. *Generally, Refd.* **Elkin v. Janson** (1845), 14 L. J. Ex. 201; **Geach v. Ingall** (1845), 14 M. & W. 95; **Leete v. Gresham Life Insce. Soc.** (1851), 15 Jur. 1161; **Griffiths v. Fleming**, [1909] 1 K. B. 805. *Mentd.* **Booth v. Millns** (1846), 15 M. & W. 669; **Edwards v. Matthews** (1847), 16 L. J. Ex. 291; **Brandford v. Freeman** (1850), 5 Exch. 734; **Clack v. Clack**, [1906] 1 K. B. 483.

**2914.** ———.]—(1) A party whose life is insured is not the general agent for the assured; & therefore the policy is not void by reason that such party failed to communicate a material fact, as to which he was not interrogated by the insurers, unless he was aware of the materiality of the fact, & studiously concealed it.

(2) It is a question of fact for the jury whether a fact, not communicated, was under the circumstances one which the assured ought to have communicated.—**RAWLINS v. DESBOROUGH** (1840),

2 Mood. & R. 328, N. P.; *previous proceedings* (1837), 2 Mood. & R. 70, N. P.; (1838), 2 Jur. 135.

*Annotations*:—As to (1) *Distd.* **Wheelton v. Hardisty** (1857), 8 E. & B. 232. *Generally, Refd.* **Geach v. Ingall** (1845), 14 M. & W. 95; **Ashby v. Bates** (1846), 15 M. & W. 589.

**SECT. 10.—COMMENCEMENT AND DURATION OF RISK.**

**2915.** Policy "from" specified date.]—**HOWARD'S CASE** (1699), Holt, K. B. 195; 2 Salk. 625; 90 E. R. 1006.

*Annotation*:—*Mentd.* *Re* **Shurey, Savory v. Shurey**, [1918] 1 Ch. 263.

**2916.** Lapse by non-payment of premiums—Death of party insured—Renewal premium accepted without knowledge of death.]—**PRITCHARD v. MERCHANTS' & TRADESMAN'S MUTUAL LIFE ASSURANCE SOCIETY**, No. 2935, *post*.

**SECT. 11.—CONDITIONS IN THE POLICY AND AVOIDANCE.**

**SUB-SECT. 1.—PAYMENT OF PREMIUMS.**

**2917.** What amounts to payment—Whether entry in insurer's books—Debiting agent.]—The premium payable upon a life policy became due on Mar. 15, but was not paid until Apr. 12, when the country agent, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the co. to the agent were, that the premium on every life policy must be renewed within fifteen days from the time of its becoming due; if not paid within that time, that he was to give immediate notice to the office of such fact, & in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the co. of the non-payment of the premium within the fifteen days; it was therefore entered in their books as paid on Mar. 15, & the agent was debited for the amount:—*Held*: (1) the mere debiting the agent with the premium could not be considered as a payment to the co. by the assured; (2) the agent having no authority to contract for the co., the fact of his receiving the money after the expiration of the fifteen days, & the entry in the co.'s books, debiting him with the amount, were no evidence of a new agreement between the co. & the assured.—**ACEY v. FERNIE** (1840), 7 M. & W. 151; 10 L. J. Ex. 9; 151 E. R. 717.

*Annotations*:—As to (2) *Apld.* **London & Lancashire Life Assce. v. Fleming**, [1897] A. C. 499. *Refd.* **Wing v. Harvey** (1854), 5 De G. M. & G. 265; *Re* **Economic Fire Office** (1896), 12 T. L. R. 142. *Generally, Mentd.* **Splents v. Lefevre** (1863), 11 L. T. 114.

**PART IV. SECT. 10.**

b. *General rule.*]—A policy of insurance signed, sealed, & delivered, by the president & managing director of an insurance co. is complete & binding as against the co. from the date of execution, though, in fact, it remains in the co.'s possession, unless there remains some act to be done by the other party to declare his adoption of it.—**ELSON v. NORTH AMERICAN LIFE ASSURANCE CO.** (1902), 9 B. C. R. 474; *affd.* 33 S. C. R. 383.—**CAN.**

c. ———.]—Upon payment & acceptance of the premium a contract of insurance is complete for the period for which the premium was paid, although no policy is delivered to the insured.—**SAUERMAN v. ENGLISH & SCOTTISH LAW LIFE ASSURANCE ASSOCN.** (1898), 15 S. C. 84.—**S. AF.**

**2915 i.** Policy "from" specified date.]

—A policy of insurance for twelve calendar months from a given day excludes that day but includes the corresponding day of the next year.—**DOUGLAS v. MUTUAL LIFE ASSURANCE CO. OF CANADA**, [1918] 1 W. W. R. 239; 13 Alta. L. R. 18; 38 D. L. R. 469.—**CAN.**

d. *Termination by notice—Time of notice.*]—A condition endorsed on a policy provided that, if for any cause the co. should so elect, it should be optional with them to terminate the insurance upon notice given to the insured or his representatives of their intention so to do, in which case the co. should refund a ratable proportion of the premium:—*Held*: not essential that the notice should precede the termination of the insurance.—**CAIN v. LANCASHIRE INSURANCE CO.** (1868), 27 U. C. R. 453.—**CAN.**

e. *Commencement from payment of*

*premium.*]—**SUN LIFE ASSURANCE CO. v. PAGE** (1888), 15 A. R. 704.—**CAN.**

f. *Commencement from delivery of policy.*]—**DONOVAN v. EXCELSIOR LIFE INSURANCE CO.** (1915), 43 N. B. R. 580.—**CAN.**

g. *Termination by surrender—Policy for benefit of wife—Whether wife's consent necessary.*]—**MOORE v. CONFEDERATION LIFE ASSOCN.**, [1918] 2 W. W. R. 895.—**CAN.**

h. ———.]—**JOHNSON v. CENTURY INSURANCE CO., LTD.**, [1909] S. C. 1032; 46 Sc. L. R. 746; [1909] 2 S. L. T. 10.—**SCOT.**

**PART IV. SECT. 11, SUB-SECT. 1.**

**2917 i.** What amounts to payment—Whether entry in insurer's books—Debiting agent.]—**STEINBRECKER v. MUTUAL LIFE ASSURANCE CO.** (1919), 46 O. L. R. 36; 16 O. W. N. 318.—**CAN.**



**2918. ——— Debiting Insured — Policy assigned to insurers by way of security.]**—Deft. by deed assigned to pltfs., who were trustees for the A. Assurance Society, & as collateral security for a mtge. for advances made by the office, a policy of assurance in the A. Society, & covenanted with pltfs. to keep it alive; & in case he should not do so, that it should be lawful for pltfs. to pay the premiums & keep it alive, & that all sums so paid by them should be charged on the land in the same way as the original mtge. money; but there was no covenant, on the part of deft., to repay any such sums to pltfs. Deft. made default in paying the premiums for several years, & such premiums were placed to the credit of the co. in their books, in an account kept by them for that purpose, & were yearly debited by them to the mtge. account of deft., all which was according to the usual practice of the office. Pltfs. then sued deft. for a breach of covenant, & deft. paid into court 1s.:—*Held*: assuming the facts to show that pltfs. had paid the annual premiums to the office, they were not entitled to recover more than nominal damages. *Qu.*: whether the facts did amount to payment.—*BROWNE v. PRICE* (1858), 4 C. B. N. S. 598; 27 L. J. C. P. 290; 31 L. T. O. S. 248; 4 Jur. N. S. 882; 6 W. R. 721; 140 E. R. 1225.

**2919. ——— Credit given in account—Cash settlement of balance.]**—The premiums which became due upon policies were not paid in cash, but within the thirty days of grace, policy receipts were given by pltfs. to defts. as if the premiums had been paid at the time of the receipts, & the amount of those items became items in the mutual account between pltfs. & defts., which account was settled & the balance paid by defts. to pltfs., which balance included the items for premiums upon the policies in question. This was the usual course of dealing between pltfs. & defts.:—*Held*: this amounted to payment within the thirty days of grace, so as to keep the policies alive.—*PRINCE OF WALES ASSURANCE CO. v. HARDING* (1858), E. B. & E. 183; 27 L. J. Q. B. 297; 31 L. T. O. S. 149; 4 Jur. N. S. 851; 120 E. R. 477; *sub nom.* *PRINCE OF WALES ASSURANCE SOCIETY v. ATHENÆUM ASSURANCE SOCIETY*, 3 C. B. N. S. 756, n.

*Annotation*:—*Mentd. Re Magdalena Steam Navigation Co.* (1860), John. 690.

**2920. ——— Payment by notes—Notes subsequently dishonoured.]**—The conditions of policies of life assurance were, first, that a policy should not be in force until the first premium was paid;

& secondly, that if a note were taken for a premium, & such note were not paid when due, the policy should become void at & from default. A proposal was received by appls. & notes given to an agent for premiums. The agent indorsed the notes & appended his personal guarantee, waiving protest. The notes were discounted by the agent, but dishonoured at maturity. The agent wrote to appls.' manager that he had mailed a note for these & other premiums, & the manager acknowledged the letter, stating that he would hold the note as requested. The co. subsequently cancelled the policies, & refused to register assignments to resp., on the ground that the policies were not in force. The agent deposed that, according to the usual course of business, his note sent to the manager was not in discharge of premiums, but evidence that the premiums were due. On the death of the assured resp. sued appls. for the policy moneys:—*Held*: though the notes were accepted by the agent in payment of the premiums, the condition applied on their non-payment & the policies became void; the onus of proof that the notes were placed in the hands of the agent, as agent for the assured to raise money by negotiating them, lay with resp. & had not been discharged, & according to the principle of *Acey v. Fernie*, No. 2917, *ante*, the dealings between the co. & their agent as regarded the assured were *res inter alios*. & afforded no presumption of an intention to treat the agent as acting not for his true principals, but as representing the assured.—*LONDON & LANCASHIRE LIFE ASSURANCE CO. v. FLEMING*, [1897] A. C. 499; 66 L. J. P. C. 116; 13 T. L. R. 572, P. C.

**2921. Date when premiums "due"—Whether days of grace included.]**—A policy of life insurance provided that the premiums were to be payable "on or before the last day of Jan., Apr., July & Oct." in each year. By the conditions attached it was provided that "Thirty days of grace without liability to fine are allowed for the payment of each renewal premium," & that "any policy which has acquired a surrender value will not immediately lapse if a renewal premium be not paid within the days of grace, but will be kept in force for twelve calendar months from the date upon which the last premium became due," subject to payment of the arrear premiums & interest within that period. The premium payable on Apr. 30, 1915, was paid. At that date the policy had acquired a surrender value. The premium payable on July 31, 1915,

**2920 i. ——— Payment by notes—Notes subsequently dishonoured.]**—Under a life policy providing that "a grace of one month will be allowed in payment of premiums, at the expiration of which time, if said premium remain unpaid, this policy shall thereupon become void," & also that "if any note given on account of the premium be not paid when due this policy shall be void & all payments made upon it shall be forfeited to the co.," the insurance comes to an end upon default in payment of a premium note, unless the insurers elect to keep it in force.—*MANUFACTURERS LIFE INSURANCE CO. v. GORDON* (1893), 20 A. R. 309.—CAN.

assured gave to the co. two promissory notes each containing a provision that if payment were not made at maturity the policy should be void:—*Held*: the contract came to an end upon non-payment of the first note.—*FRANK v. SUN LIFE ASSURANCE CO.* (1894), 20 A. R. 564; 23 S. C. R. 152, n.—CAN.

**2920 iii. ——— ———.]**—A condition of a policy declared that if any note

given for a premium was not paid when due, the policy should cease to be in force. When the note matured a part was paid & a renewal note given for the balance, which was unpaid at the time of the death of the assured:—*Held*: the policy had lapsed on default to pay the note at maturity.—*HUTCHINGS v. NATIONAL LIFE ASSURANCE CO.* (1905), 26 C. L. T. 187; 37 S. C. R. 124.—CAN.

**2920 iv. ——— ———.]**—A person who applies for & receives a policy of life insurance & gives his promissory note for the amount of the first premium, payable in three months, cannot, by refusing to pay the note & returning the policy, avoid liability for the full amount of the note, although the policy becomes void by reason of such non-payment.—*MANUFACTURERS LIFE INSURANCE CO. v. ROWES* (1907), 16 Man. L. R. 540.—CAN.

**2920 v. ——— ———.]**—*DEVITT v. MUTUAL LIFE INSURANCE CO. OF CANADA* (1915), 7 O. W. N. 575; 8 O. W. N. 210; 33 O. L. R. 68, 473.—CAN.

**2920 vi. ——— ———.]**—*MCNEIL v. NORTH AMERICAN LIFE ASSURANCE CO.* (1921), 67 D. L. R. 560; 51 O. L. R. 443.—CAN.

*Whether sufficient to entitle insured to extended policy.]*—*Held*: the giving of a promissory note was not a payment of the premium such as would entitle the insured to the extended insurance allowed in case three full annual premiums had been paid.—*TILLEY v. CONFEDERATION LIFE ASSOCN.* (1900), 7 B. C. R. 144; 20 C. L. T. 184.—CAN.

**l. ——— Notes partly paid & partly extended.]**—*WOOD v. CONFEDERATION LIFE ASSOCN.* (1901), 35 N. B. R. 512.—CAN.

**m. ——— Notes renewed—Renewal unpaid at death.]**—*MCGEACHIE v. NORTH AMERICAN LIFE INSURANCE CO.* (1894), 23 S. C. R. 148.—CAN.

**n. ——— Payment by cheque—Cheque dishonoured.]**—*NEILL v. UNION MUTUAL LIFE INSURANCE CO.* (1882), 7 A. R. 171.—CAN.

*Payment partly by notes.]*



**Sect. 11.—Conditions in the policy and avoidance:**  
**Sub-sects. 1 & 2.]**

& all subsequent premiums were unpaid. On Aug. 7, 1916, *pltf.*, who was assignee of the policy, with the object of keeping the policy on foot, offered to pay to the insurers the premiums then in arrear, contending that the twelve months mentioned in the conditions ran from the last of the days of grace, but the insurers refused to accept the premiums:—*Held*: the last premium "became due" on the date specified in the policy as that on or before which it was payable—namely, July 31, 1915; the offer on Aug. 7, 1916, to pay the premiums in arrear was consequently too late, & the policy had lapsed.—*McKENNA v. CITY LIFE ASSURANCE CO.*, [1919] 2 K. B. 491; 88 L. J. K. B. 1223; 122 L. T. 30.

**2922. Premium overdue at time of death—Tender within days of grace.]**—The rules which govern the construction of conditions to create real estates do not apply to personal contracts, which must be performed according to the words & apparent meaning of the parties, & are not satisfied by a performance *cy près*. Where one, as a member of a life insurance society for the benefit of widows & female relations, entered into a policy of assurance with the society for a certain annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society during his life; & the society covenanted to him & his exors., etc., that if he should pay to their clerk the quarterly premiums, on the quarter days, during his life, & if he should also pay his proportion of contributions which the members of the society should during his life be called on to make in order to supply any deficiencies in their funds; then, on due proof of his death, the society engaged to pay the annuity to his widow: & by the rules of the society, if any member neglected to pay up the quarterly premiums for fifteen days after they were due, the policy was declared to be void, unless the member, continuing in as good health as when the policy expired, paid up the arrears within six months, & 5s. per month extra. A member insuring, having died, leaving a quarterly payment overdue at the time of his death:—*Held*: the policy expired; & a tender of the sum by the member's exor., though made within fifteen days after it became due, did not satisfy the requisition of the policy & the rules of the society, which required such payment to be made by the member in his lifetime, continuing in as good health as when the policy expired.—*WANT v. BLUNT* (1810), 12 East, 183; 104 E. R. 73.

*Annotation*:—*Refd. Sheridan v. Phoenix Life Assce.* (1858), 32 L. T. O. S. 210.

**2923. ———.]—SIMPSON v. ACCIDENTAL DEATH INSURANCE CO., No. 3145, post.**

**2924. ——— Ignorance of death of assured.]**  
**—PRITCHARD v. MERCHANTS' & TRADESMAN'S**

**—GREENWOOD v. HOME LIFE INSURANCE CO.** (1901), 21 C. L. T. 90.—*CAN.*

*p.* ——— *Payment in small instalments.]*—*Defts.* pleaded that *pltf.* had failed to pay all the premiums on certain days when due. The evidence showed that *pltf.* had paid the premiums in dribbles:—*Held*: a technical triviality.—*WHITEHORN v. CANADIAN GUARDIAN LIFE INSURANCE CO.* (1909), 14 O. W. R. 804; 1 O. W. N. 114; 19 O. L. R. 535.—*CAN.*

*q.* ——— *Receipt for premium on agent's life signed by agent himself.]*—A receipt for an insurance premium on the life of an agent of the insuring co. countersigned by the agent himself & found among his papers after

his death constitutes *prima facie* proof of the payment of such premium.

—*BAKER v. ONTARIO EQUITABLE LIFE & ACCIDENT INSURANCE CO.*, [1925] 3 D. L. R. 720; 2 W. W. R. 378; 19 Sask. L. R. 571; *affg.*, [1925] 1 D. L. R. 694.—*CAN.*

**2922 i. Premium overdue at time of death—Tender within days of grace.]**—*SKEY v. MUTUAL LIFE ASSOCN. OF AUSTRALASIA* (1894), 13 N. Z. L. R. 321.—*N.Z.*

**2924 i. ——— Ignorance of death of assured.]**—Where the agent of a life assurance society received a premium from the trustee of an insured person after the death of the insured in ignorance of the fact of such death,

*MUTUAL LIFE ASSURANCE SOCIETY, No. 2935, post.*

**2925. ——— Annual premium payable quarterly.]**—*S.* effected an insurance on the life of *B.* The policy was headed with these words, "Annual premium, £33 whole term, payable by quarterly instalments of £8 5s. each." The policy was dated Aug. 2, 1856, & recited that "the assured had paid £8 5s. as the premium until Nov. 2." It then witnessed that "if *B.* shall die within twelve calendar months from the date hereof, or shall live beyond such period, & the assured shall on or before that period, or before the expiration of every succeeding twelve calendar months, pay the amount of premium," etc., the insurers should be liable: provided, "that if *B.* shall die before the whole of the quarterly payments shall have become payable for the year, the directors may deduct from the sum insured the whole of the premiums for that year, reckoning it to commence from Aug. 2." *B.* died after the third quarterly instalment had become payable, but before it was paid. In an action on the policy, *deft.* pleaded that the non-payment of this third instalment rendered the policy void:—*Held*: the plea was an answer to the action.—*PHOENIX LIFE ASSURANCE CO. v. SHERIDAN* (1860), 8 H. L. Cas. 745; 31 L. J. Q. B. 91; 3 L. T. 564; 7 Jur. N. S. 174; 11 E. R. 621, H. L.; *reversg.* *S. C. sub nom. SHERIDAN v. PHOENIX LIFE ASSURANCE CO.* (1858), E. B. & E. 156, Ex. Ch.

*Annotation*:—*Mentd. Thompson v. Harvey* (1859), 32 L. T. O. S. 320.

**2926. ——— Ignorance of death of assured.]**—*Pltf.* was assignee of a policy of insurance on the life of another person. The policy was for a year, & the premium was payable quarterly, the first quarterly payment being made at the date of the policy. One of the conditions of the policy was that it should be of no effect if, at the time of the death of the assured, any quarterly premium should be more than thirty days in arrear. The assured died during the year after one of the dates fixed for payment of a quarterly premium, but within the days of grace, & the premium was paid after his death by the *pltf.*, but also within the days of grace. In an action to recover the amount insured:—*Held*: the policy being for a year, subject to defeasance on non-payment of any quarterly premium, no question arose as to the revival of the policy by payment during the days of grace, but the policy was prevented from lapsing by such a payment, & *pltf.* was entitled to recover.—*STUART v. FREEMAN*, [1903] 1 K. B. 47; 72 L. J. K. B. 1; 87 L. T. 516; 51 W. R. 211; 19 T. L. R. 24, O. A.

*Annotation*:—*Consd. McKenna v. City Life Assce.*, [1919] 2 K. B. 491.

**2927. Premium overdue at date of petition to wind up—Before expiry of days of grace.]**—A claim under a winding-up in respect of a policy of

& on the following day, on discovering the fact, offered to return such premium:

—*Held*: the receipt of the money did not revive such policy, if already lapsed. Where days of grace are given in such terms as clearly to show that they were only intended to apply to the case of the assured being alive within the period of the days of grace, they cannot be extended to the case of the assured dying after the due date of the premium without having paid the same.—*WOOD'S TRUSTEES v. SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY* (1892), 9 S. C. 220.—*S. AF.*

*r.* ——— *Tender after days of grace.]*—*TATTERSALL v. PEOPLE'S LIFE INSUR-*

life assurance, held not to be affected by non-payment of the premium, the days of grace for payment of which expired after the commencement of the winding-up by presentation of the petition.—*Re ALBERT LIFE ASSURANCE CO., COOK'S POLICY* (1870), 1 L. R. 9 Eq. 703; 39 L. J. Ch. 257; 22 L. T. 92; 18 W. R. 426.

**2928. Payment to agent—Out of time—Authority of agent to waive delay.]**—An agent for an assurance co. has no implied authority to waive a forfeiture of a policy.

A. insured his wife's life: the premiums were to be paid weekly, & the policy forfeited if the premiums should be in arrear for more than four weeks. The premiums were not paid for eleven weeks. The agent of the co. then received payment of the arrears:—*Held*: in an action on the policy, the co. were not liable, & the agent had no implied authority to waive the forfeiture by accepting payment of the arrears.—*BRITISH INDUSTRY LIFE ASSURANCE CO. v. WARD* (1856), 17 C. B. 644; 27 L. T. O. S. 81; 20 J. P. 391; 139 E. R. 1229.

*Annotation*:—*Mentd. Card v. Carr* (1856), 1 C. B. N. S. 197.

*See, generally, Part I., Sect. 14, sub-sect. 2, ante.*

**2929. — Acceptance of notes by agent—Notes discounted & subsequently dishonoured.]**—*LONDON & LANCASHIRE LIFE ASSURANCE CO. v. FLEMING*, No. 2920, *ante*.

**2930. Breach of covenant to pay—Insured discharged as insolvent debtor—Whether a defence.]**—A plea by deft., that he was discharged under the Insolvent Debtors Act, is not a good bar to an action of covenant by an insurance co. for premiums due after such discharge, upon a policy of insurance upon the life of the insolvent effected before the discharge, as a security for money advanced to the insolvent by the insurance co.—

*FLETCHER v. TURK* (1843), 13 L. J. Q. B. 43; 8 Jur. 186.

*Annotation*:—*Apld. Stephens v. Jervis* (1848), 11 L. T. O. S. 245.

**2931. — — — — —.]**—Where deft. had covenanted to pay certain premiums, & in case of his default, another should, which premiums deft. would repay; & deft. having made default, & premiums having been paid by the other party, after the deft.'s discharge under Judgments Act, 1838 (c. 110):—*Held*: a plea framed upon Sect. 80 of that Act was no discharge.—*STEPHENS v. JERVIS* (1848), 11 L. T. O. S. 245.

**2932. — — — — — Measure of damages.]**—*BROWNE v. PRICE*, No. 2918, *ante*.

**2933. Provision for reduction of premiums—Refusal to reduce—Discretion bonâ fide exercised—Whether court will interfere.]**—The bill alleged that pltf. effected a life policy in deft.'s office at an extra premium, & that by the prospectus the life might, from time to time, be re-examined, & the "society being satisfied" of the removal of the cause for charging the extra premium would reduce it. The directors having *bonâ fide* exercised their discretion, refused to reduce the premium:—*Held*: on demurrer, this ct. could not interfere in favour of pltf. though the assured had become "thoroughly healthy & sound."—*MANBY v. GRESHAM LIFE ASSURANCE SOCIETY* (1861), 29 Beav. 439; 31 L. J. Ch. 94; 4 L. T. 347; 7 Jur. N. S. 383; 9 W. R. 547; 54 E. R. 697.

#### SUB-SECT. 2.—REVIVAL OF POLICY.

**2934. What amounts to revival—Whether action by insurers against sureties for unpaid premiums.]**—A loan was granted by an insurance co. upon a bond with sureties, & a policy on the life of the

ANCE Co. (1905), 5 O. W. R. 307; 6 O. W. R. 756; 9 O. L. R. 611.—CAN.

t. — — — — —.]—*BAKER v. ONTARIO EQUITABLE LIFE & ACCIDENT INSURANCE CO.*, [1925] 1 D. L. R. 694.—CAN.

**2928 i. Payment to agent—Out of time—Authority of agent to waive delay.]**—Pltf., assured's wife, paid to an agent of defts. the amount of a premium which was overdue. The agent gave pltf. a receipt for the amount, signed by himself. Defts. being notified of the death, endeavoured to return to pltf. the identical money which she had paid & which had been set apart in an envelope & so remained, but she refused to receive it:—*Held*: the policy had lapsed.—*FOXWELL v. POLICY HOLDERS MUTUAL LIFE INSURANCE CO.* (1918), 42 O. L. R. 347; 14 O. W. N. 9; 43 D. L. R. 726.—CAN.

**2928 ii. — — — — —.]**—*NORTH BRITISH INSURANCE CO. v. BARKER* (1833), 6 Wils. & S. 323; *reversq.*, 9 Sh. (Ct. of Sess.) 869; 6 Fac. Coll. 598.—SCOT.

**2929 i. — Acceptance of notes by agent—Notes discounted & subsequently dishonoured.]**—A policy was effected with an agent, A., who, to accommodate the insurer, took bills for the amount of the premiums, & debited himself, in his accounts with the co. with that amount, but did not communicate the transaction to the co. The bills were not paid.—*BUSTEED v. WEST OF ENGLAND INSURANCE CO.* (1857), 5 L. Ch. R. 553.—IR.

a. *Premium overdue—Unpaid premium & interest less than surrender value.]*—*Held*: the policy did not become forfeited for non-payment of premiums, so long as the premiums & interest in arrear were not, at the

time, in excess of the surrender value.—*EQUITABLE LIFE ASSURANCE OF UNITED STATES v. BOGIE* (1905), 3 C. L. R. 878.—AUS.

b. — — — — — *Pure endowment policy.]*—*EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES v. REED* (1914), 111 L. T. 50.—N.Z.

c. *Insufficient premium paid—Mistake of agent.]*—Where the agent of a life assurance co. continued for some years to receive, by his own mistake, premiums from a party assured, at a much less rate than that established in the published tables of the co., & pltf. had every opportunity of examining & did examine such tables, & probably was aware of the mistake:—*Held*: pltf. could not recover.—*BELOHER v. INTERNATIONAL LIFE ASSURANCE SOCIETY OF LONDON* (1859), Cosh. 35.—CAN.

d. *Payment by note—Subsequent forfeiture waived by acceptance of cash.]*—*WATTS v. ATLANTIC MUTUAL LIFE INSURANCE CO.* (1880), 31 C. P. 53.—CAN.

e. *Date when premium due—Previous notice.]*—The indorsement on the policy: all subsequent premiums are payable on the first day of Feb., May, Aug. & Nov. in each & every year, of which thirty days' previous notice will be issued, means that such notice must be issued thirty days previous to the quarter days named.—*FREEZE v. DOMINION SAFETY FUND LIFE ASSOCN.* (1895), 33 N. B. R. 238.—CAN.

f. *Whether premium liquidated damages—Refusal to accept policy.]*—An application was accepted by the co. & a policy issued & tendered to appt. who refused to accept it:—

*Held*: the co. could not claim the whole amount of the premium as liquidated damages.—*ROYAL VICTORIA LIFE INSURANCE CO. v. RICHARDS* (1900), 31 O. R. 483.—CAN.

g. *Refusal to receive premium—Whether future tenders must be made.]*—A premium was tendered but defts. refused to accept it, or any future premium, unless insured should be re-examined:—*Held*: one tender would not have been sufficient, the circumstances not being such as to justify a reasonable belief that future tenders would be rejected.—*WEBB v. NEW YORK LIFE INSURANCE CO.* (1902), 22 C. L. T. 179.—CAN.

h. *Payment by agent of insured—Premium deducted from insured's salary—Necessity for notice to agent by insurer.]*—*MOORE v. GLOBE INDEMNITY CO. OF CANADA*, [1917] 2 W. W. R. 1207; 36 D. L. R. 489.—CAN.

k. *Premium unpaid owing to mutual mistake of insurer & insured.]*—*HUGGARD v. PRUDENTIAL LIFE INSURANCE CO.*, [1923] 1 W. W. R. 557.—CAN.

l. *Change of currency in which premium payable.]*—*Re UNIVERSAL LIFE ASSURANCE SOCIETY & STERNDAL* (1895), 1 L. R. 23 Calc. 320.—IND.

m. *Issue of paid-up policy on non-payment of premium.]*—*Held*: on non-payment of a premium after payment of premiums for one of the specific periods assured became entitled *ipso facto* & without any notification on her part to the automatic issue to her of a paid-up endowment poli for the amount fixed in the table.—*REED v. EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES* (1912), 32 N. Z. L. R. 480.—N.Z.



**Sect. 11.—Conditions in the policy and avoidance:**  
**Sub-sects. 2, 3 & 4.]**

borrower, as a collateral security. The premiums were not paid within the days of grace, but were demanded by the co., who brought actions against the sureties of the bond; they refused to pay, & pleaded *non est factum* & payment. Upon a suit instituted to restrain such actions, & it being contended that the demand by the co., after the policy "was actually void," had revived it:—*Held*: such revival was neutralised by the fact of refusal to pay, & the bill was dismissed, with costs.—*EDGE v. DUKE* (1849), 18 L. J. Ch. 183.

**2935. Condition for revival on satisfactory proof of health—Payment & acceptance of premium in ignorance of death of insured.]—**A policy was effected, in the usual form, on the life of A., in consideration of the payment of certain annual premiums on Oct. 13 in each year, with a condition that the policy should be void, amongst other grounds, "if the premiums were not paid within thirty days after they should respectively become due; but that the policy might be revived within three calendar months, on satisfactory proof of the health of the party on whose life the insurance was made," & payment of a certain fine. An annual premium became due on Oct. 13, 1855. The thirty days allowed by the condition for payment of the premium expired on Nov. 12, on which day A. died. On Nov. 14 pltf., for whose benefit the policy was effected, sent the co. a cheque for the premium, for which they on the following day obtained the cash, giving a receipt as for "the premium for the renewal of the policy to Oct. 13, 1856, inclusive," both parties being ignorant that A. was then dead:—*Held*: the payment did not under the circumstances revive the policy:—*Semble*: the contract being for payment of the sum insured on the future event of the death of A., a payment of the premium within the thirty days, but after A.'s death, would not be a payment within the condition.—*PRITCHARD v. MERCHANTS' & TRADESMAN'S MUTUAL LIFE ASSURANCE SOCIETY* (1858), 3 C. B. N. S. 622; 27 L. J. C. P. 169; 30 L. T. O. S. 318; 4 Jur. N. S. 307; 6 W. R. 340; 140 E. R. 885.

*Annotation*:—*Consd. Stuart v. Freeman*, [1903] 1 K. B. 47.

**2936. — Conditional receipt by insurer—Neglect by assured to read conditions.]—**A policy of life insurance effected with an insurance co. was expressed to be conditional upon the payment of the premiums each year within thirty days of their becoming due. The holder of the policy failed to pay a certain premium within thirty days of its becoming due. On his afterwards sending the money to the co. they sent back to him a receipt upon a printed form, which stated that the policy had lapsed & that the payment was accepted subject to certain conditions printed on the back of the receipt. He received this receipt, but did not read it. One of these conditions was that the person whose life was insured had been during the past twelve months in continuous good health & free from all disease: & he was in fact, & to his knowledge, suffering at that time from a disease of which he afterwards died. Until he died the subsequent premiums were punctually paid. On

his death the co. refused to pay the sum for which his life had been insured on the ground that the policy had lapsed, & the conditions of the receipt above mentioned had not been complied with. In an action to recover the amount of the insurance money:—*Held*: as the policy had lapsed on account of the breach of its conditions, & pltf. had given no evidence of any conduct on the part of the co. which would justify him in thinking that the policy had not lapsed, & would estop them from relying on the lapsing of the policy, he was not entitled to succeed in the action.—*HANDLER v. MUTUAL RESERVE FUND LIFE ASSOCN.* (1904), 90 L. T. 192, C. A.

**Lapse by non-payment of premiums—Receipt of premiums by agent—Authority of agent to waive lapse.]—**See Nos. 2917, 2928, *ante*, No. 2939, *post*.

**2937. — Fresh policy in same terms—Claim to bonus on original policy.]—**W. insured his life in 1812, & paid the premiums till 1816 when, owing to removing to another house, he omitted to pay it. But in 1817 he got a new policy for the same amount at the same premium as his policy of 1812: & this premium was duly paid till 1851, when W. died. Certain bonuses attached to policies of 1812. W.'s exor. now filed a bill praying that the co. be ordered to pay all bonuses as if the policy had been dated & continued since 1812, but no direct evidence was given beyond the above facts, & W. had made no similar application till 1839:—*Held*: the bill showed no right to any equity against the insurance co., for there was nothing to show that the policy of 1812 had not been forfeited.—*WINDUS v. TREDEGAR (LORD)* (1866), 15 L. T. 108, H. L.

**SUB-SECT. 3.—DEPARTURE BEYOND THE SEAS.**

**2938. Condition against departure outside Europe—Insurance on life—Necessity for notice to life insured.]—**A declaration stated that by indenture deft. covenanted that he would at any time or times thereafter appear at an office or offices for the insurance of life within London or the bills of mortality & answer such questions as might be asked respecting his age, etc., in order to enable pltf. to insure his life & should not afterwards do or permit to be done any act whereby such insurance should be avoided. It then alleged, deft.'s appearance at the Rock Life Assurance Co. & that pltf. insured deft.'s life with that co., by a policy containing a proviso, that if deft. went beyond the limits of Europe, the policy should be void; breach, that deft. went beyond the limits of Europe:—*Held*: on special demurrer, the declaration was bad for want of an averment that deft. had notice that the policy was effected. *Semble*: if such notice had been given, deft. would have been bound to notice the condition of the policy.—*VYSE v. WAKEFIELD* (1840), 6 M. & W. 442; 8 Dowl. 377; 9 L. J. Ex. 274; 4 Jur. 509; 151 E. R. 491; *affd.* 7 M. & W. 126, Ex. Ch.

*Annotations*:—*Consd. Holland Gulf Stoomvaart Maatschappij v. Watson, Munro* (1915), 85 L. J. K. B. 451. *Mentd. Makin v. Watkinson* (1870), L. R. 6 Exch. 25; *Murphy v. Hurly*, [1922] 1 A. C. 369.

p. — — —.]—*SUPPLE v. CANN* (1858), 9 I. C. L. R. 1; 11 Ir. Jur. 72.—IR.

**2937 i. — Fresh policy in same terms—Claim to bonus on original policy.]—***BIRD v. NEW YORK LIFE INSURANCE CO.* (1920), 47 O. L. R. 510; 18 O. W. N. 212.—CAN.

**PART IV. SECT. 11, SUB-SECT. 2.**

**2936 i. Condition for revival on satisfactory proof of health—Conditional receipt by insurer—Neglect by assured to read conditions.]—***LINDELL v. NORTH AMERICAN LIFE ASSURANCE CO.*, [1921] 2 W. W. R. 864; 14 Sask. L. R. 337; 59 D. L. R. 655.—CAN.

n. — — —.]—*CAMPBELL v. NA-*

*TIONAL LIFE INSURANCE CO.* (1874), 24 C. P. 133.—CAN.

o. **Lapse by non-payment of premiums—Receipt of premiums by agent—Authority of agent to waive lapse.]—***CLARKE v. GREAT WEST LIFE ASSURANCE CO.*, [1921] 1 W. W. R. 1; 56 D. L. R. 80; 14 Sask. L. R. 1.—CAN.



**2939. — Waiver of breach by agent—Acceptance of premiums.]**—A debtor insured his life at the instance of his creditor, by two policies, & assigned the same to his creditor. One of the conditions indorsed on the policies was, that the policies should be void & the moneys forfeited to the insurance society if the insured should go beyond the limits of Europe without the licence of the directors. The insured did go beyond the limits without licence, & died in Canada. The society refused to pay, & the creditor filed a claim for payment, & proved that, after the breach of the condition, the local agent of the society, at the place where the insurances had been effected, continued, with knowledge of the breach, to receive the premiums, & represented to the agent of the creditor that the breach of the condition would not invalidate the policies, if the premiums were regularly paid:—*Held*: the knowledge of the local agent was constructive notice to the society of the breach; &, whether they had express notice or not, they were precluded from insisting on & availing themselves of the forfeiture when the money became payable.—*WING v. HARVEY* (1854), 5 De G. M. & G. 265; 2 Eq. Rep. 533; 23 L. J. Ch. 511; 23 L. T. O. S. 120; 18 Jur. 394; 2 W. R. 370; 43 E. R. 872, L. JJ.

*Annotations*:—*Refd.* *Splents v. Lefevre* (1864), 11 L. T. 114; *Mackie v. European Assce. Soc.* (1869), 21 L. T. 102; *Holdsworth v. Lancashire & Yorkshire Insce.* (1907), 23 T. L. R. 521; *Yorkshire Insce. v. Craine*, [1922] 2 A. C. 541. *Mentd.* *Card v. Carr* (1856), 1 C. B. N. S. 197.

**2940. — Leave & licence—By parol—Whether admissible.]**—To a declaration on a policy of insurance on the life of H., conditioned that if H. went out of Europe all claim to any interest in the funds of the society should cease, with a proviso that H. should be at liberty to visit Tangiers, or any other port within the Mediterranean, defts. pleaded that H. departed beyond the limits of Europe otherwise than by visiting Tangiers or any other port within the Mediterranean. The ct. refused to allow plffs. to plead as a replication on equitable grounds, that at the time of the making of the policy it was expressly stipulated that the policy should not be vitiated by reason that H. visited ports & places out of Europe; & that plffs. entered into the policy on the terms of such stipulation.—*REIS v. SCOTTISH EQUITABLE ASSURANCE CO.* (1857), 2 H. & N. 19; 26 L. J. Ex. 279; 29 L. T. O. S. 113; 3 Jur. N. S. 417; 5 W. R. 592; 157 E. R. 8.

*Annotations*:—*Refd.* *Wheelton v. Hardisty* (1857), 8 E. & B. 232. *Mentd.* *Bartlett v. Wells* (1862), 5 L. T. 607; *Thames Iron Works Co. v. Royal Mail Steam-Packet Co.* (1862), 13 C. B. N. S. 358.

**2941. — — By agent—Authority of agent.]**—By a verbal agreement entered into between pltf. & the agent of a life insurance co. it was agreed that a policy should be granted to pltf. on the life of H. which policy should not be vitiated by reason of H. visiting, among other places, ports on the coast of Africa; & proposals for the policy were drawn up by pltf. & forwarded through the agent to the co. In these proposals it was stated that the policy could be accepted only on the condition that "H. should be at liberty to visit Tangier or any other port within the Mediterranean, without subjecting himself to any extra premium, etc.; but it was understood that he was not to reside out of Europe at any place in the Mediterranean beyond the period of three

months, or to go into the interior of Asia or Africa." No mention was made in the proposals of ports on the coast of Africa. The policy was effected, with a memorandum indorsed upon it in the terms of the above condition, & pltf. paid several premiums. H. went to a port on the coast of Africa, & died there within three months of his arrival. The co. refused to pay the assurance money, & pltf. filed a bill to have the mistake in the indorsement rectified:—*Held*: the agent had no power to bind the co., & the memorandum having been framed under a mistake, the real terms of the agreement never having been communicated to or adopted by the co., the policy was not binding upon either party.

The co. were ordered to repay the premiums, & plffs. thereupon to deliver the policy to the co. without costs on either side.—*FOWLER v. SCOTTISH EQUITABLE LIFE INSURANCE SOCIETY & RITCHIE* (1858), 28 L. J. Ch. 225; 32 L. T. O. S. 119; 4 Jur. N. S. 1169; 7 W. R. 5.

*See, generally*, Part I., Sect. 14, sub-sect. 3, *ante*.

**2942. — — Licence construed strictly.]**—*KOENIG v. RITCHIE* (1862), 3 F. & F. 413.

**2943. — — Leave to reside "for one year."]**—On June 23, 1853, plffs., in Glasgow, effected a policy for £2000 upon the life of A., one of the conditions of the insurance being that the policy should be void if A. should go beyond the limits of Europe without leave of the directors. The premiums were regularly paid each half year down to Dec. 22, 1857. One of plffs., who was the agent at Glasgow of the co., in the confidential report made to them on June 18, 1853, stated,—“A. has for sixteen years past resided principally at Belize, Honduras: his health has not in any way suffered: he intends returning there for a few years, in about a month:” & on June 20 he wrote to them, “A. proceeds to Belize about the end of this month.” On the back of the policy, & of even date therewith, was the following memorandum:—“The life assured under this policy being about to proceed to & reside at Belize, in the state of Honduras, & an extra premium of twenty guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to & reside at Belize aforesaid, & for the time aforesaid, & for so long thereafter as the extra premium shall from time to time be paid along with the premium payable on this policy as within expressed.” The extra premium for one year's foreign residence was paid on June 23, 1853, but A. did not in fact proceed to Belize until June 9, 1856, arriving there “about the middle or latter end of Aug.” He died there on Aug. 13, 1857, within a year of his arrival at Belize:—*Held*: the permission to reside “for one year” at Belize was not limited to any particular year & consequently the assured were entitled to recover the sum insured.—*NOTMAN v. ANCHOR ASSURANCE CO.* (1858), 4 C. B. N. S. 476; 27 L. J. C. P. 275; 31 L. T. O. S. 202; 4 Jur. N. S. 712; 6 W. R. 688; 140 E. R. 1170.

#### SUB-SECT. 4.—MILITARY SERVICE.

**2944. Avoidance of policy for foreign service without licence—Unless compulsory—Whether contrary to public policy.]**—Pltf. took out with

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**g. Avoidance of policy for foreign service without licence.]**—The policy contained a condition as follows:

“The assured may not engage in active naval or military service other than hereinbefore specified without the written consent of the co. & the due payment of such extra premiums

as the co. may require.” The assured enlisted & served in the Canadian Expeditionary Force on active service, but never left Canada or took part in any engagement:—*Held*: in all the

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**Sub-sects. 4 & 5, A. & B.]**

deft. co. a life insurance policy providing that if he should engage in military service except in Great Britain or Ireland without the licence of the directors the policy should be void, but that if, not having volunteered, he should be legally compelled to serve such service should be covered without extra premium. Pltf., who was thirty-seven years of age, afterwards attested under Lord Derby's scheme, but he obtained an exemption, which was still subsisting:—*Held*: the above provisions were not contrary to public policy.—*DUCKWORTH v. SCOTTISH WIDOWS' FUND LIFE ASSURANCE SOCIETY* (1917), 33 T. L. R. 430.

**SUB-SECT. 5.—SUICIDE.**

**A. In General.**

**2945. Where no express condition against suicide.]**—There is no principle of public policy upon which a life assurance is void by the suicide of the assured while in a state of insanity.

It would be contrary to public policy to insure a man a benefit upon his dying by the hands of public justice; . . . so the argument might be pursued, to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony, & losing his life thereby (*WOOD, V.-C.*).—*HORN v. ANGLO-AUSTRALIAN & UNIVERSAL FAMILY LIFE ASSURANCE CO.* (1861), 30 L. J. Ch. 511; 4 L. T. 142; 25 J. P. 356; 7 Jur. N. S. 673; 9 W. R. 359.

*Annotation*:—*Mentd. Trower v. Law Life Assce. Soc.* (1885), 33 W. R. 647.

**2946. Express condition as to "suicide"—Suicide question of fact for jury.]**—*GARRETT v. BARCLAY* (1826), 5 Man. & G. 643, n.; 134 E. R. 717.

**2947. ———.]**—*KINNEAR v. BORRADAILE* (1832), 5 Man. & G. 644, n.; 134 E. R. 717.

*Annotation*:—*Refd. Borradaile v. Hunter* (1843), 5 Man. & G. 639.

**2948. ———.]**—In an action on a life policy, to be cancelled in case of suicide, by return of premiums, plea, that deceased died by suicide, & that the premiums were ready to be returned, defts. held entitled to begin, the onus being upon them of proving that the death was by suicide, & they having put in the deposition of the widow & extrix., given upon the coroner's inquest, to the effect, that the day before his death, deceased had unaccountably gone out of his bedroom very early in the morning, & immediately afterwards had been found falling over the bannisters; that later in the day, after he had complained of giddiness & pains in the head, he had been found suddenly falling out of a window, his wife being in the room at the time, & not being able to say how he came to fall out:—*Held*: there was a scintilla of evidence to support the plea; the question upon it was, not merely whether deceased threw himself out of the window, but whether if so, he did it voluntarily, & not through confusion of his senses.—*STORMONT v. WATERLOO LIFE & CASUALTY ASSURANCE CO.* (1858), 1 F. & F. 22, N. P.

circumstances of the case this condition was not material.—*COLPITTS v. CONTINENTAL LIFE INSURANCE CO.* (1920), 47 N. B. R. 333.—*CAN.*

**r. Avoidance of policy for active service—Without notice.]**—An insurance policy provided that the insured might engage in active service, notice thereof to be given within ninety days after the date of engaging, & he to pay such

extra premium during service as the co. should fix:—*Held*: the co., having knowledge of insured's enlistment, & thereafter receiving & receipting for the ordinary premiums for three years, had waived the conditions as to notice within the time specified & payment of the extra premium & was liable on the policy.—*BEASANT v. NORTHERN LIFE INSURANCE CO.*, [1923] 2 D. L. R. 1086; 32 Man. L. R. 471;

**2949. ——— Whether suicide during insanity included.]**—Upon a policy of life insurance were indorsed certain conditions & regulations, amongst which was the following: "Every policy effected by a person on his or her own life shall be void if such person shall commit suicide, or die by duelling or the hands of justice." To a declaration on this policy, defts. who were directors of the insurance co., pleaded that the assured did commit suicide, whereby the policy became void, & on this plea issue was joined. At the trial evidence was given that deceased destroyed himself by having, voluntarily & for the purpose of killing himself, swallowed a quantity of sulphuric acid. The same witness also gave evidence to show that at the time of his swallowing the sulphuric acid deceased was of unsound mind, whereupon the judge told the jury that in order to find the issue for defts. they must be satisfied that deceased died by his own voluntary act, being then able to distinguish between right & wrong, & to appreciate the nature & quality of the act which he was doing, so as to be a responsible & moral agent:—*Held*: this direction was incorrect; the word "suicide" must be interpreted in accordance with its ordinary meaning, & must be taken to include every act of self-destruction, provided it be the intentional act of the party, knowing at the time the probable consequences of what he is about to do.—*CLIFT v. SCHWABE* (1846), 3 C. B. 437; 17 L. J. C. P. 2; 7 L. T. O. S. 342; 136 E. R. 175, Ex. Ch.; *revsq.* S. C. *sub nom.* *SCHWABE v. CLIFT* (1845), 2 Car. & Kir. 134, N. P.

*Annotations*:—*Consd. Dufaur v. Professional Life Assce.* (1858), 25 Beav. 599; *Folld. Rowett, Leaky v. Scottish Provident Institution* (1926), 42 T. L. R. 331. *Refd. Dormay v. Borradaile* (1847), 9 L. T. O. S. 449; *White v. British Empire Mutual Life Assce.* (1868), 38 L. J. Ch. 53.

**2950. ———.]**—Pltf. co., at a time when their general manager was indebted to them in more than £30,000, effected, in London, three policies of insurance on his life with deft. institution, which was an Anglo-Scottish corpn. The policies were each for £10,000, & each contained the clause, "The life assured shall not within six calendar months from the date of the policy commit suicide, but such suicide shall not affect the interests of *bond fide* onerous holders." The policies were taken out to secure pltf. co. partially in the event of the general manager's death. Less than six months after the date of the policies the general manager committed suicide while of unsound mind, being still largely indebted to pltf. co. In an action on the policies:—*Held*: as the general manager had committed suicide within the meaning of the clause although he was of unsound mind at the time, & as the word "holder" could not include the original proposer the action failed.—*ROWETT, LEAKY & CO., LTD. v. SCOTTISH PROVIDENT INSTITUTION* (1926), 134 L. T. 660; 42 T. L. R. 331.

**2951. ——— Onus of proof of suicide—On party alleging.]**—*STORMONT v. WATERLOO LIFE & CASUALTY ASSURANCE CO.*, No. 2948, *ante*.

**2952. ——— "Should die by his own hands"—Whether suicide during insanity included.]**—A life policy of insurance contained a proviso, *inter alia*, that in case "the assured should die by his own hands, or by the hands of justice, or in consequence

[1923] 1 W. W. R. 362; *revsq.*, 66 D. L. R. 630.—*CAN.*

**t. ——— Outside particular area.]**—*GENERAL LIFE INSURANCE CO. v. MOYLE*, [1919] App. D. 1.—*S. AF.*

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**2952 i. Express condition as to "suicide"—"Should die by his own hands"—Whether suicide during in-**



of a duel, the policy should be void." The assured threw himself into the Thames & was drowned. Upon an issue whether the assured died by his own hands, the jury found that he "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, & intending thereby to do so; but that at the time of committing the act he was not capable of judging between right & wrong":—*Held*: the policy was avoided, as the proviso included all acts of voluntary self destruction, & was not limited by the accompanying provisos to acts of felonious suicide.—*BORRADAILE v. HUNTER* (1843), 5 Man. & G. 639; 5 Scott, N. R. 418; 12 L. J. C. P. 225; 1 L. T. O. S. 170; 7 J. P. 256; 7 Jur. 443; 134 E. R. 715.

*Annotations*:—*Consd.* *Clift v. Schwabe* (1846), 3 C. B. 437. *Folld.* *Dufaur v. Professional Life Insee.* (1858), 4 Jur. N. S. 841. *Refd.* *White v. British Empire Mutual Life Assce.* (1868), 38 L. J. Ch. 53. *Mentd.* *Dormay v. Borradaile* (1845), 6 L. T. O. S. 215; *Taubman v. Pacific Steam Navigation Co.* (1872), 26 L. T. 704.

2953. ————.]—A. insured his life for £1,000, subject to a condition, that "in case the assured should die upon the seas, except in certain passages, or go beyond the limits of Europe, or enter into or engage in military service, unless licence were obtained, or should die by his own hands or by the hands of justice, or in consequence of a duel, etc., the policy should be void." Previously to his marriage in 1828, A. assigned the policy to trustees, for the benefit of his intended wife & the issue of the marriage. The settlement contained a covenant by A. that he would "at all times during his life duly pay all such premiums & other moneys, & do & perform all such acts, matters, & things as should be requisite for keeping on foot the said policy." In 1838, A. threw himself into the Thames & was drowned. In an action to recover the amount of the policy, the jury had found that the assured voluntarily threw himself into the river, intending to destroy his life, but that at the time of committing the act he was not capable of judging between right & wrong; upon which finding the Ct. of Common Pleas had held that this was such a dying by the party's own hands as discharged the office from liability:—*Held*: the act of self-destruction by A. was not a breach of the above covenant for keeping the policy on foot.—*DORMAY v. BORRADAILE* (1847), 5 C. B. 380; 11 Jur. 231; 136 E. R. 925.

*Annotations*:—*Refd.* *Hawkins v. Coulthurst* (1864), 5 B. & S. 343; *Cleaver v. Mutual Reserve Fund Asscn.* (1891), 60 L. J. Q. B. 672.

2954. ————.]—(1) Where there is a condition in a life policy that in the event of the assured dying by his own hand, the policy shall be void, except to the extent of any *bonâ fide* interest, which at the time of his death, shall be vested in any other person or persons for his or their own benefit, the exception applies as much when that interest is vested in the assurers themselves as when it is vested in a third party.

Therefore, where W. effected a policy of assurance upon his life with the above condition & exception, & deposited the same with the assurers by way of collateral security for a loan from them

to him:—*Held*: notwithstanding the suicide of the assured, the policy was good to the extent of the debt for which it was held as security, & therefore that the debt was extinguished by the moneys which became payable under the policy.

(2) The condition avoiding a policy in the event of the assured dying by his own hand applies to all cases of self-destruction, & it is immaterial that at the time of committing the act the assured was of unsound mind.—*WHITE v. BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.* (1868), L. R. 7 Eq. 394; 38 L. J. Ch. 53; 19 L. T. 306; 17 W. R. 26.

2955. ———— Insurance for benefit of third party.—Condition against suicide a condition precedent.]—An application for a policy of insurance on the life of appct. for the benefit of creditors stated that it was the basis & a part of the contract; & the appct. thereby warranted & agreed that he would not commit suicide, whether sane or insane, during the period of one year from the date of the contract. The policy subsequently issued in pursuance of the application stated that it was made in consideration of the application, which was thereby made a part of the contract. Appct. committed suicide within the year while temporarily insane. In an action on the policy:—*Held*: the warranty against suicide was a condition of liability, & the action was therefore not maintainable.—*ELLINGER & CO. v. MUTUAL LIFE INSURANCE CO. OF NEW YORK*, [1905] 1 K. B. 31; 74 L. J. K. B. 39; 91 L. T. 733; 53 W. R. 134; 21 T. L. R. 20; 49 Sol. Jo. 32; 10 Com. Cas. 22, C. A.

2956. Exception in favour of *bonâ fide* onerous holder—Whether original proposers included.]—*ROWETT, LEAKY & CO., LTD. v. SCOTTISH PROVIDENT INSTITUTION*, No. 2950, *ante*.

#### B. *Bonâ fide* Interest of Third Parties.

2957. Whether condition valid.]—*MOORE v. WOOLSEY*, No. 2959, *post*.

*See, generally*, CONTRACT, Vol. XII., pp. 244, 245, 246.

2958. What is an effectual assignment—Deposit of policy with creditor—Undertaking to assign upon request.]—Debtor effected an insurance on his life, one condition of the policy being that, if it should be assigned *bonâ fide*, the assignee should have the benefit of it, so far as his interest extended, notwithstanding the assured should commit suicide: he deposited the policy with his creditor, accompanied by a letter, promising to assign it to him, when requested, as a security for his debt. No notice of the assignment was given to the assurers. The debtor committed suicide:—*Held*: inasmuch as the deposit of the policy, & the agreement to assign it by way of security for a debt, constituted in equity a valid assignment as between the parties to the transaction, it was also an effectual assignment within the condition, as against the assurers.—*COOK v. BLACK* (1842), 1 Hare, 390; 11 L. J. Ch. 268; 6 Jur. 164; 66 E. R. 1084.

*Annotations*:—*Consd.* *Solicitors & General Life Assce. Soc. (Registered) v. Lamb* (1864), 1 Hem. & M. 716. *Refd.* *Dufaur v. Professional Life Insee. Co.* (1858), 4 Jur. N. S. 841.

sanity included.]—*BALLANTYNE v. MUTUAL LIFE INSURANCE CO. OF NEW YORK* (1891), 17 V. L. R. 520.—AUS.

2952 ii. ————.]—*MUTUAL LIFE INSURANCE CO. OF NEW YORK v. MOSS* (1906), 4 C. L. R. 312.—AUS.

a. ———— *Death in rebellion—Deliberate participation.*]—B. insured his life with deft. society, the policy providing that in case "it shall not have become void by the death of the assured by suicide, whether sane or

insane, within one year of the date hereof, the society will pay to the exors., administrators, or assigns of the assured, £200." After paying the premiums for ten years B. went into rebellion, & was killed in an engagement with British troops:—*Held*: B.'s exors. were entitled to recover the amount of the policy.—*BURGER v. SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY* (1903), 20 S. C. 538; 13 C. T. R. 847.—S. AF.

#### PART IV. SECT. 11, SUB-SECT. 5.—B.

b. Assignment to mortgagee—Notice to insurers—Whether necessary.]—A mtgee. by assignment of a policy on the life of mtgor. is under no obligation to mtgor. to give notice to the insurance co., so as to protect the interest of mtgee. in the policy in a case of suicide of mtgor.—*WALPOLE v. COLONIAL BANK OF AUSTRALASIA* (1884), 10 V. L. R. 315.—AUS.



*Sect. 11.—Conditions in the policy and avoidance:  
Sub-sect. 5, B.; sub-sect. 6.]*

**2959. — Deposit with trustees of marriage settlement.]—**Declaration, by the exor. of M. against the directors of a life assurance co., alleged that M. insured his life for £999, by a policy containing conditions: viz. (8.) "Policies effected by persons on their own lives, who shall die by duelling or by their own hands, or by the hands of justice, will become void, so far as regards the exors. or administrators of the person so dying, but will remain in force only to the extent of any *bonâ fide* interest which may have been acquired by any other person under an actual assignment by deed for a valuable consideration in money, or by way of security or indemnity, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest being given to the directors to their satisfaction"; (9) "If a person, who shall have been assured upon his own life for at least five years, or shall have paid a sum equivalent to at least five years' annual premiums, shall die by his own hands, the directors shall be at liberty, if they think proper so to do, but not otherwise, to pay, for the benefit of his family, any sum not exceeding what the co. would have paid for the purchase of his interest in the policy if it had been surrendered on the day previous to his decease; provided the interest in such assurance shall be in the assured, or in a trustee for him, or for his wife or children, at the time of his decease." The declaration then averred M.'s death, & that debts. had not paid. Plea: that M. died by his own hands. Replication: that, before M.'s death, K. acquired a *bonâ fide* interest in the policy by actual assignment by way of security for money, within the meaning of the conditions; & proof of the extent of such interest was, before action, given to the directors of the co. to their satisfaction. Held bad, on demurrer, for not showing an assignment by deed. Further replication: that, before the death of M., K. acquired a *bonâ fide* interest in the policy by virtue of an equitable lien, as a security for money; & proof of the extent of such interest was, before action, given to the directors to their satisfaction. Issue being taken on this replication, the facts were stated in a case giving to the ct. the same power to draw inferences of fact as a jury. From the case it appeared that M., before his marriage, had given a bond, conditioned to secure £5,000 to his wife, that, not being able to do so, an agreement was made among the family, by which (*inter alia*), M. was to insure his life for the benefit of his wife, she paying the premiums out of her own separate income: in pursuance of which he effected the policy & handed it over to K. for the benefit of the wife, intending to assign it regularly; that no assignment was executed; but the policy remained with K. as trustee for the wife to M.'s death. These facts were communicated to the directors:—*Held*: (1) this supported the issue on the part of pltf. It was not necessary to show, by express evidence, that the proof of the interest had satisfied the directors; for that the ct. would infer from the facts that the directors were so satisfied, they not having discretion to reject reasonable proof; (2) the condition did not vitiate the policy, on the ground of public policy, as tending to encourage suicide.—*MOORE v. WOOLSEY* (1854), 4 E. & B. 243; 3 C. L. R. 207; 24 L. J. Q. B. 40; 24 L. T. O. S. 155; 1 Jur. N. S. 468; 3 W. R. 66, 119 E. R. 93.

**2960. — Charge as security for debt—Debt fluctuating in amount.]—**One of the conditions of

a life policy was that it should be void if the assured died by his own hand, except it should have been assigned to other parties, for valuable consideration, six months before his death:—*Held*: a letter to A. charging it with a floating balance due to him, & made three years previous to the death of the assured by his own hand, was within the exception.—*JONES v. CONSOLIDATED INVESTMENT ASSURANCE CO.* (1858), 26 Beav. 256; 28 L. J. Ch. 66; 32 L. T. O. S. 307; 5 Jur. N. S. 214; 53 E. R. 896.

**2961. — Deposit as equitable charge—Whether notice necessary.]—***DUFAUR v. PROFESSIONAL LIFE ASSURANCE CO.*, No. 2987, *post*.

**2962. — Deposit with insurance company as collateral security.]—***WHITE v. BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.*, No. 2954, *ante*.

**2963. — Deposit as security for antecedent debt—Assignment without consideration.]—**The mere existence of an antecedent debt is not valuable consideration for a security given by the debtor.

H. was entitled to a policy of assurance for £5,000, on his own life subject to conditions which made the policy void "if the lives assured died by their own hands . . . but without prejudice to the *bonâ fide* interests of third parties based on valuable consideration." He was indebted to W. in sums not exceeding £15,000. W. had pressed for payment or reduction of the debt. H. executed a deed of assignment of the policy to W. by way of mtge. to secure all moneys owing to him from H., & delivered the deed duly executed to his solrs., telling them to use their own discretion whether they should inform W. of the assignment or not. The solrs. obtained time from W. for payment of the debt without producing the deed, & acting on H.'s instructions, destroyed it. H. shortly afterwards died by his own hand. No notice of the existence of the assignment was given to W. or the insurance society during H.'s life. After his death his estate was being administered in ct., & the fact of the assignment was discovered & communicated to W.'s firm, who had taken in a claim. Notice of the assignment was then given to the insurance society, & the exors. of W., who had died, brought this action to recover the policy moneys:—*Held*: there was no valuable consideration for the assignment within the saving clause in the policy, & the action therefore failed.—*WIGAN v. ENGLISH & SCOTTISH LAW LIFE ASSURANCE ASSOCN.*, [1909] 1 Ch. 291; 78 L. J. Ch. 120; 100 L. T. 34; 25 T. L. R. 81.

*Annotations:—**Refd.* *Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478. *Mentd.* *Glegg v. Bromley*, [1912] 3 K. B. 474; *Hambleton v. Brown*, [1917] 2 K. B. 93.

*See, generally*, CONTRACT, Vol. XII., pp. 213 *et seq.*

**2964. — Assignment by operation of bankruptcy law—Construction of policy.]—**B., a merchant domiciled at Valparaiso, effected an insurance on his life with an insurance co. in London, of which debt. was a director. The policy, by a condition indorsed, was to be void if the insured committed suicide: "but, if any third party have acquired a *bonâ fide* interest therein by assignment or by legal or equitable lien for a valuable consideration, or as security for money, the assurance" "shall nevertheless, to the extent of such interest, be valid & of full effect." While the policy was in force, B. declared himself bkpt., & by that act itself, made, according to the law of Valparaiso, a cession of all his property to the ct. before whom the declaration was made: & the property thereupon vested, by operation of law, in the Escribano, or official notary, of the ct.

After this B. committed suicide. At a meeting of creditors, after his death, pltfs., who were themselves creditors, were duly appointed assignees to the estate, which thereupon, by operation of law, shifted from the Escribano to them as such assignees. In an action by pltfs., as such assignees, to recover the amount insured by the policy:—*Held*: pltfs. were not third parties having a *bonâ fide* interest by assignment or by legal or equitable lien for a valuable consideration, or as security for money, within the meaning of the exception.—*JACKSON v. FORSTER* (1860), 1 E. & E. 463, 470; 29 L. J. Q. B. 8; 33 L. T. O. S. 290; 5 Jur. N. S. 1247; 7 W. R. 578; 120 E. R. 986, Ex. Ch.

*See, generally*, Sect. 13, sub-sect. 1, B., *post*.

**2965. Proof of assignment—Sufficiency.]—***MOORE v. WOOLSEY*, No. 2959, *ante*.

**2966. Mortgage of policy with other property—Payment by Insurers—Right of Insurers to marshal.]—**Where a policy of assurance contains the usual condition, that it shall be void in case the assured die by his own hand, “except to the extent of any interest acquired therein by actual assignment for valuable consideration,” & the assured mortgages the policy along with other property for a sum much less than the total value of the mtged. property, but exceeding the amount secured by the policy, & afterwards dies by his own hand, not feloniously, the co. have no equity against either the property comprised in the mtge. or the estate of the assured.

The principle of marshalling securities does not apply to such a case; & the assured & the co. do not stand in the relative position of principal & surety.

*Semble*: if the mtgor.’s representative had redeemed the mtge. *aliunde* he would be entitled to recover on the policy for the benefit of the mtgor.’s estate.—*SOLICITORS’ & GENERAL LIFE ASSURANCE SOCIETY v. LAMB* (1864), 2 De G. J. & Sm. 251; 4 New Rep. 313; 33 L. J. Ch. 426; 10 L. T. 702; 10 Jur. N. S. 739; 12 W. R. 941; 46 E. R. 372, L. JJ.

*Annotations*:—*Consd.* *White v. British Empire Mutual Life Assce.* (1868), L. R. 7 Eq. 394. *Apld.* *City Bank v. Sovereign Life Assce.* (1884), 50 L. T. 565.

**2967. ———.]—**A policy of assurance contained a condition that, if the assured should die by his own hand, the policy should become void, & all moneys paid in respect thereof should be forfeited to the co. But, in case the beneficial interest in the policy had been vested in any other person for a valuable & pecuniary consideration, the policy should remain valid to the extent of the interest of such person, subject to a specified notice in writing having been given of the transaction transferring the interest. The assured deposited the policy with pltfs. to secure a debt owing from his firm & further advances, the deposit being accompanied by a memorandum stating that the policy was deposited by way of equitable mtge. as collateral security. The required notice was given to the assurance co., & S. subsequently committed suicide, pltfs. holding at the time of his death other securities for the debt besides the policy:—*Held*: (1) the suicide clause was undistinguishable from that which was under decision in *Solicitors & General Life Assurance Co. v. Lamb*, No. 2966, *ante*, & pltfs. were entitled to be paid out of the policy moneys the amount of the debt due to them at the date of the death of S.; (2) notwithstanding that the estate of the assured might thereby be benefited, the assurance co. were not entitled to have the debts paid, either primarily or ratably, out of the other securities held by

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pltfs.—*CITY BANK v. SOVEREIGN LIFE ASSURANCE Co.* (1884), 50 L. T. 565; 32 W. R. 658.

Marshalling of securities generally, *see* MORTGAGE.

**Bonâ fide onerous holder—Whether original proposer included.]—***See* No. 2950, *ante*.

#### SUB-SECT. 6.—EXECUTION FOR FELONY.

**2968. No exception in policy as to death by hands of justice—Whether policy avoided—Effect of assignment of policy by assured.]—**In 1815, a contract, called a policy of insurance, was made by F. with the Amicable Insurance co., by which F. agreed to pay £128 15s. yearly to the society, according to the provisions of the bye-laws, & in consideration of these payments F. was admitted a member of the Society, who bound themselves & their successors to pay to the exors., administrators, or assigns of F. such a share of the joint-stock as should become due upon his death, according to the charters & bye-laws of the society. The annual payments were made by F. to the society for ten years. In 1820, F. assigned all his interest under the policy, without consideration, upon certain trusts for a nominee in the indenture of assignment. In 1824, F. was convicted of felony & executed, having the day before his conviction been declared a bkpt. Upon a bill filed by his assignees against the society, the nominee, & the trustees, claiming the benefit of the policy:—*Held*: [they were not entitled to the relief prayed], upon the ground, that the contract was against public policy, & must be considered & construed as if a clause had been inserted in terms insuring against the event of the commission of a capital felony by the party insured.—*AMICABLE SOCIETY v. BOLLAND* (1830), 4 Bli. N. S. 194; 2 Dow. & Cl. 1; 5 E. R. 70, H. L.; *revsq.* *S. C. sub nom. BOLLAND v. DISNEY* (1827), 3 Russ. 351.

*Annotations*:—*Extd.* *Horn v. Anglo-Australian & Universal Family Life Assce.* (1861), 30 L. J. Ch. 511. *Expld.* *Cleaver v. Mutual Reserve Fund Life Asscn.*, [1892] 1 Q. B. 147. *Reid.* *Davis v. Eyton* (1830), 7 Bing. 154; *Borradale v. Hunter* (1843), 5 Man. & G. 639; *Moore v. Woolsey* (1854), 3 C. L. R. 207; *Dufaur v. Professional Life Insce.* (1858), 4 Jur. N. S. 841; *Jackson v. Foster* (1859), 5 Jur. N. S. 1247; *Dudley & West Bromwich Banking Co. v. Spittle* (1860), 2 L. T. 47; *Yates v. Kyffin-Taylor & Wark*, [1899] W. N. 141; *In the Estate of Hall, Hall v. Knight & Baxter*, [1914] P. 1. *Mentd.* *Re Jones, Ex p. Jones* (1833), 2 Mont. & A. 193; *Re Daintrey, Ryle, Ex p. Wright* (1841), 11 L. J. Bcy. 4; *Re Russian (Vyksounsky) Iron Works Co., Stewart’s Case* (1866), 1 Ch. App. 574; *Re Shepherd, Ex p. Ball* (1879), 48 L. J. Bcy. 57.

**2969. Policy for benefit of wife of assured—Murder of assured by wife—Failure of trust for wife—Resulting trust to estate of assured.]—**The exors. of a person who has effected an insurance on his life for the benefit of his wife can maintain an action on the policy notwithstanding that his death was caused by a felonious act of his wife. The trust created by the policy under Married Women’s Property Act, 1882 (c. 75), s. 11, having been defeated by reason of her crime, the insurance money becomes part of the assured, & as between his legal representatives & the insurers no question of public policy arises to afford a defence to the action.—*CLEAVER v. MUTUAL RESERVE FUND LIFE ASSOCN.*, [1892] 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 56 J. P. 180; 40 W. R. 230; 8 T. L. R. 139; 36 Sol. Jo. 106, C. A.

*Annotations*:—*Consd.* *Re Engelbach’s Estate, Tibbetts v. Engelbach*, [1924] 2 Ch. 348. *Reid.* *In the Goods of Crippen* (1911), 80 L. J. P. 47; *In the Estate of Hall, Hall v. Knight & Baxter*, [1914] P. 1. *Mentd.* *Yates v. Kyffin-Taylor & Wark*, [1899] W. N. 141; *Gordon v. Metropolitan Police Chief Comr.*, [1910] 2 K. B. 1080; *Re Burgess’s Policy* (1916), 85 L. J. Ch. 273.

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**Sect. 11.—Conditions in the policy and avoidance:**  
**Sub-sect. 7. Sect. 12: Sub-sects. 1 & 2.]**

**SUB-SECT. 7.—MISCELLANEOUS CONDITIONS.**

**2970. Satisfactory proof of interest—Whether a condition precedent to liability.]—**A policy on the life of a third person contained a recital that the proposer alleged that she was interested in the life of the assured, "of which allegation satisfactory proof has to be furnished to the directors of the co.," & went on to provide that should any difference or dispute arise between the proposer & the co., the difference was to be referred to & decided by the judge of the county ct., who, or his deputy, should alone have jurisdiction to hear & determine it:—*Held*: proof of insurable interest was not a condition precedent to the co.'s liability; & the difference or dispute might be tried by a jury in the county ct.—*COWELL v. YORKSHIRE PROVIDENT LIFE ASSURANCE CO.* (1901), 17 T. L. R. 452, D. C.

**2971. Only one policy to be in force—Permission for additional policies—Onus of proof.]—**A policy of insurance effected by M. upon her life with deft. society contained the following clause: "One policy only is allowed to be in force on the life of the person assured & named therein, unless special permission be obtained from the committee of management for any additional policy created, & should any such additional policy be obtained without the knowledge & consent of the committee, which consent shall be evidenced by an endorsement on the policy signed by the secretary of the society, such policy other than the first shall if discovered during the life of the assured be rejected or if discovered after death be null & void, & the sum or sums assured forfeited to the society." During the year preceding the issue of the policy in question three other policies had been effected on the life of M. by different persons. These other policies were all treated by defts. as valid & the amounts due on them had been paid. No endorsement had been made by defts.' secretary on the policy in question as to the existence of the other policies. M. having died, her exor. claimed the amount due under

the policy:—*Held*: there might be a consent to the existence of other policies without any endorsement on the policy in question; in the circumstances the burden of proof was on defts. to show that they had not consented to more than one policy on the life of M. being in force; & as they had failed to show that they had not consented they were liable on the policy in question.—*MARCOVITCH v. LIVERPOOL VICTORIA FRIENDLY SOCIETY* (1912), 28 T. L. R. 188, C. A.

**SECT. 12.—CANCELLATION OF POLICY AND RETURN OF PREMIUMS.**

**SUB-SECT. 1.—WHERE POLICY VOIDABLE.**

*See, generally, Part I., ante.*

**2972. Fraudulent misrepresentation by assured.]—**A bill in equity will lie at the suit of a life assurance office to have a policy delivered up to be cancelled on the ground of fraud in effecting the insurance, where the instrument is not void on the face of it; &, in such case, pl'tfs. have a better equity if they bring their bill in the lifetime of the assured than if they wait till after his decease.—*FENN v. CRAIG* (1838), 3 Y. & C. Ex. 216; 3 Jur. 22.

**2973. — Offer to repay premiums—Whether implied.]—**Three directors who had signed a policy, filed a bill on behalf, etc., praying, on allegations of fraud & misrepresentation, that it might be delivered up to be cancelled, "or that they might otherwise be relieved therefrom, in such manner as the ct. might think fit;" but the bill contained no offer to pay back the premiums:—*Held*: if such a submission were necessary, the prayer sufficiently implied it.—*BARKER v. WALTERS* (1844), 8 Beav. 92; 14 L. J. Ch. 37; 4 L. T. O. S. 191; 9 Jur. 73; 50 E. R. 36.  
*Annotation:—Refd. British Equitable Assoc. v. G. W. Ry.* (1868), 17 W. R. 43.

**2974. — Premiums applied towards insurer's costs.]—**Life policy obtained for fraudulent purposes declared void, & the premium already paid to the insurance office applied in payment of the

**PART IV. SECT. 11, SUB-SECT. 7.**

**c. Contract subject to foreign law.]—**A contract of insurance was expressed to be subject to the laws of the State of New York which laws provide that no order providing for an accounting or interfering with the business of an insurance co. shall be made otherwise than upon the application of the A.-G. on his own motion or after his approval of a request of the superintendent of insurance:—*Held*: this condition was not a mere matter of procedure, but formed a part of the contract & was a condition precedent to the institution of proceedings.—*JOHNSON v. MUTUAL FIRE INSURANCE CO. OF NEW YORK* (1904), 5 S. R. N. S. W. 16; 21 N. S. W. W. N. 108.—*AUS.*

**d. —.]—***LEBLANC v. COVENANT MUTUAL BENEFIT ASSOCN.* (1898), 34 N. B. R. 444.—*CAN.*

**e. Not to take unnecessary risk.]—**A policy contained a condition that the insurance should not extend to any case where the death or injury might happen in consequence of unnecessary danger, hazard, or perilous adventure. Insured was killed by being run over by an engine while contravening the rules of the N. Ry. Co.:—*Held*: there could be no recovery.—*NEILL v. TRAVELLERS' INSURANCE CO.* (1885), 12 S. O. R. 55.—*CAN.*

**f. Not to engage in more hazardous**

**occupation.]—***DAY v. DOMINION SAFETY FUND LIFE ASSOCN.* (1894), 32 N. B. R. 533.—*CAN.*

**g. — Without permission of co.]—**A life policy was subject to a condition making it void if the insured took a hazardous employment, without written permission of the co. Assured did take such employment without such written permission but with the assent of the co.'s provincial agent, & after the change of occupation paid a premium which was retained by the co. with knowledge of the change of occupation:—*Held*: the co. was estopped from taking advantage of the forfeiture clause.—*ELSON v. NORTH AMERICAN LIFE ASSURANCE CO.* (1902), 9 B. C. R. 474; 33 S. C. R. 383.—*CAN.*

**h. Rules of society—Not set out in policy.]—***MORGAN v. HUNT* (1895), 20 Q. R. 568.—*CAN.*

**k. Creditor not to be beneficiary under policy.]—***NORTHERN TRUST CO. v. COLDWELL* (1914), 30 W. L. R. 8; 18 D. L. R. 512; 20 D. L. R. 986; 6 W. W. R. 1165; 7 W. W. R. 636; 25 Man. L. R. 120.—*CAN.*

**l. Waiver of provision of policy—To be indorsed on policy.]—**Under a condition in a life insurance policy providing that "no provision of the policy can be changed, waived or modified, except by indorsement hereon signed by two of the executive officers of the co.,":—*Held*: acceptance of a

premium with knowledge of a breach of condition would not constitute a waiver unless the above condition was strictly complied with.—*COLPITS v. CONTINENTAL LIFE INSURANCE CO.* (1920), 47 N. B. R. 333.—*CAN.*

**m. To be in "sound health."]**—A contract was made subject to the condition that "no obligation is assumed by the co. prior to the date hereof nor unless on said date the insured is alive & in sound health:—*Held*: the condition as to sound health was absolute & the fact that insured was not in sound health was a complete defence to an action upon the policy.—*MOORE v. METROPOLITAN LIFE INSURANCE CO.* (1923), 54 O. L. R. 474.—*CAN.*

**n. Not to engage in mining operations.]—**A condition in a life policy that the assured is not to be engaged in mining operations is broken by his engaging in employment which necessitates the inspection & oiling of hauling machinery in the shaft of a mine.—*MUTUAL LIFE INSURANCE CO. OF NEW YORK v. INGLE* (1910), T. P. D. 540; L. L. R. 404.—*S. AF.*

**PART IV. SECT. 12, SUB-SECT. 1.**

**o. Fraudulent concealment by assured—Knowledge of company—Subsequent acceptance of premium.]—***ARMSTRONG v. TURQUAND* (1858), 9 I. C. L. R. 32.—*IR.*



costs.—**PRINCE OF WALES, ETC. ASSOCN. CO. v. PALMER** (1858), 25 Beav. 605; 53 E. R. 768.

*Annotations*:—**Refd.** *British Equitable Assce. v. G. W. Ry.* (1868), 19 L. T. 476. **Mentd.** *Bird v. Keep*, [1918] 2 K. B. 692.

**Recovery of insurance money after payment.**—See Sect. 15, sub-sect. 5, *post*.

**2975. Innocent misrepresentation by insured—Express condition avoiding policy if any averment untrue.**—By a declaration & statement as to health, etc., signed by the assured, previous to effecting a policy on a life, it was agreed, that, if any untrue averment was contained therein, or if the facts required to be set forth in the proposal annexed were not truly stated, the premiums should be forfeited, & the assurance be absolutely null & void. The statement as to the health of the life was untrue in point of fact, but not to the knowledge of the party making it:—**Held**: the premiums were forfeited, & could not be recovered back.—**DUCKETT v. WILLIAMS** (1834), 2 Cr. & M. 348; 4 Tyr. 240; 3 L. J. Ex. 141; 149 E. R. 794.

*Annotations*:—**Consd.** *Howarth v. Pioneer Life Assce.* (1912), 107 L. T. 155. **Refd.** *Huckman v. Fernie* (1838), 1 Horn & H. 149; *Borradalle v. Hunter* (1843), 5 Man. & G. 639; *Fowkes v. London & Manchester Life Assce. Asscn.* (1863), 2 New Rep. 112; *Thomson v. Weems* (1881), 9 App. Cas. 671; *Sparenborg v. Edinburgh Life Assce.*, [1912] 1 K. B. 195.

**2976. Innocent breach of condition by insured—Express condition avoiding policy on breach—Premiums paid after breach.**—By a condition indorsed on a policy of life insurance, effected in 1894, it was provided that if the assured should go beyond the limits of travel therein specified without obtaining licence from the insurers, “the assurance shall be void & the premiums paid shall be forfeited.” The assured in 1897, either not having read the terms of the condition or having forgotten them, went for a short time beyond the specified limits of travel without the licence & knowledge of the insurers. The assured continued to pay the premiums until the beginning of 1911, when he discovered that he had in 1897 committed a breach of the condition, & informed the insurers thereof. In an action by him to recover back the premiums paid since 1897 upon the ground that by reason of the breach of the condition the policy had become void as from that date:—**Held**: even assuming that the policy had become void upon the breach of the condition, the premiums paid since that date had become forfeited, & the assured was not entitled to recover them back.—**SPARENBORG v. EDINBURGH LIFE ASSURANCE CO.**, [1912] 1 K. B. 195; 81 L. J. K. B. 299; 106 L. T. 567; 28 T. L. R. 51.

**2977. Misrepresentation by insurers—Right of assured to rescission & return of premium.**—**MUTUAL RESERVE LIFE INSURANCE CO. v. FOSTER** (1904), 20 T. L. R. 715, H. L.; *affg.* S. C. *sub nom.* **FOSTER v. MUTUAL RESERVE FUND LIFE ASSOCN.** (1903), 19 T. L. R. 342, C. A.

*Annotations*:—**Folld.** *Cross v. Mutual Reserve Life Insce.* (1904), 21 T. L. R. 15; *Merino v. Mutual Reserve Life Insce.* (1904), 21 T. L. R. 167. **Refd.** *Molloy v. Mutual Reserve Life Insce.* (1906), 22 T. L. R. 525.

**2978.** — — — **Held**: following the decision of the House of Lords in *Mutual Reserve Life Insurance Co. v. Foster*, No. 2977, *ante*, the contract must be rescinded on the ground of misrepresentation & the sums paid under the policy returned, notwithstanding the delay in bringing

the action.—**CROSS v. MUTUAL RESERVE LIFE INSURANCE CO.** (1904), 21 T. L. R. 15.

*Annotation*:—**Folld.** *Merino v. Mutual Reserve Life Insce.* (1904), 21 T. L. R. 167.

**2979.** — — — **Held**: following the decisions in *Mutual Reserve Life Insurance Co. v. Foster*, No. 2977, *ante*, & *Cross v. Mutual Reserve Life Insurance Co.*, No. 2978, *ante*, the contract must be rescinded on the ground of misrepresentation & the sums paid under the policy returned, notwithstanding the delay in bringing the action.—**MERINO v. MUTUAL RESERVE LIFE INSURANCE CO.** (1904), 21 T. L. R. 167.

**2980.** — — — **Policy illegal at date of contract—Subsequent validation by statute.**—**TOFTS v. PEARL LIFE ASSURANCE CO., LTD.**, No. 2814, *ante*.

**2981. Misrepresentation by agent of insurer—Mode of trial.**—**PARR v. LONDON, EDINBURGH & GLASGOW ASSURANCE CO.** (1891), 8 T. L. R. 88, D. C.

**2982.** — — — **Recovery of premiums paid on faith of representation.**—The holder of a policy of insurance being minded to give up paying the premiums was persuaded to continue the payments by a false representation of the insurance co.’s agent that if she paid the premiums for a certain time she would receive a free policy. The representation was made without the authority or knowledge of the co. & the co. refused to grant a free policy but retained the premiums:—**Held**: the holder of the policy was entitled to recover from the co. the premiums paid upon the faith of the representation.—**REFUGE ASSURANCE CO., LTD. v. KETTLEWELL**, [1909] A. C. 243; 78 L. J. K. B. 519; 100 L. T. 306; 25 T. L. R. 395; *sub nom.* **KETTLEWELL v. REFUGE ASSURANCE CO., LTD.**, 53 Sol. Jo. 339, H. L.

*Annotations*:—**Refd.** *Evanson v. Crooks* (1911), 106 L. T. 264; *Hughes v. Liverpool Victoria Legal Friendly Soc.*, [1916] 2 K. B. 482; *Armstrong v. Jackson*, [1917] 2 K. B. 822; *Collins v. Hopkins*, [1923] 2 K. B. 617; *Parkinson v. College of Ambulance & Harrison*, [1925] 2 K. B. 1.

#### SUB-SECT. 2.—WHERE POLICY VOID OR AVOIDED BY SUBSEQUENT BREACH OF CONDITION.

**2983. Policy void ab initio—Failure of consideration.**—Pltf. signed a proposal form for an insurance with defts., an insurance co., on the life of his mother, having in fact no insurable interest in her life, & not insuring to cover funeral expenses. The policy proposed was one in favour of pltf. in his own right, & not as agent for his mother. No such policy was issued to pltf., but he received a policy purporting to insure his mother on her own life & making the policy moneys payable to her representative. Pltf.’s mother had made no proposal for a policy & had given no one authority to make one for her, being in fact totally ignorant of the matter. Pltf. duly paid the premiums under the policy in question. In an action by pltf. to recover the premiums so paid, the deputy county ct. judge found that there had been no fraud on the part of the agent of the co., but held that, although if pltf. had received such a policy as was contemplated in the proposal it would have been illegal & pltf., being *in pari delicto*, would be debarred from recovering the premiums, yet, since what he

#### PART IV. SECT. 12, SUB-SECT. 2.

**p. Policy void ab initio—Inconsistent with application.**—Pltf. applied to defts. for insurance at a fixed annual premium for life, but the policy sent to him contained a provision that the

premium might be increased. He did not read the policy, & pursuant to notices from defts., paid them seven annual premiums at the original rate. In the eighth year defts. demanded a larger premium:—**Held**: the policy, not being in accordance with the

application, there was no contract, & he was entitled to repayment of the premiums with interest.—**MOWAT v. PROVIDENT SAVINGS LIFE ASSOCN. SOCIETY** (1900), 21 C. L. T. 17; 27 A. R. 675.—CAN.

— **GILL v. GREAT**

**Sect. 12.—Cancellation of policy and return of premiums: Sub-sects. 2, 3 & 4. Sect. 13: Sub-sect. 1, A.]**

actually obtained was not a policy of any kind, legal or illegal, but a mere nullity, there was a total failure of the consideration for which the premiums were paid, & that pltf. was entitled to recover them:—*Held*: allowing the appeal, pltf. was not entitled to a return of the premiums.—*ELSON v. CROOKES* (1911), 106 L. T. 462, D. C.  
*Annotation*:—*Refd.* *Evanson v. Crooks* (1911), 106 L. T. 264.

**2984. Subsequent avoidance—By breach of condition—After risk attaches.]—If the risk has once begun you cannot sever it, & apportion the premium.**

In an insurance upon a life, with the common exceptions of suicide & the hands of justice, if the party commit suicide or is executed within twenty-four hours there shall be no return (*LORD MANSFIELD, C.J.*).—*BERMON v. WOODBRIDGE* (1781), 2 Doug. K. B. 781; 99 E. R. 497.

*Annotations*:—*Refd.* *Rothwell v. Cooke* (1797), 1 Bos. & P. 172. *Mentd.* *Furtado v. Rodgers* (1802), 3 Bos. & P. 191; *Stanton v. Percival* (1855), 5 H. L. Cas. 257; *Blecard v. Shepherd* (1861), 14 Moo. P. C. C. 471; *Britain S.S. Co. v. R.*, *Green v. British India Steam Navigation Co.*, *British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Assocn.* (1920), 89 L. J. K. B. 881.

#### SUB-SECT. 3.—WHERE POLICY ILLEGAL.

**2985. Absence of insurable interest—Policy to cover funeral expenses—Recovery of expenses under another policy.]—WOLENBERG v. ROYAL CO-OPERATIVE COLLECTING SOCIETY, No. 2815, ante.**

**2986. ——— What funeral expenses include—Misrepresentation of insurer.]—(1) By Assurance Companies Act, 1909 (c. 49), s. 36 (1), among the purposes for which collecting societies may issue policies of assurance there is included insuring money to be paid for the funeral expenses of a parent:—*Held*: the funeral expenses must be reasonable, regard being had to all the circumstances of the case in question.**

(2) Pltf. effected an insurance with defts. on the life of his mother for the purpose of providing money to be paid for her funeral expenses. Among the funeral expenses which he alleged he had incurred was a sum of £16 8s. 9d. for a tombstone. Part of these expenses having been paid by other societies he claimed the balance of £14 16s. from defts.:—*Held*: funeral expenses could not be taken as matter of law to exclude the cost of a tombstone, & whether in a particular case they properly included such an item was a question of fact.

(3) Pltf. alternatively claimed a return of the premiums paid on the policy:—*Held*: there were no circumstances entitling him to recover them.

To entitle the assured to recover premiums paid by him under a policy of insurance for funeral expenses, on the ground of misrepresentation made to him by the agent of the insurer, the misrepresentation must be fraudulent, or there must be some breach of duty by the agent acting in a fiduciary capacity towards the assured.—*GOLDSTEIN v. SALVATION ARMY ASSURANCE SOCIETY*, [1917] 2 K. B. 291; 86 L. J. K. B. 793; 117 L. T. 63, D. C.

*See, generally*, Sect. 4, sub-sect. 9, ante.

*WEST LIFE ASSURANCE CO.* (1911), 18 O. W. R. 733; 2 O. W. N. 777.—*CAN.*

*P. — Ultra vires.]—FLOOD v. IRISH PROVIDENT ASSURANCE CO., LTD.*

& *HIBERNIAN BANK, LTD.* (1912), 46 L. T. 214.—*IR.*

**PART IV. SECT. 12, SUB-SECT. 3.**  
*t. Absence of insurable interest—*

—— **Representation by agent of insurers.]—See Part I., Sect. 14, sub-sect. 6, ante.**

**Recovery of money paid under illegal contracts.]—See, generally, CONTRACT, Vol. XII., pp. 281**

**Wagering policies—Under Life Assurance Act, 1774 (c. 48).]—See Part IX., Sect. 6, post.**

#### SUB-SECT. 4.—WHERE POLICY EFFECTED UNDER MISTAKE.

**Mistake of agent.]—See Part I., Sect. 14, sub-sect. 6, ante.**

#### SECT. 13.—ASSIGNMENT OF LIFE POLICIES.

##### SUB-SECT. 1.—APART FROM STATUTE.

###### A. In General.

**2987. Whether assignable—At common law.]—**

(1) A life policy was to become void, if the assured should “commit suicide.” After assigning it, he hung himself, while of unsound mind:—*Held*: the policy was not avoided as against the assignee.

(2) A policy was to become void in certain cases, except it “should have been legally assigned”:—*Held*: this meant “validly & effectually assigned,” an equitable charge, by mere deposit, came within the exception, & notice of it to the office was unnecessary.

The only question is, whether the policy has been “legally assigned”? That depends upon the meaning of the word “legal.” . . . A policy cannot, at law, be assigned to anybody but the Crown, & it is, therefore, quite clear that the word “legal” cannot have been used in a technical sense as opposed to the word “equitable” (*ROMILLY, M.R.*).—*DUFAUR v. PROFESSIONAL LIFE ASSURANCE CO.* (1858), 25 Beav. 599; 27 L. J. Ch. 817; 32 L. T. O. S. 25; 22 J. P. 815; 4 Jur. N. S. 841; 53 E. R. 766.

**2988. ———.]—A marriage settlement contained a covenant by the settlor to settle his estate & interest in any property or estate, real or personal, of or to which he should, at any time thereafter during the marriage, become possessed or entitled by devise, bequest, purchase or otherwise. He afterwards purchased some shares, & effected some policies of insurance on his life, one of which was against death by accident only, & was subject to a condition that it should “not be assignable in any case whatever,” & to a separate proviso that the insurance co. should not be bound to recognise any equitable dealings with the policy. The settlor was drowned:—*Held*: the effect of the condition against assignment was merely to make the policy, which was subject to it, non-assignable at law, as it would have been prior to the Policies of Assurance Act, 1867 (c. 144), & did not prevent a policy-holder dealing with the beneficial interest in it, e.g. by a declaration of trust or a ct. of equity from enforcing such a transaction.—*Re TURCAN* (1888), 40 Ch. D. 5; 58 L. J. Ch. 101; 59 L. T. 712; 37 W. R. 70, C. A.**

*Annotations*:—*Refd.* *Churston v. Buller* (1897), 77 L. T. 45; *Laurie v. West Hartlepool Steamship Thirds Indemnity Assocn. & David* (1899), 15 T. L. R. 486. *Mentd.* *Re Bendy, Wallis v. Bendy*, [1895] 1 Ch. 109; *Re Reis, Ex p.*, [1904] 2 K. B. 769.

*Fraud—Parties in pari delicto.]—HOWARTH v. PIONEER LIFE ASSURANCE CO., LTD.* (1912), 46 L. T. Jo. 329.—*IR.*



**2989. Interest of assignee.]**—In general, the assignee of a policy of insurance, effected upon a life, can be in no better situation than the person who effected the policy; & such assignee is liable to all the questions which the assurers would be entitled to raise against such person. *Semble*: if such a policy be effected in fraud of the assurance office, & be afterwards assigned, the office & the assignee being at the time equally ignorant of the fraud, & the office afterwards pay the money to the assignee, both parties being in the same ignorance as to the fraud, the office, upon a discovery of the fraud, may recover back the money so paid.—*LEFEVRE v. BOYLE* (1832), 3 B. & Ad. 877; 1 L. J. K. B. 199; 110 E. R. 322.

*Annotation*:—*Mentd. Gardner v. Lachlan* (1838), 4 My. & Cr.

**2990. — Construction of assignment.]**—A., being the holder of several policies of insurance on the life of B., & being unable to keep them up, entered into an agreement with C. for the purpose of C. keeping them up. The agreement consisted of three instruments: first, a letter by which it was stated that C. was to pay the premiums & to have his advances & interest secured by a deposit of the policies, a bond & an equitable mtge. of certain estates. No time was specified for the repayment of the advances & interest. Secondly, a bond for £6,000, referring to the letter, for repaying the advances & interest at the expiration of six months from the death of B. Thirdly, an agreement, also referring to the letter & to the deposit of the policies to secure the payment of the advances & interest at the expiration of six calendar months from the death of B., by which agreement the advances & interest were secured to be paid at six months after the death of B., upon certain estates. A. died, living B., leaving a considerable amount of advances & interest unpaid, & having, before his death, assigned the policies to trustees for his creditors. C. now filed his bill claiming to have all his advances & interest paid, & that the agreement might be varied & made to conform to the letter, & that, if necessary, the policies might be sold:—*Held*: (1) upon the true construction of the three instruments, C. had no security on the policies available till after the expiration of six months from the death of B.; (2) the agreement could not be rectified, there being nothing to rectify it by except the letter itself, the letter & agreement being incorporated in effect into one instrument, & the letter not specifically pointing out the time when the security was to be available.—*BROUGHAM v. SQUIRE* (1852), 1 Drew. 151; 61 E. R. 409.

**2991. Effect of bankruptcy or insolvency of insured—Whether policy a chose in action—Within Bankruptcy Acts.]**—A policy of life insurance is a “thing in action,” & is therefore excepted from

the operation of the reputed ownership clause, Bkpcy. Act, 1869 (c. 71), s. 15.—*Re MOORE, Ex p. IBBETSON* (1878), 8 Ch. D. 519; 39 L. T. 1; 26 W. R. 843, C. A.

*Annotation*:—*Reid. Colonial Bank v. Whinney* (1885), 30 Ch. D. 261.

**2992. — Semi-tontine policy for benefits of wife or child—Assignment for benefit of creditors before expiry of tontine period.]**—By a policy effected by a husband on his own life, the insurance co. contracted to pay to E., the wife of the insured, for her sole use, “if then living,” & if not living, to the children of the insured, or their trustee for their use, or if there should be no such children surviving them to the exors., administrators, or assigns of the insured, the sum of £1,000. On the back of the policy were various conditions, from which it appeared that the policy was insured on the semi-tontine plan; that the tontine dividend period expired on June 20, 1910, that no dividend was to be allowed unless the insured survived the completion of that period & the policy should be then in force; that the surplus or profits derived from semi-tontine policies not in force when their respective tontine dividend periods expired were to be apportioned among such as completed their periods; & that on June 20, 1910, the insured in question, if the policy was then in force, would have the option of (a) withdrawing in cash the policy's entire share of the assets; (b) of converting the same into a paid-up policy for an equivalent amount; (c) of withdrawing in cash the share of accumulated surplus & continuing the policy on the ordinary plan; or (d) of continuing the assurance for the original amount & applying the entire dividend to the purchase of an annuity payable together with the annual dividends in cash to the insured or his assigns. The insured's wife died before the completion of the dividend period, leaving one daughter. In 1905 the insured assigned his property to a trustee for the benefit of his creditors, & the terms of the assignment were wide enough to include the policy if capable of assignment. On the expiration of the dividend period the insured was still alive, & the trustee for his creditors claimed the right of exercising the first option & of receiving the entire assets for the creditors:—*Held*: the options under the policy could only be exercised for the benefit of the persons for whom the trust was created; so long as any objects of the trust remained unperformed the trusts could not be defeated: the options must be exercised in the best manner for the benefit of those entitled, & the proper course was for the insurance co. to issue a paid-up policy within the meaning of option (b) for the benefit of the child or children surviving the insured, & if there should be none the benefit of it would fall into his estate.—*Re POLICY OF THE EQUITABLE LIFE ASSURANCE*

#### PART IV. SECT. 13, SUB-SECT. 1.—A.

**2989 i. Interest of assignee.]**—By a policy the insurance were payable to the father of assured. Subsequently the father made an assignment of his interest under the policy to the wife of assured. Differences having arisen between assured & his wife, they separated, & assured made a direction or declaration that the policy should be for the benefit of his father:—*Held*: the right of the father under the subsequent direction was a different right from that which had been assigned to the wife, & the father was entitled, as beneficiary, to the insurance upon the death of assured.—*Re STANDARD LIFE ASSURANCE CO. & KRAFT* (1919), 45 O. L. R. 323; 16 O. W. N. 83; 48 D. L. R. 649.—*CAN.*

**a. Right of assignee to expenses**

*of obtaining sum assured.]*—*HAYES v. HAYES* (1881), 29 Gr. 90.—*CAN.*

**b. Sale to insurer.]**—Insured in a life policy, having no surrender value, applied to insurers to purchase it, which they did for a small sum, he being at the time, to their knowledge, as well as his own, seriously ill with heart disease. Insurers in no way misled insured, who died shortly after the sale. In an action by his exors. to set aside the transaction:—*Held*: there was no evidence of fraud to submit to a jury.—*POTTS v. TEMPERANCE LIFE ASSURANCE CO.* (1892), 23 O. R. 73.—*CAN.*

**c. Effect of assignment—By way of security.]**—Where insurance was effected upon the life of a person for the benefit of her father, brothers, & sisters, plffs.:—*Held*: the beneficial

interest in the policy, as soon as it was issued, vested in plffs. & the contract of insurers being to pay them the moneys payable under the policy, insured could not by any act of hers, deprive them of the interest so vested in them, or of their right to call upon the insurers for payment; & an assignment made by her & her father to a stranger to secure a debt had no effect upon such interest or right of plffs., except that of the father.—*DOLEN v. METROPOLITAN LIFE INSURANCE CO.* (1894), 26 O. R. 67.—*CAN.*

**d. Whether consent of beneficiary necessary.]**—Pltf. was named as beneficiary in a policy of insurance on the life of her husband. The policy was taken out by the husband, & the premiums were paid by him. By an assignment, to which pltf. was a party,



**Sect. 13.—Assignment of life policies: Sub-sect. 1, A., B. & C.]**

SOCIETY OF UNITED STATES & MITCHELL (1911), 27 T. L. R. 213.

**2993. Proof of assignment—Deposit of policy by way of security—Admissibility of evidence.]—**A. being indebted to C., placed in his hands a policy of insurance upon his (A.'s) life. No written document accompanied the deposit, but it was understood between them to be as a collateral security for the debt then due, & for any further advances from C. to A. A. died, having received further advances & being still in debt to C.:—**Held:** the equitable deposit of the policy & the circumstances attending it would be sufficiently proved by the affidavit of C.—**MAUGHAN v. RIDLEY** (1863), 2 New Rep. 58; 8 L. T. 309.

**By what law governed—Assignment abroad.]—**See CONFLICT OF LAWS, Vol. XI., p. 360, No. 423.

#### *B. Mode of Assignment.*

**2994. What words operate to pass title—Equitable interest.]—**A., being possessed of a policy of assurance on his own life, while the same was subsisting, assigned to B. & C. for the benefit of his creditors, all his goods, etc., & all his estate & effects, etc., together with all writings:—**Held:** the words used passed the entire interest in the policy to B. & C., the equitable interest passing by the general words, & the deed & legal interest by the grant of the writings.—**WATSON v. MCLEAN** (1858), E. B. & E. 75; 6 W. R. 721; 120 E. R. 435, Ex. Ch.

**2995. — Legal interest.]—****WATSON v. MCLEAN**, No. 2994, *ante*.

**2996. Assignment by deed—Possession retained by grantor.]—**In detinue by the exor. of N. against M., a banker, for a policy of insurance on the life of S., M. pleaded that the policy was not the property of N., & also that N. had fraudulently permitted S. to hold the policy & represent that he was entitled to the money secured by it, & that he did so represent to M., who lent him money on it. Replication, denying the fraudulent permission; S. had insured his own life in 1831, & by deed assigned the policy to N. in 1832, who gave notice of the assignment to the office, & paid all the premiums afterward. S. retained the policy till he deposited it with M. on a loan of money in 1843:—**Held:** (1) the property in the policy passed to N. by the deed of 1832, although he had no possession of the policy; (2) though N. had been guilty of negligence in allowing S. to retain the policy, deft. had not proved his special plea, unless the jury were satisfied that N. intended that S. should borrow money of some one, & left the policy in S.'s hands in order that he might cheat some one by borrowing money on it; & the judge would not ask the jury what they would have found if the word "fraudulently" had not been inserted in the plea.—**NEALE v. MOLINEUX** (1847), 2 Car. & Kir. 672, N. P.

**2997. — For benefit of creditors.]—****WATSON v. MCLEAN**, No. 2994, *ante*.

the loss was made payable to defts., for valuable consideration moving to the husband. Upon the death of the husband, pltf. claimed the benefit of the policy, setting up that her consent to the assignment was procured by her husband's fraud:—**Held:** the assignment was valid without the consent of pltf.—**GUNTER v. WILLIAMS** (1897), 1 N. B. Eq. Rep. 401.—**CAN.**

—.]—**EMMERSON v. CLARK**  
266;

**1. Whether assignee may select surrender value.]—**An assignee holding a life assurance policy as security for a debt has no right to make a selection of the cash surrender value, thus completely changing the character of the security.—**FISKEN v. MARSHALL** (1905), 6 O. W. R. 611; 10 O. L. R. 552.—**CAN.**

**2. Consideration.]—**Testator, before his death, assigned to a trustee a life insurance policy in trust to pay his mother £100 out of his policy

**2998. — Reversionary interest of married woman.]—****Re CITY OF GLASGOW LIFE ASSURANCE CO., CLARE'S POLICY**, No. 3080, *post*.

**2999. Voluntary settlement—With irrevocable power of attorney—Whether gift complete.]—**Effect given to a voluntary assignment of a policy of assurance containing an irrevocable power of attorney.

The question is whether this is a complete instrument, or whether it requires the assistance of a ct. of equity for enforcement. I am of opinion that it is a complete & perfect instrument (**ROMILLY, M.R.**).—**PEARSON v. AMICABLE ASSURANCE OFFICE** (1859), 27 Beav. 229; 7 W. R. 629; 54 E. R. 89.

**Annotations:—****Apld. Re King, Sowell v. King** (1879), 14 Ch. D. 179. **Mentd. Garrick v. Taylor** (1860), 29 Beav. 79.

**3000. — By letter—Accompanied by delivery—Intention to execute further deed.]—**A letter expressed to be a binding assignment upon trusts, by way of voluntary settlement, of certain policies of life assurance, before such policies were at law assignable, & accompanied with delivery of those of the policies which were in the assignor's possession:—**Held:** to be an effectual equitable assignment, although the writer expressed his intention of subsequently executing a deed to vest the policies in the assignee jointly with another person not yet selected, as trustees, & although some of the policies, being in mtge. to the office were not handed over, & no notice of the assignment was given to the office. It was the duty of the assignee, not of the assignor, to give notice to the office.—**Re KING, SEWELL v. KING** (1879), 14 Ch. D. 179; 49 L. J. Ch. 73; 28 W. R. 344.

**Annotations:—****Reid. Re Richardson, Weston v. Richardson** (1882), 47 L. T. 514; **Re Hughes** (1888), 59 L. T. 586.

**3001. Notice to insurer—Of wish to transfer—Coupled with delivery of policy.]—**A., having assured his life, wrote to the assurance co., "please to take notice that I wish to transfer my interest in the policies" to C. The letter was delivered to the co. & noted in their books:—**Held:** this was a good equitable assignment, as against a subsequent assignee of the policies, who had, in addition, obtained possession of them.—**CHOWNE v. BAYLIS** (1862), 31 Beav. 351; 31 L. J. Ch. 757; 6 L. T. 739; 26 J. P. 579; 8 Jur. N. S. 1028; 11 W. R. 5; 54 E. R. 1174.

**3002. Gift of policy inter vivos.]—**In detinue by an administratrix for a policy of insurance, the evidence was that the intestate had given the policy to deft. No assignment was executed, but deft. retained the policy, & had possession of it at the time of the intestate's death:—**Held:** the action was not maintainable, for though there had been no assignment of the policy & the right to the money secured by it might not be affected, the right to the document itself passed by the gift to deft.—**RUMMENS v. HARE** (1876), 1 Ex. D. 169; 46 L. J. Q. B. 30; 34 L. T. 407; 24 W. R. 385, C. A.

**Annotation:—****Mentd. Re Richardson, Shillito v. Hobson**  
30 Ch. D. 396.

moneys, & the balance to his cousin. The consideration for the assignment was the cousin's going to N. as testator's housekeeper:—**Held:** the assignment was valid, being made on good consideration.—**PUBLIC TRUSTEE v. WALLIS** (1911), 30 N. Z. L. R. 592.—**N.Z.**

#### **PART IV. SECT. 13, SUB-SECT. 1.—B.**

**3002 i. Gift of policy inter vivos.]—****RAJNARAIN BOSE v. UNIVERSAL LIFE ASSURANCE CO.** (1881), 1 L. R. 7 Calo. 594; 10 C. L. R. 561.—**IND.**

**3003. — Subsequent premiums paid by donee.]**—H. insured his life for £100 & gave the policy to his wife on condition that she paid the premiums. He afterwards devised all his property to pltf., who was his sole extrix., upon trust for his children. The wife took possession of the policy, & paid all the premiums out of her separate estate:—*Held*: the policy passed under the will to pltf., as there was no assignment in writing.—*HOWES v. PRUDENTIAL ASSURANCE CO. & HOWES* (1883), 49 L. T. 133.

**3004. Deposit as security—Notice of intention to insurer.]**—S. having effected two policies on his life for the purpose, as he expressly informed the assurance co., of enabling him to give C. a security for a debt which exceeded the amount of the policies, deposited them with C., at the same time asking him by letter to instruct his, C.'s, solr. "to prepare the necessary assignment." C., however, never took any assignment. S. died insolvent, having made a will appointing exors., but no representation was taken out to his estate. C. then gave the co. notice in writing of the death, & that he held the policies as security for his debt, & the co. acknowledged the receipt of the notice in the terms of the Policies of Assurance Act, 1867 (c. 44), s. 6. Proper evidence of S.'s death having been subsequently produced to the co., they wrote to C. that the claim under the policies would be paid at the expiration of the three months, but that the assent of S.'s legal personal representative would be required before settlement. After the expiration of the three months C., being unable to obtain payment of the policy moneys although his debt was admitted by S.'s exors., & he offered the co. an indemnity, brought an action for that purpose against the co., insisting that S.'s deposit & letter constituted an equitable assignment of the policies within the Policies of Assurance Act, 1867 (c. 144), & enabled him to give a valid discharge for the moneys:—*Held*: there had been no equitable assignment of the policies within the Act, & the co. were justified in refusing to pay him in the absence of S.'s legal personal representative.—*CROSSLEY v. CITY OF GLASGOW LIFE ASSURANCE CO.* (1876), 4 Ch. D. 421; 46 L. J. Ch. 65; 36 L. T. 285; 25 W. R. 264.

*Annotations*:—*Refd. Re Rosier's Trusts* (1877), 37 L. T. 426; *Webster v. British Empire Mutual Life Assce.* (1880), 15 Ch. D. 169; *Curtius v. Caledonian Fire & Life Insce.* (1881), 51 L. J. Ch. 80.

**3004 i. Deposit as security—Notice of intention to insurer.]**—A. obtained a loan from B., & in security therefor he delivered to B. a policy of insurance of his life. A. died soon afterwards, & after his death B. gave notice by letter to the co. that the policy had been assigned to him, & was in his possession. Thereafter the estates of the deceased were sequestrated, & a trustee appointed:—*Held*: the deposit of the policy & the intimation to the co. were effectual to confer a preference upon the holder of the policy.—*SCOTTISH PROVIDENT INSTITUTION v. COHEN & CO.* (1888), 16 R. (Ct. of Sess.) 112; 26 Sc. L. R. 73.—*SCOT.*

**h. — Depositor paying premiums —Interest.]**—M. deposited with R. a policy of insurance upon his own life as security for a loan. R., for some years, paid the premiums under the policy to deft. co. In a suit by the extrix. of M. to redeem the policy R. was allowed interest on the several premiums paid by her, as from the date of such payment.—*MEADWAY v. RHODES* (1890), 16 V. L. R. 115.—*AUS.*

**k. —**—*HENDERSON v. STAFFORD* (1922), 68 D. L. R. 609; 32 Man. L. R. 336; [1922] 2 W. W. R. 458.—*CAN.*

**l. Assignment by deed.]**—*MURPHY v. TAYLOR* (1850), 1 I. Ch. R. 92; 3 Ir. Jur. 85.—*IR.*

**m. —**—*JACOBSON'S TRUSTEE v. STANDARD BANK* (1899), 16 S. C. 201; 9 C. T. R. 188.—*S. AF.*

**n. Voluntary settlement.]**—*Re RODDICK* (1896), 27 O. R. 537.—*CAN.*

**o. Indorsement on certificate of benevolent society.]**—*NEILSON v. TRUSTS CORPN. OF ONTARIO* (1894), 24 O. R. 517.—*CAN.*

**p. —**—*FISHER v. FISHER* (1898), 25 A. R. 108.—*CAN.*

**q. Delivery.]**—*BROWNLEE v. ROBB*, [1907] S. C. 1302; 44 Sc. L. R. 876; 15 S. L. T. 261.—*SCOT.*

**r. —**—H. had insured his life for £1,000 in favour of his wife. The wife died in 1887, & at H.'s request pltf. took charge of his children on payment of a certain sum *per mensem* for board & lodging. This amount was paid until 1890, when H. fell into arrears. In 1893 he sent pltf. the policy, he having in terms of her will, the entire control of her property, for pltf.'s benefit in satisfaction of the debt. H. died in 1894:—*Held*: the property in the policy had vested in pltf.—*BUYSKES v. HURLEY'S EXECUTOR &*

**3005. Donatio mortis causa.]**—A policy of life insurance may be the subject of a *donatio mortis causa*.—*WITT v. AMIS* (1861), 1 B. & S. 109; 30 L. J. Q. B. 318; 4 L. T. 283; 7 Jur. N. S. 499; 9 W. R. 691; 121 E. R. 655.

**3006. S. P. AMIS v. WITT** (1863), 33 Beav. 619; 55 E. R. 509.

*Annotations*:—*Mentd. Hewitt v. Kaye* (1868), L. R. 6 Eq. 198; *Re Beak's Estate, Beak v. Beak* (1872), L. R. 13 Eq. 489; *Moore v. Moore* (1874), L. R. 18 Eq. 474; *Re Farman, Farman v. Smith* (1887), 57 L. J. Ch. 637; *Re Dillon, Duffin v. Duffin* (1890), 44 Ch. D. 76.

*See, generally, GIFTS, Vol. XXV., pp. 541 et seq.*

**3007. Policy taken out "for benefit of" assignee —Death of assignee before insured—Whether resulting trust presumed.]**—A policy of insurance was taken out by A. on his own life "for behoof of B.," his wife's sister, & the policy provided that B., her exors., administrators, & assigns, should be entitled to receive the policy moneys on A.'s death. A., who survived B., retained the policy, & paid the premiums till his death:—*Held*: the legal personal representatives of B. were trustees of the policy moneys for the legal personal representatives of A.—*Re POLICY NO. 6402 OF THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY*, [1902] 1 Ch. 282; 71 L. J. Ch. 189; 85 L. T. 720; 50 W. R. 327; 18 T. L. R. 210.

*Annotation*:—*Mentd. Re Howes, Howes v. Platt* (1905), 21 T. L. R. 501.

**Whether assignment effectual—Subsequent suicide of insured.]**—*See Nos. 2958–2964, ante.*

**3008. Bequest of "premium of insurance" —Whether policy included.]**—A legacy was given to a wife by her husband's will of a premium of assurance on his life, to meet her immediate expenses. Just before the date of the will a bonus had been declared:—*Held*: the bonus & no more passed.—*BARROW v. METHOLD* (1855), 26 L. T. O. S. 56; 1 Jur. N. S. 994; 3 W. R. 629.

#### C. Notice of Assignment.

**3009. Necessity for notice.]**—B. made a voluntary assignment, by deed, of a policy of assurance upon his own life for £1,000 to trustees upon trust for the benefit of his sister & her children, if she or they should outlive him. The deed was delivered to one of the trustees, & the grantor kept the policy in his own possession. No notice of the assignment was given to the assurance office,

*HEIRS* (1894), 11 S. C. 294; 4 C. T. R. 301.—*S. AF.*

**t. Assignment as security.]**—*Re ONTARIO MUTUAL LIFE ASSURANCE CO. & FOX* (1899), 30 O. R. 666.—*CAN.*

**a. —**—The holder of a policy of insurance on his own life, intending to secure payment of a loan to him, signed a document addressed to the lenders in which he stated: "For collateral security I have placed aside & assigned to you a policy of insurance in the S. co. for \$2,000":—*Held*: the effect of the document was to give the equitable right & title to the policy to the lenders of the money as beneficiaries.—*THOMPSON & AVERY v. MACDONNELL* (1906), 8 O. W. R. 721; 13 O. L. R. 653.—*CAN.*

**b. —**—*WOOD v. ANSTRUTHER* (1843), 6 Dunl. (Ct. of Sess.) 291; 16 Sc. Jur. 159.—*SCOT.*

**c. —**—*NATIONAL BANK OF SCOTLAND v. FORBES* (1858), 21 Dunl. (Ct. of Sess.) 79; 31 Sc. Jur. 50.—*SCOT.*

#### PART IV. SECT. 13, SUB-SECT. 1.—C.

**d. Sufficiency of notice.]**—A mere notice of a statutory assignment of a life insurance policy is no notice of the



**Sect. 13.—Assignment of life policies: Sub-sect. 1, C., D. & E.]**

& B. afterwards surrendered, for a valuable consideration, the policy & a bonus declared upon it, to the assurance office. Upon a bill filed by the surviving trustee of the deed to have the value of the policy replaced, the ct. held that, upon the delivery of the deed, no act remained to be done by the grantor to give effect to the assignment of the policy, & that he was bound to give security to the amount of the value of the policy assigned by the deed.—**FORTESCUE v. BARNETT** (1834), 3 My. & K. 36; 3 L. J. Ch. 106; 40 E. R. 14.

**Annotations:—***Distd. Ward v. Audland* (1845), 8 Beav. 201. *Appld. Re King, Sewell v. King* (1879), 14 Ch. D. 179. *Refd. Edwards v. Jones* (1836), 1 My. & Cr. 226; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Pearson v. Amicable Assce. Office* (1859), 27 Beav. 229; *Bizzey v. Flight* (1876), 24 W. R. 957; *Re Richardson, Weston v. Richardson* (1882), 47 L. T. 514; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82; *Re Williams, Williams v. Ball*, [1917] 1 Ch. 1. *Mentd. M'Fadden v. Jenkyns* (1842), 1 Hare, 458; *Bridge v. Bridge* (1852), 16 Beav. 315; *Donaldson v. Donaldson* (1854), 23 L. T. O. S. 306; *Voyle v. Hughes* (1854), 2 Sm. & G. 18; *Parnell v. Hingston* (1856), 3 Sm. & G. 337; *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408.

See, further, **BANKRUPTCY**, Vol. V., pp. 770, 771, Nos. 6615-6629.

**3010. Sufficiency of notice—Verbal notice—To clerk at insurance office.]—**A party, to whom bkpt. had assigned a policy of assurance, sent an agent to the office for the purpose of paying the annual premium, who in the course of conversation with one of the clerks in the office, told him of the policy having been so assigned:—*Held*: this was not sufficient notice to the insurance office.—*Ex p. CARBIS* (1834), 4 Deac. & Ch. 354; 1 Mont. & A. 693, n.

**Annotation:—***Refd. Re Barr's Trusts* (1858), 4 K. & J. 219.

**3011. ———.]—**In order to entitle the assignee of a policy of assurance to priority over subsequent assignees, it is not necessary that notice to the insurance co. of the assignment should be given in writing. Verbal notice is sufficient.

Verbal notice by the assignor of the policy to the resident director of the co., as such, held sufficient, though he made no entry of it in the books, & retired from holding office without making any communication about it to the co.

Effect, on a subsequent assignee giving notice, of misconduct or neglect in the officer of the co. who received the notice of a previous assignment, & made no entry of it or forgot it, considered.—**NORTH BRITISH INSURANCE CO. v. HALLETT** (1861), 7 Jur. N. S. 1263; 9 W. R. 880.

**Annotation:—***Refd. Re Worcester, Ex p. Agra Bank* (1868), 3 Ch. App. 553.

See, further, **BANKRUPTCY**, Vol. V., pp. 776, 777, Nos. 6667-6673.

**D. Priority.**

See, generally, **CHANCES IN ACTION**, Vol. VIII., pp. 468 *et seq.*; **EQUITY**, Vol. XX., pp. 309, 310.

**3012. Notice not given for full amount of charge—Priority only for amount of which notice given.]—**

A. having a contingent reversionary interest in a fund invested in the names of trustees, assigned by deed to B. "so much of his share as would amount to £923," & by the same deed covenanted to insure his life against that of the life-tenant, & charged the premiums on his share. The purchaser gave notice to the trustees, that by the deed in question so much of the share as would amount to £923 had been assigned to him, but the

notice was silent as to the insurance:—*Held*: B. took priority over subsequent incumbrances on the share as to the £923 only, & not as to a further sum paid by him as premiums on the policy.—*Re BRIGHT'S TRUSTS* (1856), 21 Beav. 430; 25 L. J. Ch. 449; 27 L. T. O. S. 32; 2 Jur. N. S. 300; 4 W. R. 381; 52 E. R. 925.

**3013. Constructive notice of prior charge.]—**

An agreement in writing to execute on request an effectual mtge. of a policy of insurance deposited at the time of the agreement as security for a loan, is not an "assignment" of such policy within the meaning of the Policies of Assurance Act, 1867 (c. 144). Accordingly, notice to the Assurance co. of such an agreement does not give under that Act any priority over a prior equitable mtgee. who has given no notice but has possession of the policy. The holder of a policy of insurance on his own life deposited it with A. by way of equitable mtge. to secure a loan. A. retained the policy, but gave no notice to the co. B. afterwards, in ignorance of this prior mtge. agreed to lend money to the policy-holder upon a deposit of the same policy, & the policy-holder, alleging that he had left the policy at home by mistake, & promising forthwith to deliver it to B., took the loan & signed a memorandum that he had deposited the policy with B., & that he undertook on request to execute to B. an effectual mtge. of it. B. gave to the co. notice of his loan & memorandum of deposit, & frequently applied to the policy-holder for the policy, but the policy-holder made various excuses for not handing it over, & died leaving it in the possession of A.:—*Held*: the circumstances of the case were such as to put B. on inquiry at the time of the loan, & to fix him with constructive notice of A.'s security, & the title of A., as in possession of the policy, must prevail over that of B., although B. did & A. did not give notice to the co.—**SPENCER v. CLARKE** (1878), 9 Ch. D. 137; 47 L. J. Ch. 692; 27 W. R. 133.

**Annotation:—***Folld. Re Weniger's Policy*, [1910] 2 Ch. 291.

**3014. ———.]—**(1) Where a person lends money on the security of a policy of life assurance which is not handed over to him, he has, if it is in the hands of a prior mtgee., constructive notice of the prior mtge., & cannot obtain priority by giving notice to the assurers before the prior mtgee. gives notice.

(2) A mtgee. of a life policy is not under any obligation to give notice of his mtge. to a prior mtgee. of whose security he has notice, & if the latter makes further advances to the mtgor. in pursuance of a fresh bargain & a further charge, the security in respect of the further advances has not priority over that of the subsequent mtgee. if he gives prior notice to the assurers.

(3) *Qu.*: whether the prior mtgee. would have priority in respect of his further advances if they were made, without notice of a subsequent mtgee.'s security under a contract for security for a present advance & further sums to be advanced.—*Re WENIGER'S POLICY*, [1910] 2 Ch. 291; 79 L. J. Ch. 546; 102 L. T. 728.

**3015. No notice given by first mortgagee—Mortgagee unaware of assignment to him.]—**A solr. entrusted by a client with money to invest misappropriated it. Afterwards he executed a mtge. of certain life policies in favour of the client to secure part of the money misappropriated, but did not inform the client of the existence of the mtge. nor give notice of it to the insurance offices.

interest of the assignee in the policy within a condition on it requiring notice of such interest to be given.—**WALPOLE v. COLONIAL BANK OF AUSTRALASIA**

(1884), 10 V. L. R. 315.—**AUS.**

• ——— Notice to agent—Where notice to head office required.]—

**MACKENZIE v. MUTUAL LIFE INSURANCE CO. OF NEW YORK** (1906), T. H. 116.—**S. AF.**



Subsequently, he made a second mtge. of the same policies to a clerk in his office as a trustee for other clients whom he had defrauded, but did not disclose the first mtge. The second mtgee. gave notice to the insurance officers. On the bkpcy. of the solr. the first mtge. was discovered, & notice of it was at once given to the insurance offices:—*Held*: the second mtgee. was entitled to priority over the first mtgee.—*Re LAKE, Ex p. CAVENDISH*, [1903] 1 K. B. 151; 72 L. J. K. B. 117; 87 L. T. 655; 51 W. R. 319; 19 T. L. R. 116; 10 Mans. 17.

**3016. Further advances by prior mortgagee—Prior mortgagee without notice of subsequent charge.]—***Re WENIGER'S POLICY*, No. 3014, *ante*.

#### *E. Right to Bonus and Benefits.*

**3017. Settlement of policy for named amount—Whether bonus included—Construction of settlement.]—**A policy of insurance for £3,000 on A.'s life was assigned to trustees &, by a deed of even date, trusts were declared of it by the description of "the sum of £3,000 for which A.'s life was insured," & power was given to B. to dispose of it by will. B., after reciting the settlement, bequeathed £1,000, part of the sum of £3,000, to A., & the remaining sum of £2,000 to C. At A.'s death £9,000 was received under the policy:—*Held*: the whole fruits of the policy were subject to the trusts of the settlement, & passed by the bequests to A. & C. in proportion to their legacies.—*COURTNEY v. FERRERS* (1827), 1 Sim. 137; 5 L. J. O. S. Ch. 107; 57 E. R. 530.

*Annotation*:—*Distd. Simpson v. Mountain* (1835), 4 L. J. Ch. 221.

**3018. ———.]—**A marriage settlement recited that it had been agreed, on the treaty for the marriage, that the intended husband should insure his life in the Rock Insurance Office, in the names of trustees, in the sum of £3,000; that the dividends of certain canal shares should be applied in keeping the policy on foot; that the said sum of £3,000 under the policy should be settled in manner thereinafter mentioned; & that, in pursuance of the agreement, the intended husband had made an insurance on his life in the Rock Office, in the sum of £3,000, in the names of the trustees of the deed; & it was declared that the trustees should stand possessed of the policy, in trust for

the intended husband until the marriage, & that, upon the solemnisation thereof, they should stand possessed of the said sum of £3,000, when received under the policy, upon certain trusts for the benefit of the intended wife & the children of the marriage. The husband became bkpt. & afterwards died. On his death, a considerable bonus was payable on the £3,000:—*Held*: the husband's assignees were not entitled to the bonus, but that sum, as well as the £3,000, belonged to the trustees of the settlement.—*PARKES v. BOTT* (1838), 9 Sim. 388; 8 L. J. Ch. 14; 59 E. R. 407.

*Annotation*:—*Distd. Domville v. Lamb* (1853), 1 W. R. 246.

**3019. Policy recited in settlement—Provision that settlement trustees should stand possessed of policy moneys upon trusts of settlement.]—**A marriage settlement recited that the settlor, the husband, had in pursuance of agreement effected insurances on his life for the sums of £2,000 & £5,000, & had given a bond to secure the sum of £7,000, & provided that the trustees should stand possessed of the said sums of £2,000 & £5,000 on the trusts of the settlement:—*Held*: the bonuses did not pass.

*Parkes v. Bott*, No. 3018, *ante*, was very different from the present. There the policy was settled. Here all the bonuses were in fact the fruit of the husband's payments (*WOOD, V.-C.*).—*DOMVILLE v. LAMB* (1853), 1 W. R. 246.

**3020. Bequest of policy—Includes bonus.]—**A bequest of a policy of insurance carries with it the bonuses which have accrued.—*ROBERTS v. EDWARDS* (1863), 33 Beav. 259; 33 L. J. Ch. 369; 9 L. T. 360; 9 Jur. N. S. 1219; 12 W. R. 33; 55 E. R. 367.

**3021. Bequest of sum secured by policy—Policy on life of annuitant.]—**Testatrix invested the sum of £500 in the purchase of an annuity for the life of M., which was secured on his estate, & she insured the life of M. for the sum of £500. By her will, testatrix bequeathed "the sum of £500, secured on the estate of M., & by a policy":—*Held*: bonuses which had been added to the policy, did not pass under this bequest.—*SIMPSON v. MOUNTAIN* (1835), 4 L. J. Ch. 221.

**3022. Legacies given out of policy—Legacies exhausting nominal amount of policy—Right of legatees to proportionate share of bonus.]—***COURTNEY v. FERRERS*, No. 3017, *ante*.

#### **PART IV. SECT. 13, SUB-SECT. 1.—E.**

**f. Bequest of policy.]—***Re CAMERON, MASON v. CAMERON* (1892), 21 O. R. 631.—CAN.

**g. ———.]—**Two policies on his life were bequeathed by testator to his exors. to be invested by them as a provision for his wife & children:—*Held*: testator had declared the insurance to be for the benefit of his wife & children within R. S. O., 1887, c. 136, & therefore the proceeds were exempt from the claims of creditors.—*BEAM v. BEAM* (1893), 24 O. R. 189.—CAN.

**h. ——— Sufficient to vary policy.]—**A bequest by a testator of all his life insurance policies in favour of preferred beneficiaries is sufficient to vary a policy or declaration or apportionment previously made without specifically identifying the policies by number, name, date, or amount insured. Such a devise does not affect a policy issued after the date of the will.—*Re CHEESNOROUGH* (1897), 30 O. R. 639.—CAN.

**k. ———.]—***VIDEAN v. WESTOVER* (1897), 29 O. R. 1.—CAN.

**l. ———.]—***Re CARBERY* (1898), 30 O. R. 40.—CAN.

**m. ——— Although premiums paid by beneficiary.]—**A person whose life was insured in favour of his wife, who was a beneficiary for value, was

unable or unwilling to keep the insurance in force, & the later assessments before his death were paid by the wife. By his will the assured gave the whole of the insurance money to one of his sons:—*Held*: he had power to do so.—*BOOK v. BOOK* (1900), 32 O. R. 206; *reversd.* 1 O. L. R. 86.—CAN.

**n. ——— Where will invalid.]—**A will invalidly executed is not an "instrument in writing" effectual to vary the benefit of an insurance certificate.—*Re JANSEN* (1906), 12 O. L. R. 63; 8 O. W. R. 17.—CAN.

**o. ——— What is sufficient declaration.]—**Creditors contended that the insurance moneys formed part of the estate of N., available for payment of debts:—*Held*: the bequest of "my insurances" was a sufficient declaration in favour of N.'s second wife, as a member of the preferred class of beneficiaries, to entitle her to payment of the insurance moneys, & therefore the creditors could take nothing.—*Re NAUBERT* (1920), 46 O. L. R. 210.—CAN.

**p. ———.]—***HAMMOND v. PUBLIC TRUSTEE*, 2 J. R. N. S. 185.—N.Z.

**q. Legacies given out of policy.]—***BOYNE v. BOYNE* (1908), 4 N. B. Eq. Rep. 48; 5 E. L. R. 84.—CAN.

**r. Where payable to "legal heirs."]**—A widower, having two children,

insured in a benevolent society & took out his certificate payable to his "legal heirs" & subsequently married a second time, & died without having altered the certificate, leaving his wife surviving with the two children of the first marriage:—*Held*: the two children took the whole fund payable under the certificate, to the exclusion of the wife.—*MEARNS v. ANCIENT ORDER OF UNITED WORKMEN* (1891), 22 O. R. 34.—CAN.

**t. Where payable to children.]—**Insurers agreed to pay the insurance, after the death of insured, to his wife or her legal representatives; or, if she should not then be living, to her children. The wife predeceased insured. Two of her children died before her, one of them leaving a child:—*Held*: only the children who survived the wife were entitled to share in the insurance payable under the policy.—*MURRAY v. MACDONALD* (1892), 22 O. R. 557.—CAN.

**a. Where payable to wife—Assignment to creditor—Wife's interest unaffected.]—***FISHER v. FISHER* (1899), 25 A. R. 108.—CAN.

**b. ——— Revocation in favour of mother.]—***Re SUN LIFE ASSURANCE CO. & McLEAN* (1919), 45 O. L. R. 130; 16 O. W. N. 3; 48 D. L. R. 652.—CAN.

**Sect. 13.—Assignment of life policies: Sub-sect. 1, F. & G.; sub-sects. 2, 3, 4 & 5. Sect. 14: Sub-sect. 1, A.]**

*F. Settlement of Policies.*

**3023. Whether bonuses subject to settlement.]—**COURTNEY v. FERRERS, No. 3017, *ante*.

**3024. —.]—**PARKES v. BOTT, No. 3018, *ante*.

**3025. Settlement on marriage—Effect of divorce on application of wife.]—**By a marriage settlement alleged to have been made in consequence of false representations by the husband, a policy of assurance on the life of the wife's mother was settled on the usual trusts, giving the husband a life interest after the death of the wife. The marriage was dissolved soon after its celebration on the ground of the husband's adultery & desertion. There was no issue. The trustees of the settlement, having no funds to keep up the policy, assigned it absolutely to the wife, who paid the premiums from the date of such assignment. On the death of the assured the assurance society, after some delay, paid the money due on the policy into ct. on the ground that the wife could not give a discharge:—*Held*: under the special circumstances, the husband had no claim on the fund. The society was, nevertheless, justified in paying the money into ct., but it must pay interest from the time when the money became payable till it was paid into ct., though there was then no legal hand to receive it.—*Re ROSIER'S TRUSTS* (1877), 37 L. T. 426.

**Covenants in settlements relating to policies.]—**See SETTLEMENTS.

*G. Assignment by way of Gift.*

**Presumption of gift.]—**See GIFTS, Vol. XXV., p. 516, Nos. 114, 115.

**SUB-SECT. 2.—UNDER JUDICATURE ACT, 1873, s. 25 (6).**

*See, now, Law of Property Act, 1925 (c. 20), s. 136; Sect. 13, sub-sect. 5, post.*

**SUB-SECT. 3.—UNDER POLICIES OF ASSURANCE ACT, 1867.**

*See Policies of Assurance Act, 1867 (c. 144).*

**3026. What is an assignment within the statute—Deposit of policy.]—**CROSSLEY v. CITY OF GLASGOW LIFE ASSURANCE CO., No. 3004, *ante*.

**3027. ——— Agreement to execute mortgage on request.]—**SPENCER v. CLARKE, No. 3013, *ante*.

**3028. ——— No words of gift—Assignment conditional—Absence of consideration.]—***Re WILLIAMS, WILLIAMS v. BALL*, No. 3031, *post*.

**3029. Assignment for value—Rights of assignee—Whether subject to equities.]—**Assignees for value of a life policy hold subject to the equities affecting the same. Policies of Assurance Act, 1867 (c. 144), has not altered their position in this respect.—*BRITISH EQUITABLE INSURANCE CO. v.*

*GREAT WESTERN RY. CO.* (1868), 38 L. J. Ch. 132; 19 L. T. 476; 17 W. R. 43; *on appeal* (1869), 38 L. J. Ch. 314, L. JJ.

*Annotation:—Refd. Hoare v. Bremridge* (1872), L. R. 14 Eq. 522.

**3030. Priority—No notice by first incumbrancer—Notice by second with knowledge of prior charge.]—**Policies of Assurance Act, 1867 (c. 144), is intended to apply only as between the insurance office & the persons interested in the policy, & does not affect the rights of those persons *inter se*. Accordingly where a first incumbrancer on a policy had not given such notice as prescribed by the Act, & a second incumbrancer with notice of the prior charge had given the statutory notice:—*Held*: the second incumbrancer did not thereby obtain priority.—*NEWMAN v. NEWMAN* (1885), 28 Ch. D. 674; 54 L. J. Ch. 598; 52 L. T. 422; 33 W. R. 505; 1 T. L. R. 211.

**SUB-SECT. 4.—POLICIES UNDER FRIENDLY SOCIETIES ACTS.**

*See FRIENDLY SOCIETIES, Vol. XXV., p. 307, Nos. 146–148.*

**SUB-SECT. 5.—UNDER LAW OF PROPERTY ACT, 1925, s. 136.**

**3031. What operates as assignment—Conditional endorsement on policy—No present words of gift.]—**The owner of a life policy gave it to his housekeeper with the following signed indorsement, namely: "I authorise"—naming her—"my housekeeper & no other person to draw this insurance in the event of my predeceasing her this being my sole desire & intention at time of taking this policy out & this is my signature." The assignor paid the premiums until his death:—*Held*: the assignment was inoperative on the ground that the assignment was an incomplete gift, being either a revocable mandate or authority which was revoked by the death of the assignor, or, if taking effect on the death, a testamentary document not duly executed.—*Re WILLIAMS, WILLIAMS v. BALL*, [1917] 1 Ch. 1; 86 L. J. Ch. 36; 115 L. T. 689; 61 Sol. Jo. 42, C. A.

*Annotation:—Mentd. Re Westerton Public Trustee v. Gray*, [1919] 2 Ch. 104.

*See, generally, CHOSER IN ACTION, Vol. VIII., pp. 442 et seq.*

**SECT. 14.—TITLE TO THE POLICY AND THE INSURANCE MONEY: LIEN.**

**SUB-SECT. 1.—POLICY EFFECTED ON LIFE OF ANOTHER.**

*A. By Creditor on Life of Debtor.*

**3032. Premiums to be paid by debtor—General rule.]—**Trustees of an insurance society advanced £10,000 to C. on the security of a reversionary

**PART IV. SECT. 13, SUB-SECT. 1.—F.**

**3023 I. Whether bonuses subject to settlement.]—**STARR v. MERKEL (1891), 40 N. S. R. 23.—CAN.

**3023 II. —.]—**THOMSON'S TRUSTEES v. THOMSON (1879), 6 R. (Ct. of Sess.) 1227; 16 Sc. L. R. 727.—SCOT.

*c. Settlement on marriage.]—*At the time deceased, who died intestate, entered into a marriage contract he held \$3,000 insurance in R. This he dropped & took two policies of \$2,500

each in C. In the presence of his father as a witness he changed the notarial copy of the marriage contract so far as to read "5,000" instead of "3,000" & "C." instead of "R."—*Held*: widow entitled to insurance as it had been identified beyond doubt.—*Re ROGER* (1909), 14 O. W. R. 267; 18 O. L. R. 649.—CAN.

*d. —.]—*ARMSTRONG v. LYNN (1874), 9 I. R. Eq. 186.—IR.

*e. — Delivery of policy.]—Held*:

a policy of insurance taken by a husband in favour of trustees for behoof of his wife & the children of the marriage did not confer a vested right in the beneficiaries without delivery, actual or constructive, of the policy.—*JARVIE'S TRUSTEE v. JARVIE'S TRUSTEES* (1887), 14 R. (Ct. of Sess.) 411; 24 Sc. L. R. 209.—SCOT.

*f. Settlement after re-marriage—Void for previous designation to daughter.]—*NEILSON v. TRUSTS CORPN. OF ONTARIO (1894), 24 O. R. 517.—CAN.



interest to which C. was entitled contingently on his surviving his father. As part of the loan transaction the trustees insured the life of C. against that of his father for £34,500 in the society of which they were trustees, & paid the premiums till C.'s death. C. executed a bond charging the reversion with principal, premiums, & interest on principal & premiums. By written agreements the interest & premiums were to accumulate at compound interest for five years. The agreements contained special clauses providing (*inter alia*) to whom the policy in certain specified events should belong, & declared that in the event of C. paying the whole sum due before the death of his father the trustees should be bound to assign the policy to C., & that if C. should pre-decease his father without having paid all principal moneys, interest, & costs the policy should belong absolutely to the trustees, they being bound in that event to impute to the debt all moneys they might receive in respect of the policy. C. died in his father's lifetime, having never paid anything:—*Held*: upon the true construction of the documents the contract was, not that the policy should be effected for the trustees' protection, only & for their sole benefit, subject to an option for C. to make it his own in the event of his paying off the debt in his lifetime, but that the policy was mortgaged to the trustees & was the property of C. subject to the charge; therefore in accordance with the equitable doctrine against fettering a mtgor.'s right of redemption C.'s representatives were entitled to the policy moneys after deducting all sums due.

The authorities . . . certainly establish, that the *primâ facie* effect of an agreement between debtor & creditor, in a transaction such as the present, that the creditor shall effect a policy, & that the debtor shall pay the premiums, is to vest the equitable property in the policy, subject to the creditor's security, in the debtor; the principle being, that what the debtor pays or agrees to pay for is (*primâ facie*, at all events) his, subject to the security for the purpose of which it was brought into existence (LORD SELBORNE).—SALT v. NORTHAMPTON (MARQUESS), [1892] A. C. 1; 61 L. J. Ch. 49; 65 L. T. 765; 40 W. R. 529; 8 T. L. R. 104; 36 Sol. Jo. 150, H. L.

*Annotations*:—*Mentd.* Eyre v. Wynn-Mackenzie, [1894] 1 Ch. 218; The Benwell Tower (1895), 72 L. T. 664; Booth v. Salvation Army Bldg. Assocn. (1897), 14 T. L. R. 3; Biggs v. Hoddinott, Hoddinott v. Biggs, [1898] 2 Ch. 307; London & Globe Finance Corp'n. v. Montgomery, (1902), 18 T. L. R. 661; Noakes v. Rice, [1902] A. C. 24; Bradley v. Carritt, [1903] A. C. 253; Samuel v. Jarrah Timber & Wood Paving Corp'n., [1904] A. C. 323; Kreglinger v. New Patagonia Meat & Cold Storage Co., [1914] A. C. 25.

**3033.** ———.]—C. borrowed of W. £1,000, & in consideration of £999, C. & his wife, pltf., granted to W. an annuity of £105 17s. 6d. for the life of pltf., being interest at the rate of 7 per cent, together with an annual sum of £35 17s. 6d., with which amount by way of annual premiums, W. insured pltf.'s life. The annuity was charged on the rents of a house to which pltf. was entitled for her separate use for life, with separate power of appointment. The deed contained a proviso that on redemption W. would release the annuity " & all securities for the same." Additional premiums if any became payable, were also, by the deed, made chargeable on the rents of the house. W. died; & afterwards C.:—*Held*: upon the pltf.'s redeeming the annuity, the policy of assurance was the property of pltf., the grantor, not of the exors. of W., the grantee, & insurer.

Where a policy of assurance has been effected by a creditor, either directly or indirectly, at the

expense of the debtor, & by way of indemnity to himself, the policy, on payment of the debt, must be delivered up to debtor. The case of an annuity is analogous.—COURTENAY v. WRIGHT (1860), 2 Giff. 337; 30 L. J. Ch. 131; 3 L. T. 433; 6 Jur. N. S. 1283; 9 W. R. 153; 66 E. R. 141.

*Annotations*:—*Distd.* Preston v. Noele (1879), 12 Ch. D. 760. *Reid.* Knox v. Turner (1869), L. R. 9 Eq. 155.

**3034.** ——— **Repayment of principal.**—Where a policy of insurance has been effected on the life of a debtor, as a security to the lender of money, & the lender charges the premiums to the account of the debtor, who pays them, if the principal is afterwards paid, the debtor, or his representative, is entitled to the policy.—HOLLAND v. SMITH (1806), 6 Esp. 11, N. P.

*Annotation*:—*Folld.* Salt v. Northampton, [1892] A. C. 1.

**3035.** ——— **Premiums charged to debtor—Repayment of principal & premiums at death.**—

(1) A tradesman insured the life of his debtor, in his own name; he charged the debtor with the premiums, but they were never paid by him. On the death of the debtor, the ct. held that his representatives were entitled to the produce of the policy after payment of the debt & premiums.

(2) There is a distinction between a policy effected to secure a debt & one to secure an annuity.—MORLAND v. ISAAC (1855), 20 Beav. 389; 24 L. J. Ch. 753; 25 L. T. O. S. 137; 1 Jur. N. S. 989; 3 W. R. 397; 52 E. R. 653.

*Annotations*:—*As to* (1) *Distd.* Drysdale v. Piggott (1856), 22 Beav. 238. *Folld.* Salt v. Northampton, [1892] A. C. 1.

**3036.** ——— **Without debtor's knowledge.**—

An army agent, to whom an officer was largely indebted on the balance of their account, effected in his own name policies on the life of the officer, & in the books kept by the army agent the account of the officer was charged with the premiums paid & with interest on the balances including the premiums. The officer was aware that the policies had been effected, but there was no evidence that the account had ever been shown to him, or that he knew that he was in the account charged with the premiums:—*Held*: the army agent was, under the circumstances, entitled to retain the sums received upon the policies after the death of the officer, & was not liable to account for them to his representatives.—BRUCE v. GARDEN (1869), 5 Ch. App. 32; 39 L. J. Ch. 334; 22 L. T. 595; 18 W. R. 384, L. C.

*Annotations*:—*Reid.* Re Arcedekne, Atkins v. Arcedekne (1883), 24 Ch. D. 709; Salt v. Northampton, [1892] A. C. 1.

**3037.** ——— **Offer to assign policy to debtor before debt discharged—Offer refused & policy sold.**—

A debtor being entitled to a life interest in certain property, & being pressed by his creditors, agreed to pay his debts in full by instalments, & the creditors agreed to insure his life, & he was to be entitled on payment of his debts & repayment to the creditors of the premiums paid by them, to have an assignment to himself of the policy. Before the payment of the last instalment the creditors offered to assign the policy to the debtor on payment of the premiums they had already paid, but the offer was declined. Shortly after the payment of the last instalment of their debts the creditors, without again offering it to the debtor, sold the policy.

On the death of the debtor, which happened soon after the sale of the policy, his widow claimed to be entitled to the insurance money on paying the premiums paid by the creditors:—*Held*: the creditors were under no obligation to offer again to assign the policy to the debtor after he had paid the last instalment, & a demurrer to the widow's



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bill was accordingly allowed.—*LEWIS v. KING* (1875), 44 L. J. Ch. 259; 32 L. T. 2, L. JJ.

**3038. — Principal deducted from insurance money—Construction of agreement.]—SALT v. NORTHAMPTON (MARQUESS), No. 3032, ante.**

**3039. — Bankruptcy & discharge of debtor—Policy included in schedule as security for debt—Title to surplus after payment of debt.]—A mtgee., by way of collateral security for his mtge. debt, insured in his own name the life of his debtor, the latter paying the premiums upon the policy. The debtor afterwards took the benefit of the Insolvent Debtors' Act, obtained the ordinary vesting order, & having put in his schedule, in which the mtge. debt was specified, & the policy, as one of the securities for payment of such debt, obtained his discharge. The debtor, after surviving the mtgee., died, & the insurance co. paid the amount due upon the policy to the personal representatives of the mtgee., who, after retaining thereout the amount of their debt & costs, paid the balance into ct. The balance being claimed by the assignee in insolvency of the debtor, on the one hand, & by his personal representatives on the other:—*Held*: the title of the assignee in insolvency was to be preferred.—*Re STORIE'S WILL TRUSTS* (1859), 1 Giff. 94; 28 L. J. Ch. 888; 34 L. T. O. S. 20; 5 Jur. N. S. 1153; 65 E. R. 839.**

**3040. Payment of some premiums by debtor.]—Where A. effects a policy in his own name, upon the life of B., declaring he is interested in B.'s life, such policy, *prima facie*, belongs to A., & the mere proof that some of the premiums were paid by B., does not rebut that presumption.—*TRISTON v. HARDEY* (1851), 14 Beav. 232; 51 E. R. 275.**

**3041. Premiums paid by creditor—Right of creditor to bonus.]—A person effecting an insurance on his debtor's life, for the amount of the debt, & paying the premiums on the policy, is not entitled to more than what he has expended, where the increased value of the policy exceeds the amount due, unless an intention to that effect is shown.—*SIMPSON v. WALKER* (1832), 2 L. J. Ch. 55.**

**3042. —.]—Debtor, at the request & expense of his creditor, insured his life for £400, being less than he then owed creditor, in a benefit insurance society, & nominated his creditor as the person to receive the amount. The debt was reduced to £314; debtor died, & creditor received the £400:—*Held*: debtor's administrator was not entitled to recover the balance beyond the £314 from creditor.—*BROWN v. FREEMAN* (1851), 4 De G. & Sm. 444; 64 E. R. 906.**

*Annotation*:—*Folld. Bruce v. Garden* (1869), 5 Ch. App. 32.

**3043. —.]—*LEA v. HINTON*, No. 2807, ante.**

**3044. — No contract for insurance between debtor & creditor.]—J. being unable to pay the premiums of policies effected by him on his own life, gave to T. a *post obit* bond for £14,000, payable on the death of J.'s father if J. survived him, & if T. had in the meantime kept up the policies. In fixing the sum of £14,000 regard was had not only to the amount of premiums required to keep the policies on foot, but also to the amount of premiums to be paid for keeping the life of J. insured in the sum of £14,000, to be paid in the event of his dying in his father's lifetime. This**

was known to J., who knew also that T. intended to effect this latter insurance, but there was not any agreement that T. should do so. T. did effect the insurance. J. died in his father's lifetime, appointing T. one of his exors.:—*Held*: (1) no contract for T. to insure being proved, T., & not the estate of J., was entitled to the benefit of the policy which T. had effected; (2) if the transaction as to the *post obit* bond was a fraud upon J., then T. had no insurable interest in J.'s life, the insurance office was not liable on the policy & the sum insured could not, if paid by the office, be claimed by J.'s estate.—*FREME v. BRADY* (1858), 2 De G. & J. 582; 27 L. J. Ch. 697; 31 L. T. O. S. 347; 4 Jur. N. S. 746; 6 W. R. 739; 44 E. R. 1115, L. JJ.

*Annotations*:—*As to* (1) *Folld. Bruce v. Garden* (1869), 5 Ch. App. 32. *Reid. Knox v. Turner* (1869), 39 L. J. Ch. 207.

**3045. Payment of some premiums by creditor—Whether policy abandoned by debtor—Refusal of debtor to pay.]—Debtor & a surety entered into a bond to secure payment by instalments of a debt, & the expenses of effecting a policy on debtor's life in creditor's name, as a collateral security. The policy was effected, but after a time neither debtor nor his surety paid the premiums on the policy, though required to do so by creditor, who paid them himself:—*Held*: on the death of debtor, he & his surety had not abandoned the policy, but it was redeemable by the surety on repayment of the premiums paid by debtor.—*DRYSDALE v. PIGGOTT* (1856), 8 De G. M. & G. 546; 25 L. J. Ch. 878; 27 L. T. O. S. 310; 2 Jur. N. S. 1078; 4 W. R. 773; 44 E. R. 500, L. JJ.**

*Annotations*:—*Folld. Courtenay v. Wright* (1860), 2 Giff. 337. *Distd. Preston v. Neele* (1879), 12 Ch. D. 760. *Apld. Salt v. Northampton*, [1892] A. C. 1. *Reid. Knox v. Turner* (1869), L. R. 9 Eq. 155.

**3046. Insurance & premiums paid by surety—Onus of proof of title.]—*LEA v. HINTON*, No. 2807, ante.**

**Insurable interest of creditor in life of debtor.]—*See, generally*, Sect. 4, sub-sect. 5, ante.**

**Insurable interest of surety in life of debtor.]—*See, generally*, Sect. 4, sub-sect. 6, ante.**

#### *B. Policy to secure Annuity.*

**3047. General rule.]—A money lender agreed to advance a sum at 8 per cent. *per annum*, & the premiums on the insurance of the borrower's life. The borrower executed a bond with sureties conditioned for payment of an annuity during his life equal to the above aggregate sums, & any increase in premiums by reason of the grantor being abroad; & the condition also provided for the cesser of the annuity on notice & payment of the original sum advanced, & all arrears of the annuity up to that time, but said nothing as to the policy:—*Held*: on redemption, the borrower had no equity to have the policy delivered to him.**

The mere circumstance that a purchaser of annuity insures the life on which the annuity depends does of course not give to the person or estate that pays the annuity an interest in the policy (*KNIGHT BRUCE, L.J.*).—*GOTTLIEB v. CRANCH* (1853), 4 De G. M. & G. 440; 1 Eq. Rep. 341; 22 L. J. Ch. 912; 21 L. T. O. S. 284; 17 Jur. 704; 43 E. R. 579, L. JJ.

*Annotations*:—*Consd. Drysdale v. Piggott* (1856), 8 De G. M. & G. 546. *Distd. Freme v. Brado* (1858), 2 De

#### PART IV. SECT. 14. SUB-SECT. 1.—A.

**3044 i. Premiums paid by creditor—No contract for insurance between debtor & creditor.]—*STEVENSON v. COTTON* (1846), 8 Dunl. (Ct. of Sess.) 872; 18 Sc. Jur. 465.—*SCOT.***

G. & J. 582. *Consd. Courtenay v. Wright* (1860), 2 Giff. 337. *Foll. Knox v. Turner* (1870), L. R. 9 Eq. 155; *Preston v. Neele* (1879), 12 Ch. D. 760.

3048. —.]—*COURTENAY v. WRIGHT*, No. 3033, *ante*.

3049. Distinguished from policy to secure a debt.]—*MORLAND v. ISAAC*, No. 3035, *ante*.

3050. Annuity *pur autre vie*—Lives on which annuity depends insured by grantee—Annuity redeemed by grantor.]—Where the grantee of an annuity insured the lives for which the annuity was granted, without there being any stipulation on the subject between him & the grantor:—*Held*: the latter, on redeeming, had no right to have the policy delivered to him.—*Ex p. LANCASTER* (1851), 4 De G. & Sm. 524; 64 E. R. 941.

3051. Insurance of grantor—Annuity redeemed by grantor.]—On the sale of an annuity for the life of the grantor, it was provided that the grantor would appear at an insurance office for the purpose of having his life insured, & would, if he went beyond the seas, pay any extra premiums which might be occasioned thereby; & it was further provided that the grantor might at any time repurchase the annuity for the sum which was originally paid for it. The purchaser of the annuity insured the life of the grantor, & paid the premiums on the policy of insurance. The grantor afterwards repurchased the annuity:—*Held*: the grantor of the annuity was not entitled to have the policy of insurance assigned to him.—*KNOX v. TURNER* (1870), 5 Ch. App. 515; 39 L. J. Ch. 750; 23 L. T. 227; 18 W. R. 873, L. C. *Annotation*:—*Foll. Preston v. Neele* (1879), 12 Ch. D. 760.

3052. — Under provisions of grant.]—The grant of an annuity with a right of repurchase on payment of the consideration money & all arrears of the annuity, does not create the relation of debtor & creditor so as to give the grantor, upon repurchase of the annuity, the right to a policy effected by the grantee on the life of the grantor as a security or indemnity; or, after the death of the grantor, to entitle his representatives to the surplus proceeds of the policy after satisfaction of the consideration money & all arrears of the annuity. In 1822, in consideration of £600, A. & B. his wife, granted to C. an annuity of £64 7s. 6d. for ninety-nine years, if B. should so long live. By the same deed the rents of copyhold property to which B. was entitled were granted during her life to C., with a covenant to surrender from & after B.'s death to the use of C., & power to C. to sell in case the annuity should be in arrear. The deed contained provisions that any extra premiums to become payable at the office where B.'s life should be insured, should be paid by A., & a power to A. to repurchase the annuity at any time after three years on payment to C. of £600 & all arrears of the annuity. On the day before the date of the deed by which the annuity was granted, C. insured B.'s life for £600, at an annual premium of £16 7s. 6d. The copyholds were surrendered & C., by himself or his representatives since his death, had been in possession since 1828. A. died in 1858, & B. in 1869:—*Held*: as between the representatives of

C. & B., the surplus proceeds of the policy effected by C. on B.'s life, after satisfaction of the £600 & all arrears of the annuity belonged to the representatives of C. & not of B.—*PRESTON v. NEELE* (1879), 12 Ch. D. 760; 40 L. T. 303; 27 W. R.

*Annotation*:—*Held*. Secretary of State in Council of India v. British Empire Mutual Life Assce. (1892), 67 L. T. 434.

3053. Annuity in repayment of loan—Premiums added to original advance.]—*GOTTLIEB v. CRANCH*, No. 3047, *ante*.

#### C. Policies to secure Funeral Expenses.

See Assurance Companies Act, 1909 (c. 49), s. 36.

3054. Whether policy within Assurance Companies Act, 1909 (c. 49), s. 36.]—A father in 1891 insured his infant son, then two years of age, in a friendly society in the name of the child. The father kept possession of the policy & paid the premiums, & died in 1915. On his death the society paid the policy-moneys to another child of the father, who claimed to have been presented by him with the policy. The administratrix of the assured, who had died intestate in 1916, sued the society for the policy-moneys as part of the estate of the assured:—*Held*: it was a question of evidence whether the father at the time he effected the policy intended it to be for his own benefit, or for the benefit of the son, & there was evidence, in the terms of the policy itself, & the circumstances of the case, that the father had taken out the policy in order to cover the possible expenses of the son's funeral, & therefore the policy enured for the father's own benefit by virtue of above sect., & that being so, any presumption that the policy was an advancement to benefit the son was rebutted by such evidence.—*HATLEY v. LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY* (1918), 88 L. J. K. B. 237; 118 L. T. 687, D. C.

3055. — Sufficiency of discharge.]—Two policies of life assurance in exactly the same terms were effected with an industrial assurance co. in 1900 & 1905 respectively in the name of M., who was the mother of J. The policies, though in the name of M., were what are known as "own life" policies. They were in fact effected by J., he having an expectation that he would be liable for expenses in connection with his mother's funeral; & the sums for which he insured were not of an unreasonable amount for that purpose. By each of the policies it was provided that the co. should pay the sum assured "to the exors. or administrators of the assured." But there was a proviso that a receipt signed by any person being a relation by blood of the assured should be a discharge to the co. for the same. The co. paid the policy moneys to J. & obtained a receipt from him. The sole extrix. of M. brought an action against the co. claiming payment of the policy moneys to her:—*Held*: the receipt given by J. to the co. was a good discharge to them; & the policies enured for his benefit within Assurance Companies Act, 1909 (c. 49), s. 36 (2).—*DA COSTA*

#### PART IV. SECT. 14, SUB-SECT. 1.—B.

30521. Insurance of grantor—Annuity redeemed by grantor—Under provisions of grant.]—A party entitled to a life estate, granted an annuity for his life, redeemable by him at the end of five years, upon payment of the original purchase-money. The annuitant, effected an insurance on the life of the grantor, in a sum slightly exceeding

the amount given for the annuity, & kept up the policy out of the annuity. The grantor, after the expiration of the five years, offered to redeem the annuity, but required the annuitant to assign to him the policy:—*Held*: he was not entitled to the policy upon the redemption of the annuity. It was the property of the annuitant.—*LAW v. WARREN* (1843), 6 L. Eq. R. 299.—*IR.*

305211. — — — —.]—*WILLIAMS v. ATKYNS* (1845), 2 Jo. & Lat. 603.—*IR.*

g. Policy on life of one of two grantors—Death of assured—Annuity in arrear—Whether survivor may set off amount of policy.]—*MILLIKEN v. KIDD* (1843), 5 L. Eq. R. 396; 2 Con. & Law. 442.—*IR.*



**Sect. 14.—Title to the policy and the insurance money : lien: Sub-sect. 1, C., D. & E.; sub-sect. 2, A.]**

**v. PRUDENTIAL ASSURANCE CO. (1918), 88 L. J. K. B. 884; 120 L. T. 353, C. A.**

*See, generally, Sect. 4, sub-sect. 9, ante.*

**D. Payment by Insurance Company to Person without Insurable Interest.**

**3056. Who entitled to policy money—General rule.]—HENSON v. BLACKWELL, No. 3061, post.**

**3057. ———.]—FREME v. BRADE, No. 3044, ante.**

**3058. ——— Policy by father on son's life—Payment to father as son's administrator.]—**A father effected a policy in the name & on the life of his son, in which he had no insurable interest, under circumstances which satisfied the ct. that he intended it for his own benefit. The son died intestate & the father took out administration to his estate, & the insurance co. paid the money assured by the policy to him:—*Held*: although as between the insurer & the co. the policy was illegal & void under Life Assurance Act, 1774 (c. 48), yet, as between the father & the estate of the son, the father was entitled to retain the money for his own benefit.—**WORTHINGTON v. CURTIS (1875), 1 Ch. D. 419; 45 L. J. Ch. 259; 33 L. T. 828; 24 W. R. 228, C. A.**

*Annotations:—Folld. A.-G. v. Murray, [1904] 1 K. B. 165. Rejd. British Workman's & General Assoc. v. Cunliffe (1902), 46 Sol. Jo. 360.*

**3059. ——— Policy settled on son's marriage—Payment to trustees of settlement.]—**A father effected with an insurance co. a policy of insurance on the life of his son, & paid all the premiums due in respect of it. By a deed of settlement made in contemplation of the son's marriage, the father, with the approbation of the son, assigned the policy to trustees upon trust to invest the policy-money when paid, & to pay the income thereof after the death of the son to the son's intended wife for her life, & after her death as therein directed. It did not appear that the father had any insurable interest in the son's life. On the death of the son, who survived his father, the insurance co. paid the policy money to the trustees, who invested it, & applied the income as directed by the settlement:—*Held*: even assuming that the policy as between the father & the insurance co. was void for want of insurable interest under the Life Assurance Act, 1774 (c. 48), yet the policy money, having in fact been paid to the trustees by the insurance co. was held by them on the trusts of the settlement, inasmuch as such payment must be treated as made in respect of the policy, & all the same consequences must follow as if the Act of 1774 had not been passed.—**A.-G. v. MURRAY, [1904] 1 K. B. 165; 73 L. J. K. B. 66; 89 L. T. 710; 68 J. P. 89; 52 W. R. 258; 20 T. L. R. 137, C. A.**

*Annotations:—Rejd. A.-G. v. Lethbridge (1905), 2 K. B. 323. Mentd. A.-G. v. Pearson, [1924] 2 K. B. 375.*

#### **E. Other Cases.**

**3060. Joint ownership—Whether constitutes partnership.]—**Where two persons joined in the purchase of a policy of insurance upon a life; &

on the dropping of the life, one of them received the whole of the money from the insurance office:—*Held*: the other might maintain an action at law against his companion for his half of the money; there being no other transaction in which they had a joint interest.—**BYWATER v. MILLER (1830), 9 L. J. O. S. K. B. 64.**

*See, generally, PARTNERSHIP.*

**3061. Debtor entitled to annuity in right of wife—Insurance by creditor on life of wife—Death of wife before debtor.]—**A., being entitled in right of his wife to an annuity during the joint lives of R. & T., & the life of the survivor of them, joined with his wife in assigning the same to B. by way of mtge., for securing a debt of £300 & interest; & the deed contained an agreement that it should be lawful for B. in case of the death of either of them, R. & T., to insure the life of the survivor, & that the premiums, etc., payable on such insurance should be a charge upon the premises. B., without the knowledge of A. or his wife, insured the life of the wife for £200. In 1835 the wife of A. died, & thereupon B. received the £200 from the insurance office. In 1840 A., as administrator to his late wife, filed his bill against B., claiming to be entitled to set off the £200 against the mtge. debt, & to be let in to redeem on payment of the balance:—*Held*: B. had an insurable interest in the life of A.'s wife, as, in the event of her surviving A., the security of B. would have been gone; but, as between B. & the insurance office, the contract on the policy was one of indemnity merely & the £200 were paid by the office in their own wrong; & A. had no interest in the money so paid, & was not entitled to have it set off against the debt due upon the mtge.—**HENSON v. BLACKWELL (1845), 4 Hare, 434; 14 L. J. Ch. 329; 5 L. T. O. S. 191; 9 Jur. 390; 67 E. R. 718.**

*Annotations:—Rejd. Dalby v. India & London Life Assoc. (1854), 15 C. B. 365; Lea v. Hinton (1854), 19 Beav.*

**3062. Onus of proof—Policy in name of one on life of another—Premiums paid by latter.]—**Where A. pays the premiums upon a policy on his life, but the benefit of it is claimed by B., the *onus* of proof lies on the latter, even though the policy stands in his name.—**PFLEGER v. BROWNE (1860), 28 Beav. 391; 54 E. R. 416.**

**3063. Policy money received by mortgagee—Right to retain surplus—In respect of simple contract debt.]—**A mtgee. of a policy who, after the mtgor.'s death, has received the policy moneys & paid his mtge. debt, is simply a trustee of the surplus for the mtgor.'s estate, & cannot retain it to satisfy a simple contract debt due to himself in preference to the claims of other creditors.

The fact of his being the mtgor.'s exor. gives him no right so to retain the surplus in preference to creditors of a higher degree.—**TALBOT v. FRERE (1878), 9 Ch. D. 568; 27 W. R. 148.**

*Annotations:—Folld. Re Gregson, Christison v. Bolam (1887), 36 Ch. D. 223. Mentd. Roxburghe v. Cox (1881), 17 Ch. D. 520; Re Hankey, Cunliffe-Smith v. Hankey, [1899] 1 Ch. 541; Re Gedney, Smith v. Grummitt, [1908] 1 Ch. 804; Re Sutherland, Michell v. Bubna, [1914] 2 Ch. 720; Re Thorne, [1914] 2 Ch. 438.*

**3064. ——— Right to set off surplus—Against arrears of annuity granted by mortgagor.]—**

#### **PART IV. SECT. 14, SUB-SECT. 1.—E.**

**h. Husband insured by wife & children.]—****FRASER v. PHOENIX MUTUAL LIFE INSURANCE CO. (1875), 36 U. C. R. 422.—CAN.**

**k. Name of third party included by mistake.]—**A municipal corpn. effected insurance on all *bona fide* residents of the municipality who were members of the Canadian Overseas

forces. The name of pltf.'s husband was included by mistake. There was no contract between pltf. & the municipality or the co.:—*Held*: his wife could not recover upon his death.

**l. Policy in name of member of firm—Premiums paid by firm.]—**Two trading cos. obtained, in the name of a partner

of both firms, an advance from an insurance office, repayable by instalments, upon the security of a policy of insurance which they opened on the life of that partner. The policy was payable to the "exors., administrators & assigns" of insured, but the premiums were paid by the cos. Upon the death of insured:—*Held*: the proceeds of the policy belonged to the firms.—**FORRESTER v. ROBSON'S**



G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mtgees. After the death of G. the mtgees. received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy:—*Held*: they had no right to set off the balance against the exor. in respect of arrears of the annuity.—*Re GREGSON, CHRISTISON v. BOLAM* (1887), 36 Ch. D. 223; 57 L. J. Ch. 221; 57 L. T. 250; 35 W. R. 803.

*Annotations*:—*Consd. Re Thorne*, [1914] 2 Ch. 438. *Refd. Watkins v. Lindsay* (1898), 67 L. J. Q. B. 362; *Re Gedney, Smith v. Grummitt*, [1908] 1 Ch. 804.

#### SUB-SECT. 2.—LIENS ON THE POLICY AND THE MONEYS SECURED THEREBY.

##### A. For Premiums paid by other than Sole Beneficial Owner.

*See, generally*, LIEN; MORTGAGE.

**3065. General rule.**—(1) *Feme covert*, out of her separate income, pays the premiums on certain policies of assurance, which, by a settlement made previously to her marriage were assigned as a collateral security for a provision settled upon her under that instrument by the covenant of her husband:—*Held*: upon the money secured by the policies becoming payable, she was entitled to a lien on the policy fund for the amount of the premiums so paid.

(2) The voluntary payment of premiums on a policy of assurance confers on the payer no interest in the policy.—*BURRIDGE v. ROW* (1842), 1 Y. & C. Ch. Cas. 183; 11 L. J. Ch. 369; 6 Jur. 121; 62 E. R. 846; *affd.* (1844), 13 L. J. Ch. 173, L. C.

*Annotations*:—*As to* (1) *Refd. Re Jewell's Settlement*, *Watts v. Public Trustee*, [1919] 2 Ch. 161. *As to* (2) *Appld. Clack v. Holland* (1854), 19 Beav. 262. *Folld. Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552. *Appld. Falcke v. Scottish Imperial Insce.* (1886), 34 Ch. D. 234. *Refd. West v. Reed* (1843), 7 Jur. 147; *Re M'Kenna's Estate, Ex p. Busteed* (1861), 5 L. T. 241. *Generally, Mentd. Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164.

**3066.** —.]—When a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following cases: (a) by contract with the beneficial owner; (b) by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; (c) by subrogation to their right of some person who, at the request of trustees, had advanced money for the preservation of the property; (d) by reason of the right of a mtgee. to add to his charge any money paid by him to preserve the property. In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy.—*Re LESLIE, LESLIE v. FRENCH* (1883), 23 Ch. D. 552; 52 L. J. Ch. 762; 48 L. T. 564; 31 W. R. 561.

*Annotations*:—*Expld. Re Winchelsea's Policy Trusts* (1888), 39 Ch. D. 168. *Consd. Strutt v. Tippet* (1890), 62 L. T. 475; *Re Phillips*, [1914] 2 K. B. 689. *Appld. Re Jones' Settlement*, *Stunt v. Jones*, [1915] 1 Ch. 373. *Refd. Leigh v. Dickeson* (1883), 12 Q. B. D. 194; *Falcke v. Scottish Imperial Insce.* (1886), 34 Ch. D. 234; *The Ripon City,*

[1898] P. 78; *Kenrick v. Mountateven* (1899), 48 W. R. 141; *Re Fitzgerald, Surman v. Fitzgerald* (1904), 90 L. T. 266; *Re Pearce*, [1909] 2 Ch. 492; *Re Stokes, Ex p. Mellish*, [1919] 2 K. B. 256.

**3067.** —.]—By indentures of assignment testator assigned to M. two policies on the life of testator. Testator lived in England, but M. for many years acted as solr. & land agent for testator on his estate in Ireland. The policies were assigned by testator to M. as trustee to secure to mtgees. the repayment of a loan on the Irish property. M. acted as solr. both for testator & the mtgees. M. died on July 19, 1889, & testator died on Mar. 14, 1890. C., widow & extrix. of M., claimed in a creditor's action to have a lien on the proceeds of the policies in ct. for two sums of money: (a) in respect of professional charges of M. acting as solr. to testator; (b) partly for work done as a land agent, & partly for two insurance premiums paid by M. for testator. The chief clerk allowed a claim made by the mtgees., but disallowed the claim of C. to be entitled to a lien on the proceeds of the policies. On summons by C. to vary the chief clerk's certificate:—*Held*: (1) the solr.'s lien could not be extended to the claim in respect of land agency; (2) C. was entitled to be repaid out of the fund in ct. the premiums paid by the late M.; (3) as to the professional charges as solr., M.'s lien was preserved subject to the mtge., & the chief clerk's certificate must be varied by finding that C. was entitled to be paid the two sums, except in respect of the land agency, & must have her costs.—*Re WALKER, MEREDITH v. WALKER* (1893), 68 L. T. 517; 3 R. 455.

**3068. Whether doctrine of salvage applies.**—The mtgor. of a policy of insurance became bkpt., but, notwithstanding his bkpcy., continued to pay the premiums on the policy:—*Held*: the premiums so paid were in the nature of salvage moneys & ought to be repaid, with interest at 4 per cent., out of the policy moneys.—*SHEARMAN v. BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.* (1872), L. R. 14 Eq. 4; 41 L. J. Ch. 466; 26 L. T. 570; 20 W. R. 620.

*Annotations*:—*Expld. Saunders v. Dunman* (1878), 7 Ch. D. 825. *Consd. Falcke v. Scottish Imperial Insce.* (1886), 34 Ch. D. 234. *Refd. Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552.

**3069.** —.]—E. mortgaged a policy of life assurance to F., & afterwards filed a petition for liquidation. Resolutions of creditors were passed, under which E.'s friends were to pay 2s. in the pound on the unsecured debts, & the trustee was to assign to a nominee of the friends all E.'s property except the equities of redemption in the securities held by secured creditors. The terms of these resolutions were carried out, & E. obtained his discharge. Shortly after this, in 1883, E. agree with D., who professed to be F.'s agent, for the purchase of F.'s interest in the policy, but no such purchase was ever carried out. Shortly after this agreement D. informed E. that none of the incumbrancers would pay the premium for that year, & E. paid it on the faith, as he deposed, of his interest under the agreement. There was no evidence that D. had any authority to enter into any agreement on behalf of F., or that F. had any knowledge of the contract or of the payment by

TRUSTEES (1875), 2 R. (Ct. of Sess.) 755; 12 Sc. L. R. 464.—SCOT.

*m. Insurance of son by fath. Son as beneficiary—Whether delivery of policy necessary.*—*CARMICHAEL v. CARMICHAEL'S EXECUTRIX*, [1920] S. C. (H. L.) 195.—SCOT.

PART IV. SECT. 14, SUB-SECT. 2.—A. **3068 i. Whether doctrine of salvage**

*applies.*—The wife & her sister kept alive four insurance policies upon the life of F. by paying the premiums for several years before his death. Three of these policies were made payable to F.'s wife & as to the fourth, F. gave a declaration that it was to be for the benefit of his wife, who was in possession of the policies. The sister, & the exor. of the wife claimed, against the exor.

of F. to be repaid out of the fruits of these policies, the sums which had been so paid for the premiums:—*Held*: the payments were voluntary & the claimants had no lien by virtue of any contract or by way of salvage or otherwise & their claim failed.—*FIDELITY TRUST CO. v. FENWICK* (1921), 51 O. L. R. 23; 64 D. L. R. 647.—CAN.

**Sect. 14.—Title to the policy and the insurance money: lien: Sub-sect. 2, A.]**

E. F.'s representative, Mrs. F., brought an action to enforce her security, & the policy was sold for much less than the amount of the mtge. debt:—*Held*: E.'s payment of a premium in his character of owner of the equity of redemption could not give him a lien in priority to the mtge. debt; E.'s belief that he had a valid contract for purchase, when he had not, could not give him any advantage as regarded the premium, there being nothing to show that F. knew of the alleged contract or of the payment of the premium; in this state of the evidence no request from F. to pay the premium could be inferred, & no equity could be held to have arisen against F. on the ground of acquiescence or lying by; & the fact that the policy had been preserved by E.'s payment did not give him a right to have the premium repaid nor give him a lien on the policy for it, & the whole proceeds of sale must be paid to Mrs. F. without deducting the premium.—*Semble*: the maritime doctrine of salvage has no application to the payment of premiums on a policy.—*FALCKE v. SCOTTISH IMPERIAL INSURANCE CO.* (1886), 34 Ch. D. 234; 56 L. J. Ch. 707; 56 L. T. 220; 35 W. R. 143; 3 T. L. R. 141, C. A.

*Annotations*:—*Consd.* *Re Coventry & Nuneaton Tram. Co.* (1888), 4 T. L. R. 458; *Re Winchilsea's Policy Trusts* (1888), 39 Ch. D. 168; *Strutt v. Tippet* (1889), 61 L. T. 460. *Distd.* *Re Walker, Meredith v. Walker* (1893), 68 L. T. 517. *Consd.* *Re McKerrell, McKerrell v. Gowan* (1912), 82 L. J. Ch. 22; *Re Phillips*, [1914] 2 K. B. 689. *Reid.* *Re Winn, Reed v. Winn* (1887), 57 L. T. 382; *Patten v. Bond* (1889), 60 L. T. 583; *Securities & Properties Corp. v. Brighton Alhambra* (1893), 62 L. J. Ch. 566; *The Gas Float Whitton, No. 2*, [1896] P. 42; *The Ripson City*, [1898] P. 78. *Mentd.* *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Keighley, Maxsted v. Durant*, [1901] A. C. 240; *Re National Motor Mail-Coach Co., Clinton's Claim*, [1908] 2 Ch. 515; *Re Becket, Purnell v. Paine*, [1918] 2 Ch. 72.

**3070. Trustee—Of marriage settlement.]—**(1) A trustee having a duty to keep up a policy, & the means of procuring funds for that purpose, can himself acquire no lien on the policy for premiums paid out of his own moneys, nor can he give any lien thereon to a third party who advances money for that purpose & which is so applied.

(2) If a trustee has no funds properly applicable for keeping up a trust policy, he may advance or borrow money to pay the premiums, & the amount will be a lien on the policies.

(3) A policy was held on trust, the trustee assigned it to B. to secure some premiums. It being held that B., under the circumstances, had no lien on the policy, it was also held, that he had obtained no priority over the *cestuis que trust* by first giving notice of the assignment to the assurance office.—*CLACK v. HOLLAND* (1854), 19 Beav. 262; 24 L. J. Ch. 13; 24 L. T. O. S. 49; 18 Jur. 1007; 2 W. R. 402; 52 E. R. 350.

*Annotations*:—*As to* (1) *Consd.* *Saunders v. Dunman* (1878), 7 Ch. D. 825; *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552. *As to* (3) *Reid.* *Ashwin v. Burton* (1862), 32 L. J. Ch. 196. *Generally, Mentd.* *Williams v. Higgins* (1868), 17 L. T. 525; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546; *Re Hurst, Addison v. Topp* (1890), 63 L. T. 665; *Re Roberts, Knight v. Roberts* (1897), 76 L. T. 479; *Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 509.

**3071. — Trust income applicable in paying premiums—Policy not vested in trustee.]—**Under the provisions of a private estate Act the trustee of a term of years in certain settled estates, of which W. had been tenant for life, was bound to apply the rents of the estates, first, in the payment from time to time of the interest upon certain incumbrances existing before the passing of the Act, & subject thereto in the payment

from time to time of the interest on sums to be raised by W. by mtges. created under the powers conferred by the Act, & of the premiums on policies of life assurance, constituting the collateral security for the repayment of those sums, the equity of redemption being reserved to W. The rents having become insufficient, the trustee, in order to save one of the policies from lapsing, paid a premium out of his own moneys. He did this without any request from the mtgee. or from the owner of the equity of redemption of the policy. The life insured having dropped, & the proceeds of the policy having been received by the mtge.:—*Held*: the trustee was not entitled to any lien on the proceeds in respect of the premiums which he had paid, he not being a trustee of the policy.—*Re WINCHILSEA'S (EARL) POLICY TRUSTS* (1888), 39 Ch. D. 168; 58 L. J. Ch. 20; 59 L. T. 167; 37 W. R. 77.

*Annotation*:—*Reid.* *Strutt v. Tippet* (1889), 61 L. T. 460.

**3072. Stranger—Advancing money to trustee of settled policy.]—***CLACK v. HOLLAND*, No. 3070, *ante*.

**3073. Mortgagee—Covenant by mortgagee to pay premiums.]—**An employee was indebted to his firm, & by way of security for the debt he assigned a life policy to a member of the firm, in which assignment the mtgee. covenanted to pay the premiums on the policy with a proviso that the premiums so paid were to be debited to the mtgor. in the books of the business:—*Held*: the covenant by the mtgee. to pay the premiums did not deprive him of the right to add the premiums to the debt.—*SHAW v. SCOTTISH WIDOWS' FUND ASSURANCE SOCIETY* (1917), 87 L. J. Ch. 76; 117 L. T. 697.

**3074. Mortgagor of policy—Or his representative.]—**A., being mtgee. of a policy of assurance, gave B. an equitable charge on it to secure payment of a certain sum. A. paid the premiums on the policy down to his death, & his administrator paid them down to 1868, when the policy moneys became due by the expiration of the life insured:—*Held*: A.'s administrator was entitled to priority over B. in respect of the moneys which he had expended out of A.'s estate in payment of premiums on the policy, but not in respect of the premiums paid by A. in his lifetime.—*NORRIS v. CALEDONIAN INSURANCE CO.* (1869), L. R. 8 Eq. 127; 38 L. J. Ch. 721, 20 L. T. 939; 17 W. R. 954.

*Annotation*:—*Reid.* *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552.

**3075. — — — Payment by mortgagor after bankruptcy.]—***SHEARMAN v. BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.*, No. 3068, *ante*.

**3076. — — — In belief that he had contracted to repurchase.]—***FALCKE v. SCOTTISH IMPERIAL INSURANCE CO.*, No. 3069, *ante*.

**3077. Tenant for life—Where trustees have power to pay premiums.]—**The tenant for life of an estate, the investments of which the trustees had power to continue, paid the premiums for thirty-three years on a life policy which was included in the estate. Soon after the insured life fell in the tenant for life died:—*Held*: the policy money must be paid to the trust estate, the tenant for life having no lien.—*Re WAUGH'S TRUSTS* (1877), 46 L. J. Ch. 629; 25 W. R. 555.

**3078. Assignee of equity of redemption—Mortgaged property & policy included in one mortgage—Covenant by mortgagor to pay premiums.]—**A., the owner of land, & also of a policy of life assurance on his own life in the office of the B. co., mortgaged both these properties to the B. co. It was provided that the mtge. debt should be



reduced by instalments, & the mtge. deed contained a covenant by A. to pay the premium on the policy, & a power of sale was given to the mtgees. (*inter alia*), if there should be a breach of the covenant, to keep up the policy. A. sold the land subject to the mtge. to C., but retained the policy, & agreed to pay the premiums. He afterwards failed to pay the premiums. The B. co. thereupon called upon C. to pay the premiums, & threatened to call in the mtge. & exercise their power of sale if he failed to do so. C. accordingly paid the premiums, & claimed to have it declared that he was entitled to a lien on the policy for the premiums so paid:—*Held*: (1) C. was not under the circumstances entitled to any lien on the policy; (2) C. might have been entitled to a lien if the terms of the agreement between him & A. had not by implication excluded it, & the list of persons in *Re Leslie*; *Leslie v. French*, No. 3066, *ante*, who may obtain a lien on a policy is not exhaustive.—*STRUTT v. TIPPETT* (1889), 62 L. T. 475, C. A.

*Annotation*:—As to (1) *Reid*. *Re McKerrell*, *McKerrell v. Gowans*, [1912] 2 Ch. 648.

**3079. One of two joint owners—At request of other joint owner.**—In 1892 pltf. & her husband effected in their joint names a policy of assurance on their joint lives to be payable upon the death of whichever of them should first die. They had previously agreed that each should pay one-half of the annual premiums, & in some years the premiums were so paid, but the husband from time to time became unable to pay his moiety, & then pltf. at his request paid it for him out of her own moneys. They both concurred in creating charges upon the policy, & subsequently the husband executed a deed of assignment for the benefit of his creditors, assigning all his property, but not specifically mentioning the policy, to deft. as trustee. No notice of this deed was given to the insurance co. At the time of the husband's death the aggregate of the premiums paid by pltf. on his behalf exceeded in amount one moiety of the balance of the policy moneys remaining after payment of the joint charges. Upon a summons to determine the respective rights & interests of pltf. & deft.:—*Held*: (1) pltf. being the legal owner of the policy, deft., whose only claim was in equity, must do equity; & pltf. was entitled to set off her claim against her husband for the portion of the premiums paid on the policy by her at his request; (2) pltf., one of the joint owners of the policy, having paid premiums at the request & on behalf of the other co-owner, was, in the circumstances, entitled to a lien on the policy moneys for the premiums so paid by her.

*Qu.*: whether in the circumstances the deed of assignment transferred or conveyed to deft. any interest whatever, either legal or equitable, in the policy or the moneys thereby secured, although, *semble*, it might have passed to deft. the right to all the policy moneys if the husband had survived pltf.—*Re MCKERRELL*, *MCKERRELL v. GOWANS*, [1912] 2 Ch. 648; 82 L. J. Ch. 22; 107 L. T. 404; 6 B. W. C. C. N. 153.

**3080 i. Sub-mortgagee.**—*Re POWER'S POLICIES*, [1899] 1 L. R. 6, 12.—*IR*.

*n. Trustee.*—T. insured his life, & gave notice to the co. that he had ceded the policy to his wife "for the benefit of herself & our children," who were all minors. The co. acknowledged the cession as being to the wife. The wife died. At the date of the cession T. had been solvent, but he

then fell into pecuniary difficulties. C., a friend, advised him to keep up the policy, & advanced some of the premiums. Afterwards C. took possession of the policy, & paid the premiums himself. He took over the policy with T.'s consent, on behalf of the children, who were minors, & to secure himself for his advances. In 1886 T. died, & without the policy, his estate was insolvent:—*Held*: C.

**3080. Sub-mortgagee.**—In 1858, C., a married woman, effected a policy on her own life which provided that if she elected to pay, during the first seven years, one-half of the annual premiums, the unpaid half premiums were to be a debt at 5 per cent., interest due to the insurance co., & the unpaid premiums with interest should be held as a claim against the policy at settlement. The assured availed herself of the option, & in 1867 she deposited the policy with W. to secure money advanced. In 1879 W. deposited the policy with Y. to secure money advanced. Y. died in Sept. 1905. From Sept. 1880, to the death of the assured in Nov. 1913, the interest on the half premiums & the renewal premiums had been paid by Y. or persons claiming under him. The exor. of C. now claimed the policy moneys as against the representatives of Y.:—*Held*: the policy being a reversionary chose in action in personality, neither W. nor Y. could require any title from C., but as the relationship of mtgor. & mtgee. had been established by the keeping down of the interest on the unpaid premiums, the exor. of C. could only redeem on payment of such interest, & of the renewal premiums with interest on the latter at 4 per cent.

It is contended that being a reversionary chose in action in personal estate, it could only effectually be assigned or charged by C. by an assurance by deed under Married Women's Reversionary Interests Act, 1857 (c. 57). I think that contention is sound (EVE, J.).—*Re CITY OF GLASGOW LIFE ASSURANCE CO., CLARK'S POLICY* (1914), 84 L. J. Ch. 684; 112 L. T. 550.

**3081. Wife—Policies settled as collateral security for settlement.**—*BURRIDGE v. ROW*, No. 3065, *ante*.

**3082. — Policies settled by husband.**—Policies on a husband's life were settled by a marriage settlement, the wife taking the first life interest. The husband covenanted to pay the premiums, but, owing to his want of means, the wife, in order to prevent the policies lapsing, paid the premiums voluntarily & without any request by the trustees. On the husband's death the trustees received the policy moneys:—*Held*: the wife was not entitled to a lien for the premiums.—*Re JONES' SETTLEMENT*, *STUNT v. JONES*, [1915] 1 Ch. 373; 84 L. J. Ch. 406; 112 L. T. 1067; 59 Sol. Jo. 364.

**3083. — Of bankrupt.**—The principal established by *Ex p. James* (1874), L. R. 9 Ch. 609, that the Ct. of Ch. will not allow its officer, the trustee in bkpcy., to retain moneys for distribution amongst the creditors, where it would be contrary to fair dealing to do so, is not confined to the case of money paid under a mistake of law, but is of general application.

The bkpt. having assigned a policy on his own life by way of mtge. to his bankers, requested his wife on the eve of his bkpcy. to pay the premiums & interest for him, & she, after paying one premium before the commencement of the bkpcy., paid the premiums & interest during his bkpcy. until his death, when the policy moneys were received by the mtgees., who retained thereout the amount due to them on their mtge. & paid

had a lien on the policy for the premiums paid by him.—*THORPE'S EXECUTORS v. THORPE'S TUTOR* (1886), 4 S. C. 488.—*S. AF*.

*o. Tenant for life.*—*MONEY v. GIBBS* (1837), 1 Dr. & Wal. 394.—*IR*.

*p. Wife.*—Deceased insured his life & by the policy the insurance money was appropriated in favour of his wife, but by his will he absolutely



## INSURANCE.

*Sect. 14.—Title to the policy and the insurance money: lien: Sub-sect. 2, A., B. & C.; sub-sect. 3. Sect. 15: Sub-sect. 1.]*

the balance to the official receiver. The wife claimed to be repaid out of the balance the sums she had paid for premiums & interest. The official receiver had no previous knowledge that the wife had been making these payments, but it subsequently appeared that this fact had been disclosed by bkpt. in his preliminary examination taken before a former official receiver. The official receiver moved for a declaration that he was entitled to retain the balance of the policy moneys as part of the bkpt.'s estate:—*Held*: even assuming that all the payments were made during the bkpcy., the ct. ought not to allow the official receiver, having regard to the knowledge of his predecessor, to retain the policy moneys without repaying to the wife the sums she had paid for premiums & interest.—*Re TYLER, Ex p. OFFICIAL RECEIVER*, [1907] 1 K. B. 865; 76 L. J. K. B. 541; 97 L. T. 30; 23 T. L. R. 328; 51 Sol. Jo. 291; 14 Mans. 73, C. A.

*Annotations*:—*Distd. Tapster v. Ward* (1909), 101 L. T. 503; *Re Phillips*, [1914] 2 K. B. 689. *Consd. Re Stokes, Ex p. Mellish*, [1919] 2 K. B. 256. *Mentd. Re Hall, Ex p. Official Receiver*, [1907] 1 K. B. 875; *Wells v. Wells*, [1914] P. 157; *Re Craig, Ex p. Hinchcliffe* (1916), 115 L. T. 157; *Re Thellusson, Ex p. Abdy*, [1919] 2 K. B. 735; *Re Wigzell, Ex p. Hart*, [1921] 2 K. B. 835; *Scranton's Trustee v. Pearce*, [1922] 2 Ch. 87; *Re Wilson, Ex p. Salaman v. Keith, Prowse* (1925), 133 L. T. 814.

**3084. Bankrupt.]**—A. having, in Oct. 1879, effected a policy of assurance on his own life, presented a petition in Dec. 1879, for the liquidation of his affairs by arrangement without disclosing the existence of the policy upon which only one premium had been paid & which had no surrender value. In Oct. 1880, the liquidation was closed. Subsequent premiums were paid by A. until his death in 1907. A.'s legal personal representative then claimed the policy money as against the official receiver, who represented the trustee in the liquidation proceedings:—*Held*: the trustee having been absolutely ignorant of the existence of the policy, & the payments for premiums in respect thereof having been made by debtor himself without the knowledge of the trustee, the official receiver was entitled to the policy money.—*TAPSTER v. WARD* (1909), 101 L. T. 503, C. A.

*Annotations*:—*Folld. Re Phillips*, [1914] 2 K. B. 689; *Re Stokes, Ex p. Mellish*, [1919] 2 K. B. 256. *Mentd. Re Thellusson, Ex p. Abdy*, [1919] 2 K. B. 735.

**3085. —.]**—A bkpt. the year before his discharge became operative effected a policy on his own life at an annual premium, & kept the policy on foot for six years when he became bkpt. a second time & shortly afterwards died. The policy was disclosed in the second bkpcy. & the trustee in that bkpcy. received the policy moneys, which admittedly belonged to the trustee in the first bkpcy., who did not know of the existence of the policy:—*Held*: the trustee in the first bkpcy. as an officer of the ct. was under no obligation, legal, equitable, or moral, to allow out of the policy moneys to the trustee in the second bkpcy. the amount of the premiums debtor had paid.—*Re PHILLIPS*, [1914] 2 K. B. 689; 83 L. J. K. B. 1364; 110 L. T. 939; 58 Sol. Jo. 364; 21 Mans. 144.

*Annotations*:—*Folld. Re Stokes, Ex p. Mellish*, [1919] 2 K. B. 256. *Mentd. Re Thellusson, Ex p. Abdy*, [1919] 2 K. B. 735.

revoked this appropriation & directed that the money should become part of his estate & should be paid to his exor.:—*Held*: the widow was entitled to a charge in her favour for insurance premiums paid by her to keep the

policy in force.—*NATIONAL TRUST CO. v. HUGHES* (1902), 14 Man. L. R. 41.—*CAN*

*a. Agent for insurer.]*—*BUSTEED v. WEST OF ENGLAND INSURANCE CO.* (1857), 5 I. Ch. R. 553.—*IR.*

**3086. —.]**—The trustee of a debtor whose affairs were being liquidated by arrangement under Bkpcy. Act, 1869 (c. 71), carried on the business of the debtor for practically the whole period of the liquidation, & for that purpose engaged the debtor as his clerk at a salary. During the liquidation the debtor, without the trustee's knowledge, effected a policy on his life & continued to pay the premiums until his death. The liquidation having been closed, the trustee was released & the debtor obtained his discharge. After his discharge the debtor made a will by which he appointed his niece his extrix. The insurance co. having declined to pay the policy moneys to the extrix. until it had been determined whether they passed under the will of the debtor to her or belonged to the official receiver who was the present trustee in the liquidation:—*Held*: as the original trustee had no knowledge of the existence of the policy or of the payment of the premiums by the debtor, the case was governed by *Tapster v. Ward*, No. 3084, *ante*, & the moneys belonged to the official receiver as trustee.—*Re STOKES, Ex p. MELLISH*, [1919] 2 K. B. 256; 88 L. J. K. B. 794; 121 L. T. 391; 35 T. L. R. 345; [1918-19] B. & C. R. 208.

*Annotations*:—*Consd. Re Wigzell, Ex p. Hart*, [1921] 2 K. B. 835. *Refd. Re Thellusson, Ex p. Abdy*, [1919] 2 K. B. 735; *Scranton's Trustee v. Pearce*, [1922] 2 Ch. 87.

### B. Loans by Insurers.

**3087. Deposit with insurers as collateral security for loan—Default in payment of premiums.]**—P., being tenant for life of real estate, with remainder to his first & other sons by his then wife in tail male, remainder to himself in fee, applied to the N. U. Life Insurance Co. for a loan of £12,500; & the co. having agreed to lend the same, an indenture of mtge. was entered into between P. of the one part & four persons, who were the trustees of the co., of the other part. The trustees were not so named in the mtge. deed, which recited that there was no probability of the mtgor. having issue by his then wife; that a policy of insurance with the said co. had been effected, whereby three directors of the co. insured to the said four persons, trustees, the sum of £13,000, in case of the death of P., leaving male issue by his then wife, & in case P. should keep up the annual premiums regularly. The indenture then witnessed, that in consideration of £12,500 the life estate, & also the reversion in fee, of P. were conveyed to the four trustees by way of mtge.; & it was provided, that in case P. should neglect or refuse to pay the premiums, it should be lawful for the mtgees. to pay them, & that all such sums so paid by them should be charged on the hereditaments thereby conveyed. Subsequently another mtge. was entered into between the same parties by way of further charge, accompanied by a similar policy. P. paid the premiums on the policies for about four years; the directors then, at his request, reduced the amount of the premiums, & he continued to pay the reduced amounts for three years longer. P. then ceased to pay the premiums altogether. The co. debited his account in their books with the annual amounts, & added them to their mtge. debt. P. died without leaving issue male, & on taking the accounts in a mtgee.'s suit against the estate, the chief clerk disallowed

**PART IV. SECT. 14, SUB-SECT. 2.—B.**  
*r. Right of insurer to deduct loans & premiums from sum assured.]*—*GREEN v. STANDARD TRUSTS CO.* (1912), 20 W. L. R. 488; 1 W. W. R. 993; 1 D. L. R. 609.—*CAN.*

to the insurance co. the amounts with which they had debited the estate on account of the premiums. On motion to vary the chief clerk's certificate:—*Held*: the co. were entitled, by the terms of the indentures of mtge. to be allowed the sums with which they had so debited P.'s estate.—*FITZWILLIAM (EARL) v. PRICE* (1858), 31 L. T. O. S. 389; 4 Jur. N. S. 889.

#### C. Other Liens.

**3088. Policy deposited with agent—Whether for safe custody or security for balance of account—Question for jury.]**—Detinue for a policy of insurance for £1,500, effected upon the life of pltf.'s intestate, remaining in the hands of deft., his agent, & on which the latter claimed a general lien upon a balance of accounts between himself & deceased.

The policy was effected in the year 1810, & had been immediately placed in deft.'s hands; deft. had regularly paid the premium upon it; deft. both before & since the date of the policy had been in the habit of making advances for intestate, for which he never had any other security than the policy; the account was generally against intestate; & deft. had advanced to pltf. the money necessary to defray the expenses of taking out letters of administration.

Defendant is not an agent in the meaning of the word, which is necessary to confer a general lien. In a case like the present, a general lien can be claimed only in respect of a general balance of accounts, & we have no decisive evidence here that there ever existed any general balance of accounts between the parties. A special contract may raise a special lien, & I shall therefore leave it to the jury, as a question of fact, to say whether the policy of insurance was left in the hands of deft., merely as the agent of the intestate, for safe custody, or whether it was deposited with him as a security for his advances, telling them, that in point of law, in the former case, their verdict must be for pltf., & in the latter, for deft. (*ABBOTT, C.J.*).—*MUIR v. FLEMING* (1822), Dow. & Ry. N. P. 29, N. P.

*See, generally, AGENCY, Vol. I., pp. 547 et seq.*

**3089. Solicitor's lien—Surrender of policy for purpose of realisation—Lien extends to proceeds.]**—A solr.'s lien on his client's papers for the amount due to him in respect of professional services, is equivalent to a contract; & the ct. will not order the papers to be delivered up to the client, merely on payment into ct. of the amount due to the solr. *Seem*: however, the ct. would take care that the lien of a solr. on a document should not be productive of injury to or loss of the property to which the document related, & would direct it to be delivered up, if such a step were necessary for the preservation of the property, but without prejudice to the solr.'s lien thereon; & in the case of a policy of assurance, would order the proceeds arising therefrom to be paid into ct., subject to the same right of lien thereon as previously existed on the policy.—*RICHARDS v.*

#### PART IV. SECT. 14, SUB-SECT. 2.—C.

**t. Policy for benefit of wife & children—Rights of pledgee.]**—A policy of insurance effected by a man on his own life & expressed to be for the benefit of his wife & children cannot be pledged by assured by way of security so as to create a lien in favour of the pledgee.—*TWADDELL v. NEW ORIENTAL BANK CORPN.* (1895), 21 V. L. R. 171.—AUS.

#### PART IV. SECT. 15, SUB-SECT. 1.

**a. Ambiguity of payee.]**—*MOSS v.*

*PLATEL* (1841), 1 Cr. & Ph. 79; 10 L. J. Ch. 375; 5 Jur. 834; 41 E. R. 419, L. C.; *subsequent proceedings* (1842), 11 L. J. Ch. 409, L. C.

*Annotations*:—*Consd. Re South Essex Equitable Investment & Advance Co.* (1882), 46 L. T. 280; *Re Galland* (1885), 31 Ch. D. 296. *Refd. Cooper v. Hewson* (1843), 12 L. J. Ch. 446.

**3090. — Whether notice to insurers necessary—As against subsequent assignees.]**—A solr. who holds a policy of assurance on the life of his client, as a lien for that client's bill of costs, is not bound as against a subsequent assignee to give notice to the assurance co. that he holds it; for the solr. has no right against the fund, but merely a right to embarrass, by the non-production of the piece of paper on which the policy is written, any person who claims the fund; & the fact that the policy is not in the possession of the client is notice to all the world that the paper is held by some one else.—*WEST OF ENGLAND BANK v. BATCHELOR* (1882), 51 L. J. Ch. 199; 46 L. T. 132; 30 W. R. 364.

*Annotation*:—*Refd. Fairfield Shipbuilding & Engineering Co. v. Gardner, Mountain* (1911), 27 T. L. R. 281.

*See, generally, SOLICITORS.*

**By what law governed.]**—*See CONFLICT OF LAWS, Vol. XI., p. 400, No. 717.*

#### SUB-SECT. 3.—OTHER CASES.

**3091. Policy money payable to wife of insured—Cash value of policy taken by insured during life.]**—A husband took out an insurance policy for £500 on his life, & by the terms of the policy the insurance co. agreed to pay that sum to the insured's wife, if she were living at his death, or in the event of her prior death to pay it to the insured's exors., administrators & assigns. The policy contained a proviso that, if at the end of twenty years the insured was still living, he should have the right to exercise any of six specified options. The insured being then still living, he exercised an option to receive the entire cash value of the policy with its share of accumulated profits & to discontinue the policy. A sum of £288 thus became payable. The insurance co. were unwilling to pay over this sum except on the joint receipt of the husband & wife, & ultimately paid it into ct.:—*Held*: (1) the policy came within Married Women's Property Act, 1882 (c. 75), s. 11, & created a trust in favour of the wife in certain events; (2) the insured must be taken to have exercised the option for the benefit of the trust; & (3) unless the husband & wife came to an agreement, the fund must be accumulated in ct. until it could be ascertained by the death of either party who was entitled to it.—*Re FLEETWOOD'S POLICY*, [1926] 1 Ch. 48.

#### SECT. 15.—PAYMENT OF CLAIMS.

##### SUB-SECT. 1.—IN GENERAL.

**Necessity for representation—Deceased domiciled abroad.]**—*See Nos. 3120, 3121, post.*

**LEGAL & GENERAL LIFE ASSURANCE SOCIETY OF AUSTRALIA** (1875), 1 V. L. R. 315.—AUS.

**b. Payment "on delivery of policy."]**—Insurers agreed to pay insured, within thirty days after proof of the event insured against, on delivery of the policy duly discharged:—*Held*: delivery of the policy was not a condition precedent to an action to recover the policy moneys, the intention being that delivery of the policy & payment of the policy moneys should be concurrent acts.—*COULSON v. CITY*

**MUTUAL LIFE ASSURANCE CO., LTD.** (1907), 7 S. R. N. S. W. 782.—AUS.

**c. Place of payment.]**—To an action in Ontario on a policy payable in Montreal, defts. pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that defts. had no office in Ontario for the payment of moneys by them:—*Held*: a good defence.—*PRITCHARD v. STANDARD LIFE ASSURANCE CO.* (1884), 7 O. R. 188.—CAN.

**d. —.]**—By the terms of a



**Sect. 15.—Payment of claims: Sub-sects. 2, 3 & 4.]****SUB-SECT. 2.—PROOF OF DEATH.**

**Presumption of death.]—***See, generally, EVIDENCE, Vol. XXII., pp. 165 et seq.; EXECUTORS, Vol. XXIII., pp. 85 et seq.*

**3092. — While policy in force.]—**PATTERSON v. BLACK (1780), 2 Park's Marine Insurances, 7th ed., p. 644; 2 Marshall on Insurances, 3rd ed. p. 781.

*Annotation:—*Reid. Watson v. King (1815), 1 Stark. 121.

**3093. — Right of insurers to notice of application.]—**Where the estate of a person whose death the ct. was asked to presume consisted in part of a policy of assurance on his life, the ct. ordered that notice of the application should be given to the insurance co.—*In the Goods of BARBER* (1886), 11 P. D. 78; 56 L. T. 894; 35 W. R. 80.

**3094. — —.]—***In the Goods of MORIVIAN* (1902), 46 Sol. Jo. 587.

**3095. — —.]—***In the Goods of PEACOCK* (1902), 46 Sol. Jo. 603.

**3096. — —.]—***In the Goods of LORD* (1903), 47 Sol. Jo. 299.

**3097. Proof to satisfaction of directors—Reasonable satisfaction.]—**(1) A policy of insurance was entered into with a co. against bodily injury from any railway accident directly affecting the assured while travelling on any line of railway in Great Britain or Ireland by a passengers train propelled by steam power. One of the conditions in the deed of settlement of the co., which by the terms of the policy was incorporated with it, provided that, before payment of the sum insured by any policy, proof satisfactory to the directors of the co. should be furnished by claimant of the death or accident, together with such further evidence or information, if any, as the directors should think necessary to establish the claim:—*Held*: this must be understood to mean such evidence or information as the directors might reasonably, & not such as they might unreasonably & capriciously require.

(2) There was a condition indorsed on the same policy, that, in case of difference of opinion as to the amount of compensation payable in any

case, the question should be referred to the arbn. of a person to be named by the secretary for the time being of the Master of the Rolls, & all expenses & costs should be subject to the decision of such arbitrator, & the award made on such arbn. was to be taken as a final settlement of the question, & might be made a rule of Court:—*Held*: a reference to arbn. in the manner prescribed was rendered a condition precedent to bringing an action for an injury within the policy.—*BRAUNSTEIN v. ACCIDENTAL DEATH INSURANCE CO.* (1861), 1 B. & S. 782; 31 L. J. Q. B. 17; 5 L. T. 550; 8 Jur. N. S. 506; 121 E. R. 904.

*Annotations:—*As to (1) *Consd. Diggle v. Ogston Motor Co.* (1915), 84 L. J. K. B. 2165. *Reid. Stadhard v. Lee* (1863), 3 B. & S. 364. As to (2) *Reid. Elliott v. Royal Exchange Assce. Corpn.* (1867), 26 L. J. Ex. 129.

**3098. — Order under 6 Ann. c. 12—Whether sufficient.]—**Money was payable to a tenant *pur autre vie* under a policy, after proof, to the satisfaction of directors, of the death of the *cestui que vie*. An order was made under above Act that the *cestui que vie* ought to be deemed & taken to be dead under the statute & the remaindermen entered:—*Held*: the directors might reasonably require further evidence of the death of the *cestui que vie*.—*DOYLE v. CITY OF GLASGOW LIFE ASSURANCE CO.* (1884), 53 L. J. Ch. 527; 50 L. T. 323; 48 J. P. 374; 32 W. R. 476.

**Necessity for representation—Deceased domiciled abroad.]—***See* Nos. 3120, 3121, *post*.

**SUB-SECT. 3.—LOST POLICIES.**

**3099. Claim allowed—Right of claimant to interest.]—**Interest is not payable on a sum recovered, on a lost policy, from a life insurance co.—*BUSHNAN v. MORGAN* (1833), 5 Sim. 635; 58 E. R. 478.

**3100. Right of insurer's to indemnity—Payment under decree of court.]—***FIELD v. BARNEWALL* (1854), cited in L. R. 1 Eq. at p. 345; 35 Beav. at p. 256; 55 E. R. 894.

*Annotation:—**Apld. England v. Tredegar* (1866), L. R. 1 Eq. 344.

policy defts. agreed to pay at their head office in Ontario:—*Held*: a non-suit should not be granted on the ground that pltf. had failed to prove a demand at the head office.—*SEERY v. FEDERAL LIFE ASSURANCE CO. OF CANADA* (1907), 3 E. L. R. 59; 38 N. B. R. 96.—*CAN.*

**e. —.]—***Re MELLON ESTATE*, [1920] 3 W. W. R. 413; 53 D. L. R. 664.—*CAN.*

**f. To whom payment may be made—Trustee.]—**The latter part of Life, Fire, & Marine Insurance Act, s. 9, merely protects the insurers from claims by the insured when they have paid the trustee duly appointed under the Act. It does not exclude the implication that the insured has power to give a valid discharge for the moneys payable under the policy, either as legal owner or as trustee under the Act.—*MUTUAL LIFE INSURANCE CO. OF NEW YORK v. PECHOTSCH* (1905), 2 C. L. R. 823.—*AUS.*

**g. —.]—**A trustee appointed by will to receive all moneys payable under life insurance policies of testator is the proper person to receive the money, & his receipt therefor is a valid discharge of the liability of the co.—*DICKS v. SUN LIFE CO.* (1910), 15 O. W. R. 366; 20 O. L. R. 369.—*CAN.*

**h. — Guardian.]—***Held*: R. S. O., 1887, c. 136, s. 12, does not justify an insurance co. in paying the amount of a policy to a testamentary

guardian, the guardian there named being one who has given security.—*CAMPBELL v. DUNN* (1892), 22 O. R. 98.—*CAN.*

**k. — Executor.]—**Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed be paid to the exors., of the will of the insured.—*DODDS v. ANCIENT ORDER OF UNITED WORKMEN* (1894), 25 O. R. 570.—*CAN.*

**l. Costs of action to determine survivorship—Not payable out of insurance money.]—***BENNETT v. PEATTIE* (1925), 57 O. L. R. 233.—*CAN.*

**PART IV. SECT. 15, SUB-SECT. 2.**

**m. Presumption of death—Onus of proof.]—**In an action on a policy pltf. alleged that she had furnished proof of the death of insured on a certain date, & that all conditions were performed & all times elapsed to entitle her to payment. Defts. denied these allegations & put pltf. to strict proof thereof:—*Held*: pltf. was bound to prove the truth of her above allegations.—*RANDALL v. HOMELIFE ASSOCN.* (1899), 20 C. L. T. 49; 30 S. C. R. 97.—*CAN.*

**n. —.]—**Insured in a policy effected by him in favour of his wife & two of his children, which had not been varied by him, perished with his wife in a storm, & there was no evidence of survivorship. The personal representatives of the wife claimed a third share of the policy

moneys, which had been paid into ct.:—*Held*: the wife's representatives, being unable to prove that she was living at the time her husband died, were not entitled to the share claimed by them.—*Re PHILLIPS & CANADIAN ORDER OF CHOSEN FRIENDS* (1906), 12 O. L. R. 48; 7 O. W. R. 765.—*CAN.*

**o. — Authority of officer of society to waive proof.]—***Held*: the Chief Ranger of deft. co. by reason of the duty imposed on him by defts.' constitution to "see that justice is done to all parties" had authority to waive the production of formal proof of death.—*LINKE v. CANADIAN ORDER OF FORESTERS* (1915), 7 O. W. N. 516, 795; 8 O. W. N. 399; 33 O. L. R. 159.—*CAN.*

**30971. Proof to satisfaction of directors—Reasonable satisfaction.]—**H. insured his life with defts. By a policy under which defts. were only bound to pay after proof, satisfactory to the directors of the co. for the time being, of the cause of death had been given:—*Held*: the onus lay on the administrator of H. to give to the co. such proof of the drowning of H., & the proximate cause thereof, as ought reasonably to satisfy the co. that the drowning was the result of an accident.—*HARVEY v. OCEAN ACCIDENT & GUARANTEE CORPN.*, [1905] 2 I. R. 1, 26.—*IR.*

**p. Proof of cause of death.]—***BALLANTINE v. EMPLOYERS' INSURANCE CO. OF GREAT BRITAIN* 31 Sc. L. R. 230.—*SCOT.*



— — —.]—Sums secured by life policies alleged to have been lost or destroyed in the lifetime of the insurer, ordered to be paid to his administratrix by the insurance co. without any other indemnity than the decree of the ct.—*CROKATT v. FORD* (1856), 25 L. J. Ch. 552; 2 Jur. N. S. 436; 4 W. R. 426.

*Annotation*:—*Folld. England v. Tredegar* (1866), L. R. 1 Eq. 344.

**3102.** — — —.]—An insurance co. paying under a decree of the ct. the money payable under a lost policy are sufficiently indemnified by the decree, & are not entitled to any indemnity from the persons to whom the money is paid.—*ENGLAND v. TREDEGAR (LORD)* (1866), L. R. 1 Eq. 344; 35 Beav. 256; 35 L. J. Ch. 386; 55 E. R. 894.

**3103. Right of insurers to pay into court.**—Where an action was brought against a life insurance co. upon a life policy which had been lost, & the directors of the co. were of opinion that no sufficient discharge could otherwise be obtained:—*Held*: the provisions of the Life Assurance Companies (Payment into Court) Act, 1896 (c. 8), were applicable, & therefore leave should be given to defts. to pay the amount of the policy into the High Court under R. S. C. Ord. 54c, r. 3.—*HARRISON v. ALLIANCE ASSURANCE CO.*, [1903] 1 K. B. 184; 72 L. J. K. B. 115; 88 L. T. 4; 51 W. R. 281; 19 T. L. R. 89, C. A.

#### SUB-SECT. 4.—DISCHARGE OF INSURER.

**3104. By payment—Insurance calculated in foreign currency—Currency changed.**—In 1887 defts., an insurance co., issued a semi-tontine life policy on the life of pltf.'s husband, by which, in consideration of the payment in London of an initial premium of 2,149.80 reichsmarks & thereafter quarterly payments of 570 reichsmarks for twenty years, defts. promised to pay 60,000 reichsmarks on the death of pltf.'s husband. The policy became fully paid in 1907, & as from that date there were certain profit-sharing rights. Pltf.'s husband died in 1922, & the policy money became payable in this country in sterling. Pltf. claimed to be entitled to payment on the basis of gold marks. Defts. claimed to be entitled to pay the amount of the policy & accrued profits at the rate of exchange prevailing for reichsmarks when the payment became due. In deft.'s account the calculation of shares of profits had been made throughout on the basis of a continuous uniformity in the exchange value of the reichsmark:—*Held*: as the contract did not refer to gold marks but only to reichsmarks as a token of exchange, its true construction was that defts. undertook to pay in their office in this country a sum in sterling at the rate of exchange applicable to the German reichsmark on the date of payment.—*ANDERSON v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES* (1926), 42 T. L. R. 302, C. A.

**3105. Where policy assigned—Payment to assignee—Whether receipt of representative of insured necessary.**—It does not appear that the legal personal representative of a deceased party, who had assigned a policy of assurance on his life to secure a sum of money exceeding the amount of the policy, & had by the deed of assignment given the assignee full & absolute power to receive the money which should become due on the policy, is a necessary party to sign the receipt given to the assurance office.—*OTTLEY v. GRAY* (1847), 16 L. J. Ch. 512; 10 L. T. O. S. 262.

**3106.** — — — **Consent of representative of insured—Whether necessary.**—(1) In 1847 A. deposited a policy on his own life with B. as security for an advance of money, & died in 1874 insolvent, & no administration was taken out to his estate. In 1875 B. proved A.'s death to the satisfaction of the insurance co., & demanded payment of the policy moneys, which were insufficient to pay his debt, but the co. refused to pay him without the consent of the legal personal representative of A. In 1878 B. died, & on action brought by his exors. against the co. claiming a declaration that they were entitled to the policy moneys, & payment with interest from the time when the demand of payment was made. The judge held that the co. was justified in refusing to pay over the policy moneys without the consent of A.'s legal personal representative, dispensed with the legal personal representative of A. under the Chancery Amendment Act, 1852 (c. 86), s. 44, & ordered payment of the policy moneys, with interest at 4 per cent. from the date when demand of payment was made. On appeal on the question of interest:—*Held*: as the default of delay in payment of the policy moneys had been caused, not by the co., but by B.'s neglect to clothe himself with a legal title to the money, interest did not commence to run till the order for payment of the principal was made. (2) *Qu.*: whether, in an action by an equitable mtgee. of a life policy against the assurance co. claiming payment of policy moneys, the ct. has jurisdiction, under Chancery Amendment Act, 1852 (c. 86), s. 44, to dispense with the legal personal representative of the insured.—*WEBSTER v. BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.* (1880), 15 Ch. D. 169; 49 L. J. Ch. 769; 43 L. T. 229; 28 W. R. 818, C. A.

*Annotations*:—*As to* (1) *Refd. Re Drax, Saville v. Drax*, [1903] 1 Ch. 781. *As to* (2) *Consd. Curtius v. Caledonian Fire & Life Insce.* (1881), 19 Ch. D. 534. *Generally, Mentd. L. C. & D. Ry. v. S. E. Ry.*, [1892] 1 Ch. 120.

**3107.** — — — **Jurisdiction of court to dispense with.**—*WEBSTER v. BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.*, No. 3106, *ante*.

*See, generally, EXECUTORS*, Vol. XXIII., pp. 213, 214.

**3108.** — — — **Right of insurer to interplead on refusal.**—A life insurance co. received notice of an assignment, by an insurer, of a policy which the co. had granted, & the insurer afterwards became bkpt. Soon after the death of the person whose life was assured, the party to whom the assignment had been made applied for the payment of the sum due upon the policy, & the co. inquired of the assignees of the bkpt. whether there was any objection to payment being made to claimant. The assignees did not assent to the payment, but made no positive claim to the policy. In the meantime an action was brought upon the policy by claimant, in the name of the bkpt., against the co.:—*Held*: it was a case in which the co. were entitled to file their bill of interpleader against pltf. in the action, the bkpt., & his assignees; & the assignees, who had in the suit shown no title to the policy, must pay the costs.—*FENN v. EDMONDS* (1846), 5 Hare, 314; 67 E. R. 933.

*Annotations*:—*Overd. Desborough v. Harris* (1855), 5 De G. M. & G. 439. *Refd. Great Southern & Western Ry. v. Corry & Turquand* (1867), 15 W. R. 650.

**3109.** — — —.]—A life insurance co. received notice of an assignment by an insured of a policy, which the co. had granted, & the insured afterwards became insolvent. Soon after the death of the person whose life was insured, the assignee for value applied for payment of the

**Sect. 15.—Payment of claims: Sub-sects. 4, 5 & 6.]**

sum due upon the policy, & the co. inquired of the provisional assignee of the insolvent whether he would consent to payment being made to the assignee for value. The provisional assignee said he could not give such consent, but that it must be sought for from the ct. of Insolvent Debtors. The insolvent himself gave notice to the co. not to pay over the policy moneys to his assignee for value, on the ground that the debt for which it was assigned as a security was satisfied. In the meantime an action was brought upon the policy by the assignee for value, in the name of the insolvent, against the co.:—*Held*: it was not a case in which the co. were entitled to file their bill of interpleader against pltf. in the action, the insolvent & his provisional assignee, the insolvent having no title, & the title of his provisional assignee being subordinate to that of the assignee for value.—*DESBOROUGH v. HARRIS* (1855), 5 De G. M. & G. 439; 3 Eq. Rep. 1058; 26 L. T. O. S. 1; 1 Jur. N. S. 986; 4 W. R. 2; 43 E. R. 940. L. C.

*Annotations*:—*Refd.* *Great Southern & Western Ry. v. Cory & Turquand* (1867), 15 W. R. 650; *Crossley v. City of Glasgow Life Assco. Soc.* (1876), 46 L. J. Ch. 65; *Matthew v. Northern Assco.* (1878), 9 Ch. D. 80.

*See, generally, INTERPLEADER, pp. 446 et seq.*

**3110. — No claim by assignee—Right of insurer to proof that claim satisfied.]**—A. assured his life, & in Mar. 1852, assigned the policy to B. absolutely. B., in Dec. 1869, assigned the policy to C. absolutely. In Mar. 1875, A. died. The office admitted C.'s title to the policy money subject to production of evidence, that an assignment by way of mtge. made by A. in Mar. 1851, of which the office had notice, but on which no claim had ever been made, was satisfied; & on C.'s declining to comply with the requisition, in July, 1875, paid the money into ct. under the Trustee Relief Act, 1847 (c. 96):—*Held*: (1) Trustee Relief Act, 1847 (c. 96), until extended by Jud. Act, 1873 (c. 66), s. 25 (6), did not enable an assurance society having notice of conflicting claims to pay policy moneys into ct., unless the moneys were the subject of a trust; but the objection could not be entertained on a petition praying payment out of Ct. of moneys so paid in; (2) the requisition was proper, inasmuch as if the mtge. had not been satisfied, the mtgee. might, by virtue of the Policies of Assurance Act, 1867 (c. 144), have sued the office in his own name on his assignment.

(3) The assurance society were entitled to the costs as between solr. & client, but not to their charges & expenses.—*Re HAYCOCK'S POLICY* (1876), 1 Ch. D. 611, 45 L. J. Ch. 247; 24 W. R. 291.

*Annotation*:—*As to* (3) *Appld.* *Re Sutton's Trusts* (1879), 12 Ch. D. 175.

**3111. Where title to insurance money disputed—Right to pay into court—Trustee Relief Act, 1847 (c. 66).]**—Where, on the death of a party whose life has been insured in an assurance office, & disputes arise as to the parties entitled to the amount of the insurance, the assurance co. may pay the amount due from them into ct., under above Act.—*Re HALL* (1861), 5 L. T. 395; 10 W. R. 37.

*Annotations*:—*Folld.* *Re United Kingdom Life Assco.* (1865), 6 New Rep. 59. *Dbtd.* *Matthew v. Northern Assco.* (1878), 9 Ch. D. 80. *Refd.* *Re Webb's Policy* (1866), L. R. 2 Eq. 456; *Re Haycock's Policy* (1876), 1 Ch. D. 611.

**3112. — — — — —.]**—*Re ROSIER'S TRUSTS*, No. 3025, *ante*.

**3113. — — — — — Costs of insurers.]**—An insurance co., when a policy became payable,

received notice of several claims to it. They then paid the policy money into ct., under the provisions of the above Act:—*Held*: (1) where any person, by the force of circumstances, became a bare trustee, he might avail himself of the provisions of the Act; the insurance co. were trustees within the meaning of the Act; & they were therefore justified in paying the money into ct.

(2) Resps. to a petition for payment out of ct. of the policy money who had made an unfounded claim to it were held bound to pay the costs of petitioners & the insurance co.—*Re UNITED KINGDOM LIFE ASSURANCE CO.* (1865), 34 Beav. 493; 6 New Rep. 59; 34 L. J. Ch. 554; 12 L. T. 441; 11 Jur. N. S. 424; 13 W. R. 645; 55 E. R. 726.

*Annotations*:—*As to* (1) *Consd.* *Matthew v. Northern Assco.* (1878), 9 Ch. D. 80. *Refd.* *Re Haycock's Policy* (1876), 1 Ch. D. 611. *As to* (2) *Folld.* *Re Webb's Policy* (1866), L. R. 2 Eq. 456. *Generally, Mentd.* *Re Pettit's Estate* (1876), 1 Ch. D. 478.

**3114. — — — — —.]**—An assurance co. having received notice of conflicting claims to policy moneys, paid the moneys into ct. under above Act:—*Held*: the co. were entitled to their costs of appearance as between solr. & client, but not to any charges & expenses.—*Re WEBB'S POLICY* (1866), L. R. 2 Eq. 456; 35 L. J. Ch. 850; 14 L. T. 589; 12 Jur. N. S. 595; 14 W. R. 857.

*Annotations*:—*Folld.* *Re Cobbe's Policy* (1866), 15 W. R. 29. *Appld.* *Re Kerr's Policy* (1869), L. R. 8 Eq. 331. *Consd.* *Matthew v. Northern Assco.* (1878), 9 Ch. D. 80. *Refd.* *Re Haycock's Policy* (1876), 1 Ch. D. 611.

**3115. — — — — —.]**—Where an insurance co. paid insurance money into ct. under above Act, & the co. was afterwards served with & appeared on the petition to pay it out:—*Held*: the co. was entitled to costs as between solr. & client.—*Re COBBE'S SETTLEMENT* (1866), 15 L. T. 170; 15 W. R. 29.

**3116. — — — — — Where policy money not subject to trust.]**—*Re HAYCOCK'S POLICY*, No. 3110, *ante*.

**3117. — — — — —.]**—Money payable under a policy by a life assurance society on the death of the assured is not money held upon any trust, & cannot properly be paid into ct. under the Trustee Relief Act, 1847 (c. 66). On an action by the assignee of a policy against an assurance society, where a difficulty had arisen as to the title to the money, the ct. being satisfied that pltf. was entitled:—*Held*: the co. had not discharged themselves by paying the money due on the policy into ct., & they must pay to pltf. the amount, which on petition would be ordered to be transferred to them, with interest & costs.—*MATTHEW v. NORTHERN ASSURANCE CO.* (1878), 9 Ch. D. 80; 47 L. J. Ch. 562; 38 L. T. 468; 27 W. R. 51.

**3118. — — — — — Whether payment into court ordered—Pending suit before foreign court.]**—An assurance co. having its principal office in Edinburgh, & a branch office in London, issued a policy on which was indorsed a memorandum that the moneys to become payable thereunder should be payable to the exors., administrators or assigns of the assured at the office of the co. in London. On the death of the assured the policy money being claimed by the exor. of the assured who had proved the will in Scotland, & by pltf. as equitable mtgees. of the policy, the co. commenced an action in the Ct. of Session in Scotland, in order to have the conflicting claims adjudicated upon, & subsequently pltf. filed the bill in this suit against the co. & the exor. of the assured. On a summons taken out by pltf. that the co. might pay the policy moneys into ct.:—*Held*: the co. having admitted they had no interest in the money, must



pay it into ct. without being indemnified by pltf. from having to pay it into ct. in Scotland, although the practice of the Scottish cts. might be to require this to be done, notwithstanding the payment of the same sum into an English ct.—*COOK v. SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY* (1872), 26 L. T. 571.

**3119. Where no sufficient discharge can be given—Right to pay into court.]—***HARRISON v. ALLIANCE ASSURANCE CO.*, No. 3103, *ante*.

**3120. Insured domiciled abroad—Whether representation necessary.]—**(1) By Revenue Act, 1889 (c. 42), s. 9, "where a policy of life assurance has been effected with any insurance co. by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a ct. in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect of such policy":—*Held*: the words "establish the right to receive," are applicable to legal proceedings in which the title to the money payable upon the policy is established.

(2) Policies of life assurance were effected with an English insurance co. by a foreigner who died domiciled in Switzerland. By the policies respectively three directors of the co. whose hands were thereunto subscribed agreed that they would within three months after the decease of the assured should have been duly certified to the directors of the co. at their principal office pay out of the stock & funds of the co. to the exors. & administrators or assigns of the assured the sums of £300 & £700. Pltf., who was the testamentary exor. by Swiss law of the assured, brought an action, without taking out probates in the United Kingdom, against the insurance co. to recover the amount due on the policies, & proved that by Swiss law he had the right to recover debts due to the estate of the deceased, including the sums due under the policies:—*Held*: pltf. was within the words "exors. or administrators" in the policies; he had established the right to receive the money payable in respect of the policies within the meaning of the sect.; & he was therefore entitled to judgment for the amount less any English estate duties which might be payable thereon.

*Qu.*: whether pltf. was an assign of deceased within meaning of the policies.—*HAAS v. ATLAS ASSURANCE CO., LTD.*, [1913] 2 K. B. 209; 82 L. J. K. B. 506; 108 L. T. 373; 29 T. L. R. 307; 57 Sol. Jo. 446; 6 B. W. C. C. N. 87.

**3121. ———.]—**A French subject, resident in Egypt, mortgaged his policies to the insurance co., & subsequently assigned them to C. to secure a further loan. On his death the insurance co., after deducting what was due to them, paid

the balance of the policy moneys into ct., as there was a dispute as to who was entitled to them. C. obtained judgment in the French Consular Ct. in Egypt, that she was the only & lawful assignee of the policies. On a petition by her for payment out of the policy moneys:—*Held*: the petition need not be served on the other claimants, it was not necessary to take out representation here to the French subject, & no duty was payable.—*Re LOIR'S POLICIES* (1916), 60 Sol. Jo. 445.

Dispensing with representation generally, *see* EXECUTORS, Vol. XXIII., pp. 175 *et seq.*

**3122. ——— Right of insurer to retain for possible liability for estate duty.]—***HAAS v. ATLAS ASSURANCE CO., LTD.*, No. 3120, *ante*.

#### SUB-SECT. 5.—INTEREST.

*See, generally, MONEY & MONEY-LENDING.*

**3123. Whether payable—Money not paid on due date.]—**In covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A.—*HIGGINS v. SARGENT* (1823), 2 B. & C. 348; 3 Dow. & Ry. K. B. 613; 2 L. J. O. S. K. B. 33; 107 E. R. 414.

*Annotations*:—*Appld.* *Foster v. Weston* (1830), 6 Bing. 709; *Hill v. South Staffordshire Ry.* (1874), L. R. 18 Eq. 154. *Refd.* *Page v. Newman* (1829), 9 B. & C. 378; *Gaunt v. Taylor* (1834), 3 L. J. Ch. 135; *Frühling v. Schroeder* (1835), 2 Bing. N. C. 77; *Price v. G. W. Ry.* (1847), 16 L. J. Ex. 87; *The Northumbria* (1869), L. R. 3 A. & E. 6; *L. C. & D. Ry. v. S. E. Ry.*, [1892] 1 Ch. 120; *Swift v. Board of Trade* (1924), 93 L. J. K. B. 529.

**3124. ——— Conflicting claims—Money paid into court.]—***Re ROSIER'S TRUSTS*, No. 3025, *ante*.

**3125. ——— Delay not caused by default of company.]—***WEBSTER v. BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.*, No. 3106, *ante*.

**3126. ——— On lost policy.]—***BUSHNAN v. MORGAN*, No. 3099, *ante*.

#### SUB-SECT. 6.—RECOVERY BY INSURERS AFTER PAYMENTS.

**3127. Policy effected in fraud of insurance company—Payment of policy money to assignee—Both parties innocent of fraud.]—***LEFEVRE v. BOYLE*, No. 2989, *ante*.

*See, generally, MISREPRESENTATION & FRAUD.*

**3128. Payment of policy money under mistake—Non-payment of premiums.]—**Money paid with full means of knowledge, but under a forgetfulness of facts at the time of payment, which implies

#### PART IV. SECT. 15, SUB-SECT. 4.

**3120 i. Insured domiciled abroad—Whether representation necessary.]—***LOASBY v. THE HOME CIRCLE, WALKER & EGAN* (1893), N. B. Dig. 314.—CAN.

*q. Where title to insurance money disputed—Right to pay into court.]—*An insurance co. was allowed to pay into ct. the amount of a policy where it was claimed by two claimants.—*Re HEITNER & MANUFACTURERS' LIFE INSURANCE CO.* (1912), 23 O. W. R. 413; 4 O. W. N. 251; 6 D. L. R. 879.—CAN.

*r. Whether beneficiary can enforce payment—Where policy assigned—Will.]—*Where a person takes out a policy of insurance on his own life for his own benefit, & dies while the policy is still in force, leaving a will disposing of all his property, the beneficiaries under the will have no right either at law or in

equity to enforce payment by the insurer of the moneys due under the policy, even though the exors. refuse to sue & are made parties to the action.—*MILLER v. NATIONAL MUTUAL LIFE ASSOCN. OF AUSTRALASIA, LTD.*, [1909] V. L. R. 193.—AUS.

*t. ———.]—*Where the co. refuses payment on the death of the assured, the legal representatives & not the beneficiary will be entitled to enforce the contract.—*ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE, LTD. v. VANTEDDU AMMIRAJU* (1911), I. L. R. 35 Mad. 162.—IND.

#### PART IV. SECT. 15, SUB-SECT. 5.

**3124 i. Whether payable—Money not paid on due date—Conflicting claims—Money paid into court.]—***AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. BROADBENT* (1877), 3 V. L. R. 138.—AUS.

**3124 ii. ———.]—***FRENCH v. ROYAL EXCHANGE ASSURANCE CO.* (1857), 6 I. Ch. R. 523.—IR.

*a. Claim by assignee—Must be able to give full legal discharge.]—*The assignee of a person upon whose life a policy of insurance has been effected is not entitled to claim interest on the amount of the policy until he is in a position to give to the assurers a full legal discharge upon payment of the claim.—*TORONTO SAVINGS BANK v. CANADA LIFE ASSURANCE CO.* (1868), 14 Gr. 509.—CAN.

#### PART IV. SECT. 15, SUB-SECT. 6.

*b. Payment of policy money under mistake—Bona fides of holder—Whether policy may be revived.]—**NORTH BRITISH & MERCANTILE INSURANCE CO. v. STEWART* (1871), 9 Macph. (Ct. of Sess.) 534.—SCOT.



*Sect. 15.—Payment of claims: Sub-sect. 6. Sect. 16. Part V. Sect. 1: Sub-sects. 1 & 2.]*

absence of knowledge at that time, may be recovered back.

Therefore, where the directors of an assurance co. had been informed by their actuary, that a life policy had lapsed by reason of non-payment of the last premium, but afterwards, forgetting that fact, paid the assurance money to the representative of the assured:—*Held*: they might recover it back.—*KELLY v. SOLARI* (1841), 9 M. & W. 54; 11 L. J. Ex. 10; 6 Jur. 107; 152 E. R. 24.

*Annotations*:—*Apld.* *Bell v. Gardner* (1842), 4 Man. & G. 11; *Townsend v. Crowdy* (1860), 8 C. B. N. S. 477; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49. *Consd.* *Baker v. Courage*, [1910] 1 K. B. 56; *Jones v. Waring & Gillow*, [1925] 2 K. B. 612. *Refd.* *Higgs v. Scott* (1849), 7 C. B. 63; *Aiken v. Short* (1856), 1 H. & N. 210; *Mersey Docks & Harbour Board v. Penhallow* (1861), 8 Jur. N. S. 486; *Chambers v. Miller* (1862), 13 C. B. N. S. 125; *Brownlie v. Campbell* (1880), 5 App. Cas. 925; *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Deutsche Bank (London Agency) v. Beriro* (1895), 1 Com. Cas. 255; *Hood of Avalon v. Mackinnon*, [1909] 1 Ch. 476; *Baylis v. London (Bp.)*, [1913] 1 Ch. 127; *Maskell v. Horner*, [1915] 3 K. B. 106; *Holt v. Markham*, [1923] 1 K. B. 504.

*See, generally, MISTAKE.*

**Payment by insurers to persons having no interest.**—*See Sect. 14, sub-sect. 1, D., ante.*

#### SECT. 16.—REINSURANCE.

**3129. Proposals for reinsurance—Whether signed by original insurers—Question of fact.**—Declaration in the usual form on a policy of assurance on the life of D., effected by the B. Life Assurance office in the M. Life Assurance Office. Plea: that pl'tfs. untruly stated in the declaration mentioned in the policy that D. was, at the time of delivering the said declaration into the office of defts., in good health. Issue thereon. It appeared that in 1851 pl'tfs. proposed to reassure the life of D. in the office of defts. for part of the sum for which they had previously assured his life. Defts. accepted the proposal, & sent to pl'tfs. a printed form in two parts, the first headed "Proposal for assurance," containing the usual questions relative to the age, health, etc., of the person whose life was to be assured; the second headed "Declaration," containing a declaration to be made by the person that he was then in good health, & not afflicted with any disease tending to shorten life, & an agreement by pl'tfs. that that declaration was to be the basis of the contract, & that if any untrue statement was contained in the declaration or the answers to the questions, the assurance should be void. The clerk of defts. filled in the answers to the first five questions, & the others were included in a circumflex, opposite to which was written a memorandum signed by the resident director of pl'tfs.' office. "For these particulars, see copies of B. papers attached." Neither pl'tfs. nor D. signed the declaration, & blanks were left in it for the signatures. This document was returned to defts., with copies of the papers delivered to the B. office on the original assurance attached. Defts. forwarded to pl'tfs. a policy, which recited that pl'tfs. had delivered into the office of defts. a declaration signed by them, setting forth the age & the past & present state of health of the person on whose life the assurance was effected, which declaration was to be the basis of the contract; & that it was provided, that if anything averred in it was untrue the policy should be void. When the reinsurance was executed D. was affected by a disease likely to shorten life, but this fact was not

known to pl'tfs. or to defts. It is the practice for an office reassuring in another office to hand over to it the papers on which the original assurance was effected, as an answer to the questions in the proposal sent by the latter office, & for that office to accept or decline such reinsurance on the statements contained in those papers. The judge refused an application for a nonsuit, & directed the jury to say, upon the evidence & on inspection of the documents, whether the signature of the resident director of pl'tfs.' office was understood between the parties to apply to the declaration, or only to the particular questions in the proposal to which it was attached. The jury gave a verdict for pl'tfs.:—*Held*: (1) it was a question for the jury whether a declaration as to the health of D. at the time of the reinsurance was intended to be, & was understood between the parties to have been, signed by pl'tfs.; (2) evidence of the usage was admissible to show that no such declaration was signed by pl'tfs.; (3) pl'tfs., suing on the policy, could not give parol evidence to contradict the statement contained in it, that pl'tfs. had delivered such declaration to defts.—*FOSTER v. MENTOR LIFE ASSURANCE CO.* (1854), 3 E. & B. 48; 2 C. L. R. 1404; 33 L. J. Q. B. 145; 22 L. T. O. S. 305; 18 Jur. 827; 118 E. R. 1058.

**3130. — Admissibility of evidence—Practice of insurance companies.**—*FOSTER v. MENTOR LIFE ASSURANCE CO.*, No. 3129, *ante*.

**3131. Proposal for original policy made basis of contract—Fraudulent misrepresentation by assured—Claim settled by original insurers.**—By a policy dated Jan. 2, 1908, resps. insured the life of M. for £5,000 with profits, the policy providing that certain written statements made by M. as to his health should be the basis of the contract, & that the policy should be void if they were untrue. By a proposal form of the same date resps. applied to appl'ts. to reinsure M.'s life for £5,000. This proposal contained a provision that in accepting the risk appl'ts. did so on the same terms & conditions as those on which the policy had been granted by resps., "by whom, in the event of claim, the settlement will be made." Appl'ts. on Jan. 28, 1908, issued a policy of reinsurance for £5,000, but limited to the amount which resps. should pay irrespective of any bonus. The policy recited that the written statement of M. was the basis of the contract, also that appl'ts. had agreed to accept resps.' proposal. M. died in May, 1909, & a claim was made against resps. by his executrix. Appl'ts. informed resps. that they had reason to believe that some of the statements made by M. were untrue, & warned them that they would not acquiesce in a settlement. Resps., however, paid £5,000 in settlement of the claim & sued appl'ts. upon the policy of reinsurance. The jury found that certain of M.'s statements were untrue & that he had been guilty of concealment & misrepresentation, but that resps., in settling the claim, had acted reasonably & *bonâ fide*:—*Held*: assuming that the provision in the proposal form that a settlement should be affected by resps. was incorporated in the policy of reinsurance that provision could not alter the express terms of the policy which warranted the truth of M.'s statements, & the jury having found those statements to be false appl'ts. were not liable.—*AUSTRALIAN WIDOWS' FUND LIFE ASSURANCE SOCIETY, LTD. v. NATIONAL MUTUAL LIFE ASSOCN. OF AUSTRALASIA, LTD.*, [1914] A. C. 634; 83 L. J. P. C. 289; 111 L. T. 353, P. C.

**3132. Condition for payment on proof of payment on principal policy—Principal policy payable three months after death—When liability under**

## PART V.—ACCIDENT INSURANCE.

**policy of reinsurance attaches.]—**(1) A policy of insurance declared that the funds & property of the insurance co. should be liable according to the provisions of the deed of settlement of the co., to pay to the holder of the policy, immediately after satisfactory proof of the death of the insured, the sum insured. The deed of settlement of the co. provided that insurances should be paid three months after proof of death given:—*Held*: the funds of the co. became liable to & charged with the sum insured immediately on proof of the death, although the amount was not payable until three months after.

(2) Where a policy in the form stated above was

a policy of reinsurance by another co., & there was indorsed upon it a provision that the "policy should be payable upon proof being given that the insured company had paid the sum insured by them" it was held that the same construction applied, & that the sum insured became a charge upon the funds of the insuring company immediately upon proof given of death by the insured co.—*Re ATHENAEUM LIFE ASSURANCE SOCIETY, Ex p. PRINCE OF WALES LIFE ASSURANCE SOCIETY* (1859), John. 633; 6 Jur. N. S. 12; 70 E. R. 573.

*Annotations*:—As to (2) *Reid. Re State Fire Insce.* (1863), 1 De G. J. & Sm. 634; *Re Alliance Soc.* (1885), 28 Ch. D. 559.

## Part V.—Accident Insurance: Insurance against Liability for Accidents to Third Persons.

### SECT. 1.—ACCIDENT INSURANCE.

#### SUB-SECT. 1.—IN GENERAL.

**3133. Not a contract of indemnity.]—**Pltf. effected with defts. a contract of assurance, which stated that pltf. was thereby assured by the Railway Passengers Assurance co., in the sum of £1,000 to be payable to his legal representatives in the event of death happening to the assured from railway accident whilst travelling in any class carriage on any line of railway in Great Britain or Ireland; or a proportionate part of the £1,000 will be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. Pltf. was travelling in a railway carriage to a certain place, & on the arrival of the train at the railway station there, & after it had stopped pltf., in stepping out of the carriage without any negligence on his part, slipped off the iron step, whereby he sustained an injury:—*Held*: (1) this was a "railway accident" within the meaning of the contract of assurance; (2) the damage could not be estimated by the proportion which the injury bore to the amount payable on loss of life; (3) pltf. was entitled to recover damages for the expense & suffering occasioned by the injury, but not for his loss of time or loss of profit.

This is not a contract of indemnity, because a person cannot be indemnified for the loss of life, as he can in case of a house or ship. It is, therefore, necessary to adopt some pecuniary rule (*ALDERSON, B.*).—*THEOBALD v. RAILWAY PASSENGERS ASSURANCE CO.* (1854), 10 Exch. 45; 2 C. L. R. 1034; 23 L. J. Ex. 249; 23 L. T. O. S. 222; 18 Jur. 583; 2 W. R. 528; 156 E. R. 349.

**3134. Interest must be in assured—Sufficiency of evidence.]—**Although, where insurance is really effected by the party insured, the mere circumstance that another party pays the premiums may not be conclusive, or even, *per se*, sufficient evidence to warrant a jury or the ct. upon a special verdict in finding that the interest was not in the insured, yet where the insurance is effected, by the party nominally insured, at the instance of & for the benefit of another, who is to pay the premiums, & in pursuance of an arrangement between them, under which he immediately secures the

sole benefit of it by assignment or bequest, the evidence will be so conclusive that the interest is really in the third party so that the policy is void for not having been in his name that the ct. will set aside a verdict for pltf. in an action brought by him or his representatives upon it.—*SHILLING v. ACCIDENTAL DEATH INSURANCE CO.* (1857), 27 L. J. Ex. 16; *subsequent proceedings* (1858), 1 F. & F. 116, N. P.

#### SUB-SECT. 2.—THE PROPOSAL.

**3135. Declaration in proposal—Continue until issue of policy—Material concealment between proposal & issue.]—**Declarations made in the proposal for a policy are in the nature of continuing declarations until the issue of the policy.

A policy contained a proviso "that if the insured be at any time during the continuance of this policy insured against death or disablement by accident or disease in any other co. without notice being given to the said directors & their written consent obtained . . . this policy shall be absolutely void." After the proposal for this policy was made, but before it was issued, the insured made a proposal, which was accepted, & the policy issued, by another co. No consent was obtained in accordance with the proviso:—*Held*: the first policy was void.—*Re MARSHALL & SCOTTISH EMPLOYERS' LIABILITY & GENERAL INSURANCE CO., LTD.* (1901), 85 L. T. 757.

**3136. Misstatement in proposal—Whether policy avoided—State of health of assured.]—**To an action, by the extrix. of J., on a policy of insurance, by which defts. agreed with J. to pay to his exors. £2,000 on his death, defts. pleaded that the policy was made by T. in the name of J., but for the use & benefit of T. & not for the use or on account of J.; that T. had not any interest in the life of J., & that the policy was a wagering policy contrary to the statute, whereby the policy was void:—*Held*: a good plea.—*SHILLING v. ACCIDENTAL DEATH INSURANCE CO.* (1857), 2 H. & N. 42; 26 L. J. Ex. 266; 29 L. T. O. S. 98;

#### PART V. SECT. 1, SUB-SECT. 1.

**o. Benefits secured to wives & children by statute.]—**The N. B. Act for securing to wives & children the

benefits of life insurance applies to accident insurance, as well as to life.—*CORNWALL v. HALIFAX BANKING CO.* (1902), 22 C. L. T. 360; 32 S. C. R. —CAN.

#### PART V. SECT. 1, SUB-SECT. 2.

**3136 i. Misstatement in proposal—Whether policy avoided—State of health of assured.]—***CRUIKSHANK v. NORTHERN*



*Sect. 1.—Accident insurance: Sub-sect. 2, 3 &*

5 W. R. 567; 157 E. R. 18; *subsequent proceedings*, 27 L. J. Ex. 16; (1858), 1 F. & F. 116, N. P.

*Annotations:—*Reid. *M'Farlane v. Royal London Friendly Soc.* (1886), 2 T. L. R. 755. *Mentd. Evans v. Bignold* (1869), 10 B. & S. 621.

**3137.** ——— *Occupation of assured.*—Defts., an insurance co. by their form of proposal for insurance against accidents, required the "name, residence, profession or occupation of the person whose life is proposed to be insured" to be stated. Plaintiff filled up this form thus: "I. T. P. Esquire, Saltley Hall, Warwickshire." Plaintiff lived at Saltley Hall, but he also kept an ironmonger's shop at D. in the same county. Defts. thereupon insured pltf.'s life against accidents, by a policy under which the rate of premium was the same as would have been payable by pltf. had he described himself as an ironmonger. In the policy was a proviso "that if any statement or allegation contained in the" "proposal be untrue, or if this policy has been obtained or shall hereafter be continued, through any misrepresentation, concealment, or untrue averment whatsoever," "then this policy shall be void":—*Held*: the policy was not rendered void by pltf.'s omission to state that he was an ironmonger.—*PERRINS v. MARINE, ETC. INSURANCE SOCIETY* (1859), 2 E. & E. 317; 29 L. J. Q. B. 17; 1 L. T. 27; 6 Jur. N. S. 69; 8 W. R. 41; 121 E. R. 119; *affd.* (1860), 2 E. & E. 324, Ex. Ch.

*Annotation:—*Reid. *Grogan v. London & Manchester Industrial Assce.* (1885), 53 L. T. 761.

**3138.** ——— *Height & weight of assured.*—*LEVY v. SCOTTISH EMPLOYERS' INSURANCE CO.*, No. 3144, *post*.

**3139.** ——— *Misstatements by agent of insurers—Without knowledge of assured.*—A policy of insurance against accidental injury was effected with an insurance co., through their local agent. The proposal form was filled up by the agent, many of the answers filled in by him being false in material respects; the false answers were inserted without the knowledge or authority of appct., who signed the proposal form without reading it. The proposal contained a declaration in which appct. agreed that the statements in the proposal should form the basis of the policy, & the policy contained a proviso that it was granted on the express condition of the truthfulness of the statements in the proposal. Shortly after payment of the premium the insured was accidentally injured:—*Held*: (1) it was the duty of the appct. to read the answers in the proposal before signing it, & he must be taken to have read & adopted them; (2) in filling in the false answers in the proposal the agent was acting, not as the agent of the insurance co., but as the agent of the appct.; & therefore the policy was void.—*BIGGAR v. ROCK LIFE ASSURANCE CO.*, [1902] 1 K. B. 516; 71 L. J. K. B. 79; 18 T. L. R. 119; 46 Sol. Jo. 105; *sub nom. Re BIGGAR & ROCK LIFE ASSURANCE CO.*, 85 L. T. 636.

*Annotations:—*As to (1) *Consd. Paxman v. Union Assce. Soc.* (1923), 39 T. L. R. 424. As to (2) *Distd. Golding v. Royal London Auxiliary Insc.* (1914), 30 T. L. R. 350; *Keeling v. Pearl Assce.* (1923), 129 L. T. 573. *Consd. & Apld. Paxman v. Union Assce. Soc.* (1923), 39 T. L. R. 424. *Reid. Connors v. London & Provincial Assce.* (1913), 6 B. W. C. C. N. 146; *Tofts v. Pearl Life Assce.* (1913), 110 L. T. 190.

*ACCIDENT INSURANCE CO., LTD.* (1895), 23 R. (Ct. of Sess.) 147.—*SCOT.*

**3137 i.** ——— *Occupation of assured.*—*CELS v. RAILWAY PASSENGER ASSURANCE CO.* (1909), 11 W. L. R. 706.—*CAN*

*d.* ———.]—Where a person contracting for insurance against accident & sickness, makes a representation which is material to the contract & which turns out to be a misstatement, the contract is not

— True facts disclosed to insurers agent—Whether insurers estopped.]—See Sub-sect. 5, *post*.

**3140.** *Warranties in proposal—Bodily soundness of assured—Latent tuberculosis—Rendered active by accident.*—Applts. insured resp. against bodily injury sustained through accidental means & resulting "directly, independently & exclusively of all other causes" in total disablement from performing the duties of his occupation. A statement by resp. that he was in sound condition mentally & physically was made a warranty by the policy. After the issue of the policy resp. by accidental means severely sprained his wrist. Applts. for seven quarters paid him the amount provided in the policy for total disablement, but then declined to make further payments. Resp., being still disabled, sued upon the policy. It appeared that about ten or fifteen years before the date of the policy resp. had suffered from a tubercular affection of a small part of his left lung, which had caused a lesion which had then healed.

There were concurrent findings that at that date there was no active tuberculosis in resp.'s arm, but that there was in his system tuberculosis which was latent & would have remained harmless had it not been for the accident, & that apart from tubercular infection the wrist would have recovered within six months of the accident:—*Held*: there was no breach of warranty, the disablement resulted "directly, independently & exclusively of all other causes" from the accident, & resp. was entitled to recover under the policy.—*FIDELITY & CASUALTY CO. OF NEW YORK v. MITCHELL*, [1917] A. C. 592; 86 L. J. P. C. 204; 117 L. T. 494, P. C.

**3141.** ——— *Whether warranty or description of risk.*—Pltf. was the owner of two taxi-cabs which he insured with defts. in Feb. 1918, for one year against damage caused to either of them by accidental external means. In the proposal for the policy pltf., in answer to a question, stated that each cab was to be driven in one shift per twenty-four hours. At the foot of the proposal form pltf. stated that the above statement was true, & the policy provided that the statements in the proposal were to be the basis of the contract & to be considered as incorporated therein. In Aug. 1918, while one of the cabs was undergoing repair, the other cab was driven in two shifts per twenty-four hours for a very short time, & from that time until the accident hereinafter mentioned happened the two cabs were driven in one shift only. In Nov. 1918, the cab which had been driven in two shifts in Aug. was injured by an accident. It was at that time being driven in one shift only. In an action on the policy to recover in respect of the damage so caused, defts. contended that the statement in the proposal that the cab was to be driven in one shift per twenty-four hours was a warranty, & upon breach thereof the insurance came to an end:—*Held*: the statement was not a warranty, but was merely descriptive of the risk, indicating that the cab, whilst being driven in more than one shift per twenty-four hours, would cease to be covered by the policy, but would be covered whilst being driven in one shift; & defts. were liable.—*FARR v. MOTOR TRADERS' MUTUAL INSURANCE SOCIETY*, [1920] 3 K. B. 669; 90 L. J. K. B. 215; 123 L. T. 765; 36 T. L. R. 711, C. A.

—.]—See, generally, Part I., Sect. 7, *ante*.

binding on the underwriter. The contract is one *uberrimæ fidei*.—*HOLLISTER v. ALLIANCE INSURANCE CO., LTD.*, [1923] 2 W. W. R. 162.—*CAN.*

—.]—*REID & Co.* 1



**3142. Duty of assured to read answers—Before signature — Misstatements by agent.] —** BIGGAR *v. ROCK LIFE ASSURANCE CO.*, No. 3139, *ante*.

**SUB-SECT. 3.—COMMENCEMENT AND DURATION OF RISK.**

**3143. Commencement—Risk accepted by insurers—Policy issued.]—**Deft. filled up a proposal form for a policy of insurance against claims in respect of drivers' accidents. The proposal form provided that if the risk was accepted deft. would pay the premium when called upon to do so. The risk was accepted by the insurance co., & a policy was issued. The policy contained some terms which did not appear in the proposal form:—*Held*: deft. was liable to pay the amount of the premium.—**GENERAL ACCIDENT INSURANCE CORPN. v. CRONK** (1901), 17 T. L. R. 233; 45 Sol. Jo. 261, D. C.

**3144. — Payment of premium—Receipt therefor—Unauthorised statement by agent of insurers.]—**The agent of an insurance co. obtained from pltf. a proposal for insurance against accident. In the proposal pltf. overstated his height & understated his weight. The proposal form stated that the statements therein were to form the basis of the policy, & that the proposed insurance was not to be binding on the co. until a policy should be issued in respect thereof. Pltf. paid the first year's premium to the agent & received a receipt upon which was printed "Held covered for fourteen days from date hereof, subject to the conditions of the policy, unless the proposal be previously declined." There was evidence that the agent told pltf. that he would be insured right away, & if he did not hear within fourteen days he might treat himself as insured. After the expiration of the fourteen days pltf. was injured by an accident. The proposal was, in fact, declined by the co., but no notice of the refusal was sent to pltf.:—*Held*: (1) the agent had no authority to make the statements to pltf., & pltf. was not insured at the time of the accident; (2) the misstatement avoided the policy.—**LEVY v. SCOTTISH EMPLOYERS' INSURANCE CO.** (1901), 17 T. L. R. 229, D. C.

**3145. Duration—Yearly renewal of contract—Payment & acceptance of premium—Death before premium paid.]—**A., on Jan. 22, 1851, effected with defts. an insurance against death or injury from accident, the premium on which was payable on Jan. 22, in each year. By one of the conditions indorsed on the policy it was provided that the premium was to be paid "within twenty-one days from the day on which the same should first accrue or become due," & that "provided the same should be from time to time paid within such space of twenty-one days, the policy should not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event or events upon the happening whereof the amount secured by the policy should, according to the terms thereof, become payable." By another condition, it was provided, that, "if the premium should be unpaid for twenty-one days next after it should become due, the policy should be

absolutely void, & the assured should forfeit all claim thereunder." & it was further provided that, "in every case when a new premium should become payable, the directors should be at liberty to terminate the risk by refusing to accept such premium," etc. A. duly paid the premiums under this policy down to the year 1855. On Jan. 27, 1856, an accident happened to him, which caused his death on Feb. 1 following. On Feb. 4, the co. had notice of the death, & a correspondence took place between their secretary & the attorney for A.'s exors. respecting the cause of the death & their claim on the policy, neither party at first knowing that the premium which became due on Jan. 22, 1856, was unpaid. On Feb. 8, the secretary for the first time became acquainted with the fact of the non-payment of the premium, but did not communicate it to the exors. or their attorney until Feb. 13, the day after the expiration of the twenty-one days allowed by the condition for payment of the premium, when he informed the latter by letter that the directors had considered & rejected the claim:—*Held*: (1) there was nothing in the conditions to enable the exors. of A. to pay the premium after his death, & if they had tendered it within the twenty-one days, the co. would not have been bound to accept it; (2) the policy was, by reason of the non-payment of the premium within the terms of the policy & conditions, absolutely void; & the co. were not estopped from denying the payment; (3) neither pltf. nor the assured, had he been living, would have had an absolute right to keep the policy alive by payment or tender of the premium within the twenty-one days, giving the directors the option of refusing to continue it or not, at their pleasure.—**SIMPSON v. ACCIDENTAL DEATH INSURANCE CO.** (1857), 2 C. B. N. S. 257; 26 L. J. C. P. 289; 30 L. T. O. S. 31; 3 Jur. N. S. 1079; 5 W. R. 307; 140 E. R. 413.

*Annotations*:—As to (3) *Reid*. *Pritchard v. Merchants' Life Assce. Soc.* (1858), 3 C. B. N. S. 622; *Stuart v. Freeman*, [1903] 1 K. B. 47.

**3146. — — —.] —** Accident policy renewable yearly so long as the assured pays the specified premium in advance & the insurance co. consent to receive it, & requiring the assured at each renewal to give notice of any change in his state of health since the payment of the last premium, with power for the co. in such case to determine the policy.

Upon the payment of the premium for each year, an entirely new contract arises for that year only, & the amount payable under it on the accidental death of the assured in the current year for which a premium has been paid is not affected by any assignment or other obligation made or entered into by the assured in any previous year & not extending to after-acquired property.—**STOKELL v. HEYWOOD**, [1897] 1 Ch. 459; 65 L. J. Ch. 721; 74 L. T. 781; 12 T. L. R. 463.

**SUB-SECT. 4.—CONSTRUCTION OF POLICIES.**

**A. Construction of Conditions.**

**3147. General rule—Policy construed against insurers.]—**A policy of insurance against accidental

**EMPLOYERS' ACCIDENT & LIVE STOCK INSURANCE CO.** (1899), 1 F. (Ct. of Sess.) 1031; 36 Sc. L. R. 825.—**SCOT.**

**f. — — —.]—****BRALL'S EXECUTRIX v. NEW ZEALAND INSURANCE CO., LTD.** (1916), W. L. D. 42.—**S. AF.**

**PART V. SECT. 1, SUB-SECT. 3.**

**3145 l. Duration—Yearly renewal of**

**contract—Payment & acceptance of premium—Death before premium paid.]**

—**CARPENTER v. CANADIAN RAILWAY ACCIDENT INSURANCE CO.** (1909), 18 O. L. R. 388; 13 O. W. R. 821.—**CAN.**

**g. Cancellation of policy by insurer—Conduct amounting to affirmation until date of cancellation.]—****MILLICAN v. SCOTTISH METROPOLITAN ASSURANCE**

**CO., LTD.**, [1923] 2 D. L. R. 782; [1923] 2 W. W. R. 25.—**CAN.**

**PART V. SECT. 1, SUB-SECT. 4.—A.**

**3147 l. General rule—Policy construed against insurers.]—**In construction of accident insurance policies, an ambiguous clause must be construed against rather than in favour of the

*Sect. 1.—Accident insurance: Sub-sect. 4, A.]*

death or injury excepted from the risks insured against accidents happening "by exposure of the insured to obvious risk of injury." The insured met his death through attempting, in broad daylight, to cross the main line of a railway in front of an approaching train by which he was run over & killed. There was no evidence that he was short-sighted or deaf. At the place where the accident happened there was no station or proper crossing, & there was no obstruction to prevent a person about to cross from seeing an approaching train. There was no ground for imputing negligence to the servants of the railway co.:—

*Held*: the risk incurred by the insured being one which either was obvious to him or would have been obvious to him if he had been paying reasonable attention to what he was doing, the case came within the exception in the policy.

In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy & insert the exceptions. But this principle ought to be applied only for the purpose of removing a doubt, not for the purpose of creating a doubt or magnifying an ambiguity, when the circumstances of the case raise the real difficulty (LINDLEY, L.J.).—*CORNISH v. ACCIDENT INSURANCE CO.* (1889), 23 Q. B. D. 453; 58 L. J. Q. B. 591; 54 J. P. 262; 38 W. R. 139; 5 T. L. R. 733, C. A.

3148. ———.]—(1) By the terms of a policy an accident insurance co. undertook, if, at any time during the continuance of the said policy, the insured should sustain any bodily injury caused by violent, accidental, external, & visible means, then, in case such injury should, within three calendar months from the occurrence of the accident causing such injury, directly cause the death of the insured, to pay to the legal personal representatives of the insured the capital sum of £1,000. The policy contained the following proviso: "Provided always & it is hereby as the essence of the contract agreed as follows: that this policy only insures against death where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby."

The assured, while hunting, had a heavy fall, & the ground being very wet, he was wetted to the skin. The effect of the shock, & the wetting was to lower the vitality of his system, & being obliged to ride home afterwards while wet, still further lowered his vitality. The effect of this lowering of his vitality was to cause the subsequent

development of pneumonia in his lungs of which he died. The pneumonia was not septic or traumatic, but arose as a direct & natural consequence from the fact that the diminution of vitality caused through the accident, as above mentioned, allowed the germs called "pneumococci," which in small numbers are generally present in the respiratory passages, to multiply greatly & attack the lungs:—*Held*: the death of the assured was directly caused by accident within the meaning of the policy, & the case did not come within the proviso therein, & the co. were consequently liable on the policy.

(2) It has been established by the authorities that in dealing with the construction of policies whether they be life, or fire, or marine policies, an ambiguous clause must be construed against rather than in favour of the co. (VAUGHAN WILLIAMS, L.J.).—*Re ETHERINGTON & LANCASHIRE & YORKSHIRE ACCIDENT INSURANCE CO.*, [1909] 1 K. B. 591; 78 L. J. K. B. 684; 100 L. T. 568; 53 Sol. Jo. 266; *sub nom.* *ETHERINGTON v. LANCASHIRE & YORKSHIRE ACCIDENT INSURANCE CO.*, 25 T. L. R. 287, C. A.

*Annotations*:—As to (1) *Consd.* *Leyland Shipping Co. v. Norwich Union Fire Insce. Soc.*, [1918] A. C. 350. As to (2) *Apprvd.* *Condogianis v. Guardian Assee.*, [1921] 2 A. C. 125. *Refd.* *Re Bradley & Essex & Suffolk Accident Indemnity Soc.*, [1912] 1 K. B. 415. *Generally, Mentd.* *Ystradowen Colliery Co. v. Griffiths*, [1909] 2 K. B. 533; *Alloa Coal Co. v. Drylie* (1913), 6 B. W. C. C. 398.

3149. *Exceptions in the policy—Exposure of assured to obvious danger.*—An insurance against death by accident is within Life Assurance Act, 1774 (c. 48), as to interest.

An insurance having been effected in the name & on the life of a pauper, dependent on his son for support, ruptured & subject to fainting fits:—*Held*: there was nothing in the life insured which falsified a declaration that the insured had not been subject to "epileptic or other fits"; & "there was not any circumstance or information touching his occupation or habits of life, with which the directors ought to be made acquainted, as rendering him peculiarly liable to accidents"; nor was his being driven out in a vehicle a voluntary exposure to "obvious risk," within the meaning of an exception on those terms; but it appearing that the son had caused his father to make the proposal for the insurance, & almost immediately afterwards caused him to make a will, bequeathing to him the benefit of it; & that the son had paid the premiums: the jury were directed that, if they believed it was procured by the son for his own use & benefit, & that in reality the insurance was his act, & not the father's, they should find for defts. on a plea founded upon Life Assurance Act, 1774 (c. 48), s. 1, & a former verdict for pltf. having been set aside as against evidence, they found for defts.—*SHILLING v. ACCIDENTAL DEATH INSURANCE CO.* (1858), 1 F. & F. 116, N. P.

*Insurers.*—*WADSWORTH v. CANADIAN RAILWAY ACCIDENT INSURANCE CO.* (1912), 21 O. W. R. 601; 3 O. W. N. 828; 26 O. L. R. 55; 3 D. L. R. 668; *revid.* 28 O. L. R. 537; 13 D. L. R. 113.—CAN.

3147 ii. ———.]—*GRAHAM v. LONDON GUARANTEE & ACCIDENT CO.*, [1925] 2 D. L. R. 1037; 56 O. L. R. 494.—CAN.

3147 iii. ———.]—*TUCKER v. SOUTH BRITISH INSURANCE CO.*, [1916] N. Z. L. R. 1142.—N.Z.

3149 i. *Exceptions in the policy—Exposure of assured to obvious danger.*—*NORTH WEST COMMERCIAL*

*TRAVELLERS' ASSOCN. v. LONDON GUARANTEE & ACCIDENT CO.* (1895), 10 Man. L. R. 537.—CAN.

3149 ii. ———.]—An accident policy issued to M., who was insured as a baggageman on a railway, contained a condition that the insurance did not cover death resulting from voluntary exposure to unnecessary danger. M. was killed while coupling cars, a duty generally performed by a brakeman, whose occupation was classed by the co. as more hazardous than that of a baggageman:—*Held*: as the evidence showed that the insured was in the habit of coupling cars frequently, & therefore would not consider the

operation dangerous, there was no "voluntary exposure to unnecessary danger" within the meaning of the condition.—*MCNEVIN v. CANADIAN RAILWAY ACCIDENT INSURANCE CO.* (1902), 22 C. L. T. 223; 32 S. C. R. 194.—CAN.

3149 iii. ———.]—*STANFORD v. IMPERIAL GUARANTEE & ACCIDENT INSURANCE CO. OF CANADA* (1908), 18 O. L. R. 562; 12 O. W. R. 1289; 13 O. W. R. 1171.—CAN.

3149 iv. ———.]—*SANGSTER'S TRUSTEES v. GENERAL ACCIDENT ASSURANCE CORP'N., LTD.* (1896), 24 R. (Ct. of Sess.) 56; 34 Sc. L. R. 47; 4 S. L. T. 163.—SCOT.



**3150.** ———.]—LOVELL v. ACCIDENT INSURANCE Co. (1875), 39 J. P. Jo. 293.

*Annotation* :—Consd. Cornish v. Accident Insce. (1889), 23 Q. B. D. 453.

**3151.** ———.]—CORNISH v. ACCIDENT INSURANCE Co., No. 3147, *ante*.

**3152.** ———.]—WALKER v. RAILWAY PASSENGERS ASSURANCE Co. (1910), 129 L. T. Jo. 64, C. A.

**3153.** ——— Exceptional circumstances not included.]—In a policy of life assurance it was provided that the assurance should not extend to any death or injury happening while the assured was under the influence of intoxicating liquor, or occasioned by his wilfully exposing himself to any unnecessary peril or danger. The assured, while in such a condition that there was a conflict of evidence as to the fact of his being or not being, more or less, affected by the liquor he had taken, accosted a woman in the street, persisting in doing so in the face of remonstrances, & was knocked down by the man in whose company she was at the time, receiving injuries from which he died :—*Held* : to enable the co. to take advantage of the above proviso, it was not necessary that deceased should be under the influence of intoxicating liquor at the time of his death, as well as at the time when the injury was sustained, but that it was sufficient to show that he was under such influence when he met with the injury from which death afterwards resulted. Under the influence of intoxicating liquor means under such influence as to disturb the quiet equable exercise of a man's intellectual faculties.

The latter part of the proviso, with regard to wilful exposure to peril, should be limited to dangers *ejusdem generis* with those recapitulated in the earlier part of the clause, & do not extend to the exceptional circumstances under which the assured met his death.—MAIR v. RAILWAY PASSENGERS ASSURANCE Co., LTD. (1877), 37 L. T. 356, D. C.

**3154.** ——— Influence of intoxicating liquor.]—MAIR v. RAILWAY PASSENGERS ASSURANCE Co., LTD., No. 3153, *ante*.

**3155.** ——— Death by anything swallowed or inhaled—Involuntary inhalation of gas.]—An accident policy excepted liability in the case of death or disablement by accident caused (*inter alia*) "by medical or surgical treatment, or fighting, ballooning, racing, self-injury, or suicide, or anything swallowed, or administered, or inhaled" :—*Held* : the context was not sufficient to confine the exception to voluntary inhalation; & a death resulting from the accidental & involuntary inhalation of ordinary coal gas was within the exception.—*Re* UNITED LONDON & SCOTTISH INSURANCE Co., LTD., BROWN'S CLAIM, [1915] 2 Ch. 167; 84 L. J. Ch. 620; 113 L. T. 397; 31 T. L. R. 419; 59 Sol. Jo. 529, C. A.

**3156.** ——— War risks—Death caused directly or indirectly therefrom.]—By a policy of insurance deceased, a military officer, was insured with defts. against death caused accidentally within the United Kingdom by violence due to any external & visible means. The policy was subject to the condition that it did not insure against death "directly or indirectly caused by, arising from, or traceable to . . . war." The realm being in a state of war, it became necessary to protect the

South Eastern Railway, & whilst deceased, in the course of his military duty, was walking alongside the rails of the railway for the purpose of visiting guards & sentries posted at various points along the line, he was accidentally killed by a train. The general public had no right to walk along the line at the place where the accident happened, & in normal times the place would have been illuminated by lights from an adjacent signal-box, but whose lights had been obscured in compliance with regulations made under the Defence of the Realm Act, 1914 (c. 29). An arbitrator having found that the death of deceased was traceable to war within the meaning of the condition :—*Held* : the finding of the arbitrator must be confirmed, inasmuch as the words "directly or indirectly" could not be reconciled with the maxim *causa proxima non remota spectatur*, which would have been applicable had the words not been in the condition; & deceased having been placed in a position of special danger by reason of his military duties consequent upon the war, it was open to the arbitrator to find as a fact that the death was indirectly caused by war.—COXE v. EMPLOYERS' LIABILITY ASSURANCE CORPN., LTD., [1916] 2 K. B. 629; 85 L. J. K. B. 1557; 114 L. T. 1180.

**3157.** ——— Rectification in accordance with slip.]—A firm of insurance brokers received from pltf.'s husband instructions to effect an accident insurance for him & sent on his behalf to defts., an insurance co., a slip containing the words "ex war." Defts. thereupon issued a policy, which they intended to be in accordance with the slip, & which provided that "The co. will not be liable in respect of any death of the assured directly or indirectly caused or contributed to by war or by death resulting from disease or natural causes or from any medical or surgical treatment," etc., & that "The co. will not be liable in respect of any death of the assured caused by an accident happening outside the limits of Europe unless same be agreed by special endorsement." A typewritten clause was added which provided that "Notwithstanding anything herein contained the assured is fully covered while on a journey from the United Kingdom to the United States of America &/or Canada, while there, & on return." During the currency of the policy pltf.'s husband was returning from the United States to England in the Lusitania, & the vessel was torpedoed by a German submarine & he was drowned. In an action on the policy defts. pleaded that the death of the assured was caused by war & they claimed rectification so as to give effect to the slip :—*Held* : the typewritten clause only meant that the assured was to be fully covered while on his journey to America & back as he would be if the accident had happened in Europe, & in any case, as the intention of the parties was that the policy should be in accordance with the slip, defts. were entitled to rectification, & pltf. could not recover on the policy.—LETTS v. EXCESS INSURANCE Co. (1916), 32 T. L. R. 361.

**3158.** "Wholly disabled from following usual occupation."]—A policy of insurance against accident contained a proviso "that in case such accident shall not cause the death of the insured immediately, but shall cause any bodily injury to the insured of so serious a nature as wholly to

**3158i.** "Wholly disabled from following usual occupation."]—Defts. insured pltf. against accident by a policy containing a clause providing that if "accidental injuries . . . shall immediately, continuously & wholly dis-

able & prevent the assured from pursuing his usual business or occupation" they would pay a certain weekly allowance during a limited period. Pltf. was injured accidentally within the meaning of the policy, but did not

become wholly disabled until three months afterwards, when he notified the co. :—*Held* : pltf. was entitled to recover.—SHERA v. OCEAN ACCIDENT & GUARANTEE CORPN. (1900), 32 O. R. 411.—CAN.



**Sect. 1.—Accident insurance: Sub-sect. 4, A. & B.]**

disable him from following his usual business, occupation or pursuits, the co. will pay to the insured a compensation in money at the rate of £5 per week during the continuance of such disability." The insured, a solr. & registrar of a county ct., sprained his ankle severely, & was confined to his bedroom for some weeks, being unable to get downstairs. He was prevented from passing his accounts as registrar & from attending at various places at which he was required to complete purchases for his clients:—*Held*: inasmuch as pitf. was so disabled as to be incapable of following his usual occupation; business or pursuits, he was "wholly disabled from following his usual occupation, business or pursuits," within the meaning of the policy.—*HOOPER v. ACCIDENTAL DEATH INSURANCE CO.* (1860), 5 H. & N. 546; 29 L. J. Ex. 484; 3 L. T. 22; 8 W. R. 616; 157 E. R. 1297; *sub nom.* ACCIDENTAL DEATH, ETC. INSURANCE CO. *v.* HOOPER, 7 Jur. N. S. 73, Ex. Ch.

**3159. Proof satisfactory to directors—Only reasonable proof required.]**—*BRAUNSTEIN v. ACCIDENTAL DEATH INSURANCE CO.*, No. 3097, *ante*.

**3160. Claim within year of registration—No regular register kept.]**—In a copy of Letts's Diary for the year 1906, of which resp.'s husband was owner, there was a coupon policy of insurance which stated that a thousand pounds would be paid to the exors. of any owner of the diary fatally injured in a railway accident if he had caused his name to be registered at the head office of applts., an insurance co., & if the claim was made within twelve months of the registration. Resp.'s husband filled up the form of application for registration by inserting his name & address & the date, Dec. 29, 1905, & forwarded it to applts.' office. Applts. kept no register, but date stamped & filed the applications. Resp.'s husband received a letter from applts. dated Jan. 3, 1906, enclosing an official acknowledgment dated Dec. 29, 1905, of the registration of his name as being insured against accidents in the terms of the coupon. He was injured in a railway accident on Dec. 28, 1906, & died the next day. Resp., his exor., gave notice of the claim on Jan. 2, 1907. Applts. denied liability, on the ground that the date of registration was Dec. 27, 1905, & that the insurance ended on Dec. 27, 1906:—*Held*: the twelve months within which the claim must be made had not expired when the claim was made, Jan. 2, 1907, for, there being no regular register, the date of registration must be taken to be the date when the bundle of applications, containing that of

deceased, were arranged alphabetically & filed, & in the absence of any definite proof of this date, it must be held, as against resps., to be Jan. 3, 1906, the date of the letter containing an official acknowledgment of the registration, & the claim was accordingly made within the prescribed period.

—*GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPN. v. ROBERTSON*, [1909] A. C. 404; 79 L. J. P. C. 1; 25 T. L. R. 685; *sub nom.* GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CO. *v.* HUNTER, 101 L. T. 135; 53 Sol. Jo. 649, H. L.

**B. Meaning of "Accident."**

**3161. General rule—Violence, casualty, or vis major involved.]**—Defts., a co. established "for granting assurances against loss of life & personal injury arising from accident at sea," granted a policy to S., the master of a ship then about to proceed on a voyage from England to Aden; whereby it was agreed that in case S. "should sustain any personal injury from, or by reason or in consequence of, any accident which should happen to him upon any ocean, sea, river, or lake," during the continuance of the policy, defts. should pay him a reasonable compensation for such injury; & in case he should die from the effects of such injury within three calendar months from the occurrence of the accident, should pay the sum insured to his exors. or administrators. It was further agreed by the policy that no compensation should be payable thereunder by defts., either to S. or his personal representatives, in respect of injury occasioned to S. by wounds in battle or in any way by the act of the Queen's enemies; or in respect of any injury to which S. should knowingly & without some adequate motive expose himself; but it was declared that, with those exceptions, the policy was intended to secure compensation to S. or his representatives "in the event of his sustaining any personal injury during the said intended voyage, from or by reason or in consequence of any accident whatsoever." S. then sailed on his intended voyage, & in the course of it arrived in the Cochin river, on the south-west coast of India. Whilst on board his ship in that river, & acting as master of the ship, he was struck down by a sunstroke, to which he did not knowingly & without adequate motive expose himself, & from the effects of which he on the same day died. In an action by S.'s administratrix on the policy to recover the sum insured from defts.:—*Held*: defts. were not liable: for S.'s death could not be said to have arisen from accident, within the meaning of the policy.

It is difficult to define the term "accident"

**3158 ii. —.]**—Pltf.'s occupation was that of an eye, ear, nose & throat specialist. While travelling in a railway train he fell & sprained the wrist of his right hand; after two years his arm had not recovered, & any future recovery was problematical:—*Held*: pltf.'s injury entirely precluded him from doing any special work on the eye, ear, nose & throat, & that constituted "total disability" within the meaning of the policy.—*MITCHELL v. FIDELITY & CASUALTY CO. OF NEW YORK* (1916), 35 O. L. R. 280; 9 O. W. N. 341.—CAN.

**3158 iii. —.]**—*TUCKER v. SOUTH BRITISH INSURANCE CO.*, [1916] N. Z. L. R. 1142.—N.Z.

**h. "Riding as passenger on public passenger conveyance."]**—A person who is injured while getting into a public conveyance, after he has got upon the step or platform, but before the vehicle has begun to move, is "riding as a passenger on a public conveyance"

within the meaning of a clause in an accident insurance policy containing those words.—*POWIS v. ONTARIO ACCIDENT INSURANCE CO.* (1901), 21 C. L. T. 164; 1 O. L. R. 54.—CAN.

**k. —.]**—A passenger elevator in an office building is not a "public passenger conveyance" within the meaning of that term in an accident insurance policy.—*ROBB v. MERCHANTS CASUALTY CO.*, [1918] 3 W. W. R. 322; 44 D. L. R. 185; 29 Man. L. R. 113.—CAN.

**l. "Irrecoverable loss of sight."]**—*Held*: pltf. had "irrecoverably lost the entire sight of one eye" so as to recover for same under an accident insurance policy when he had lost all useful sight of the eye although still able to distinguish light from darkness & to "see a shadow" if an object was placed close to his eye.—*SHAW v. GLOBE INDEMNITY CO.*, [1921] 1 W. W. R. 674; 57 D. L. R. 102; 29 B. C. R. 157.—CAN.

**m. —.]**—*MACDONALD v. MUTUAL LIFE & CITIZENS' ASSURANCE CO*

(1910), 29 N. Z. L. R. 1073; *affg.*, 29 N. Z. L. R. 478.—N.Z.

**n. "Permanent partial disablement."]**—*SCOTT v. SCOTTISH ACCIDENT INSURANCE CO.* (1889), 16 R. (Ct. of Sess.) 630; 26 Sc. L. R. 475.—SCOT.

**o. Conditions as to proof—Non-compliance with demand for post-mortem.]**—*BALLANTINE v. EMPLOYERS' INSURANCE CO. OF GREAT BRITAIN* (1893), 21 R. (Ct. of Sess.) 305; 31 Sc. L. R. 230; 1 S. L. T. 463.—SCOT.

**PART V. SECT. 1, SUB-SECT. 4.—B.**

**3161 l. General rule—Violence, casualty, or vis major involved.]**—The policy provided that the insurance was not to extend to mysterious disappearances, nor to any case of death, the nature, cause or manner of which was unknown, or incapable of direct & positive proof:—*Held*: this did not apply to cases where the immediate cause of death was indisputable, & evidenced by outward violence.—

as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident, & injury or death from natural causes; such as shall be of universal application. At the same time we think we may safely assume that, in the term "accident" as so used, some violence, casualty, or *vis major*, is necessarily involved (COCKBURN, C.J.).—SINCLAIR *v.* MARITIME PASSENGERS' ASSURANCE CO. (1861), 3 E. & E. 478; 30 L. J. Q. B. 77; 4 L. T. 15; 7 Jur. N. S. 367; 9 W. R. 342; 121 E. R. 521.

**3162. Death from fall—From stationary railway carriage.]**—THEOBALD *v.* RAILWAY PASSENGERS ASSURANCE CO., No. 3133, *ante*.

**3163. — Caused by fit.]**—A policy of insurance against death from accidental injury contained the following condition: "This policy insures payment only in case of injuries accidentally occurring from material & external cause operating upon the person of the insured, where such accidental injury is the direct & sole cause of death to the insured, but it does not insure in case of death arising from fits . . . or any disease whatsoever arising before or at the time, or following such accidental injury, whether consequent upon such accidental injury or not, & whether causing such death directly or jointly with such accidental injury." The insured, while at a railway station, was seized with a fit & fell forwards off the platform across the railway, when an engine & carriages which were passing went over his body & killed him:—*Held*: the death of the insured was caused by an accident within the meaning of the policy, & the insurers were liable.—LAWRENCE *v.* ACCIDENTAL INSURANCE CO., LTD. (1881), 7 Q. B. D. 216; 50 L. J. Q. B. 522; 45 L. T. 29; 45 J. P. 781; 29 W. R. 802, D. C.

*Annotations*:—*Consd.* Cox v. Employers' Liability Assce. Corp., [1916] 2 K. B. 629; Leyland Shipping Co. v. Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873. *Refd.* Hensley v. White, Lloyd v. Sugg, Walker v. Lilleshall Coal Co., [1900] 1 Q. B. 481. *Mentd.* Wilkes v. Dowell (1905), 21 T. L. R. 487.

**3164. Injury by lifting weight.]**—On an insurance against bodily injury by accident or violence, provided that the accident operated by external causes, insurers held liable for an injury to the spine caused by lifting a heavy burden in the course of business.—MARTIN *v.* TRAVELLERS' INSURANCE CO. (1859), 1 F. & F. 505, N. P.

*Annotations*:—*Refd.* Hamlyn v. Crown Accident Insce. (1893), 68 L. T. 701. *Mentd.* Fenton v. Thorley, [1903] A. C. 443.

**3165. Sunstroke.]**—SINCLAIR *v.* MARITIME PASSENGERS' ASSURANCE CO., No. 3161, *ante*.

**3166. Drowning.]**—H. effected with defts. a policy of assurance, whereby they agreed that if he should sustain any injury caused by accident or violence, within the meaning of that policy, & the conditions thereto, & should die from the effects of such injury within three calendar months from the happening thereof, then the funds & property of defts. should be subject & liable to pay the sum thereby assured. The policy contained a proviso that no claim should be made in respect of any injury unless the same should be caused by some outward & visible means, of which satisfactory proof could be furnished to the directors. On a Saturday afternoon H. went to Brighton by railway, having a ticket which entitled him to return by it on the following Monday. About 7 o'clock on Monday

evening he left his lodgings, having expressed his intention to bathe before he returned to London. His clothes were found on the steps of a bathing machine, & about six weeks afterwards a body was washed ashore on the Essex coast, which his brother & some acquaintances deposed at the inquest was his body, but the jury found that it was the body of a person unknown:—*Held*: (1) assuming H. died from drowning, that was a death by "accident" within the meaning of the policy; (2) it was a question for the jury whether H. died from the action of the water or from natural causes.—TREW *v.* RAILWAY PASSENGERS' ASSURANCE CO. (1861), 6 H. & N. 839; 30 L. J. Ex. 317; 4 L. T. 833; 7 Jur. N. S. 878; 9 W. R. 671; 158 E. R. 346, Ex. Ch.

*Annotations*:—*As to* (1) *Distd.* Sinclair v. Maritime Passengers' Assce. (1861), 30 L. J. Q. B. 77. *Folld.* Winspear v. Accident Insce. (1880), 43 L. T. 459. *Generally, Refd.* Minifie v. Railway Passengers' Assce. (1881), 44 L. T. 552.

**3167. — Caused by sudden insensibility.]**—H. effected with defts. a policy of assurance, whereby it was agreed that, if he should receive or suffer bodily injury from any accident or violence, in case such accident or violence should cause his death, within three months after the occurrence of such accident or violence, the sum assured should be payable to his personal representatives. The policy contained a proviso that no claim should be payable under the policy in respect of death or injury by accident or violence, unless such death or injury should be occasioned by some external & material cause operating upon the person of the insured, & unless in the case of death, such death should take place from such accident or violence within three calendar months from the time of the occurrence of such accident or violence. During the continuance of this policy H. went into the sea to bathe. While in a pool about one foot deep, he became suddenly insensible from some unexplained internal cause, & fell into the water with his face downwards. A few minutes afterwards he was found lying dead with his face in the water, & water escaped from his lungs in such a manner as to prove that he had breathed after falling into the water. The immediate cause of his death was suffocation by the water, but, the pool being shallow, such suffocation would not have taken place, had he not been incapable of helping himself, in consequence of the insensibility above-mentioned:—*Held*: H.'s death was caused by accident, within the meaning of the policy.—REYNOLDS *v.* ACCIDENTAL INSURANCE CO. (1870), 22 L. T. 820; 18 W. R. 1141.

*Annotations*:—*Consd.* Winspear v. Accident Insce. (1880), 6 Q. B. D. 42. *Mentd.* Wilkes v. Dowell (1905), 53 W. R. 515.

**3168. — Caused by fit.]**—W. effected an insurance with defts. against accidental injury, & by the terms of the policy defts. agreed to pay the amount insured to W.'s legal representatives, should he sustain "any personal injury caused by accidental, external, & visible means," & the direct effect of such injury should occasion his death. The policy also contained a proviso that the insurance should not extend "to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease." During the time the

WRIGHT *v.* SUN MUTUAL LIFE INSURANCE CO. (1878), 29 C. P. 221; *affd.* 5 A. R. 218; 5 S. C. R. 466.—CAN.

**3161 II. — — —.]**—OCEAN ACCIDENT & GUARANTEE CORPN. *v.* FOWLIE (1903), 33 S. C. R. 253.—CAN.

**3161 III. — — —.]**—BUTTLE *v.* FIDELITY & CASUALTY CO. OF NEW

YORK (1924), 55 O. L. R. 330; *affd.* 54 O. L. R. 24.—CAN.

**3161 IV. — — —.]**—MILES *v.* ONTARIO EQUITABLE LIFE INSURANCE CO. (1925), 57 O. L. R. 343.—CAN.

**3166 I. Drowning.]**—YOUNG *v.* MARYLAND CASUALTY CO. (1909), 10 W. L. R. 8; 14 B. C. R. 146.—CAN.

**3166 II. — — —.]**—HAINES *v.* CANADIAN RAILWAY ACCIDENT INSURANCE CO. (1910), 15 W. L. R. 300; 20 Man. L. R. 69.—CAN.

**3166 III. — — —.]**—MACDONALD *v.* REFUGE ASSURANCE CO. (1890), 17 R. (Ct. of Sess.) 955; 27 Sc. L. R. 764.—SCOT.



**Sect. 1.—Accident insurance: Sub-sect. 4, B.]**

policy was in force, & whilst he was crossing & fording a stream, W. was seized with an epileptic fit & fell into the stream, & was there drowned whilst suffering from the fit, but he did not sustain any personal injury to occasion death other than drowning:—*Held*: W.'s death was occasioned by an injury within the risk covered by the policy, & to which the proviso did not apply.—*WINSPEAR v. ACCIDENT INSURANCE CO.* (1880), 6 Q. B. D. 42; 50 L. J. Q. B. 292; 43 L. T. 459; 45 J. P. 110; 29 W. R. 116, C. A.

*Annotations*:—*Apld.* Lawrence v. Accidental Insee. (1881), 7 Q. B. D. 216. *Consd.* Leyland Shipping Co. v. Norwich Union Fire Insee. Soc., [1917] 1 K. B. 873. *Mentd.* Hensley v. White, Lloyd v. Sugg, Walker v. Lilleshall Coal Co., [1900] 1 Q. B. 481; Wilkes v. Dowell (1905), 21 T. L. R. 487; Wright & Greig v. McKendry (1918), 11 B. W. C. C. 402.

**3169. Death from hernia—Caused by violence.]**

—A policy for insuring the payment of a sum of money in case the insured should be injured by accidental violence & die from the direct effect of such accident, was subject to the following condition: "this policy insures against all forms of cuts, stabs," etc., "when accidentally occurring from material & external cause, where such accidental injury is the direct & sole cause of death to the insured," "but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured before or at the time or following such accidental injury":—*Held*: the insurers were liable under such policy where the insured died from hernia caused solely by external violence.—*FITTON v. ACCIDENTAL DEATH INSURANCE CO.* (1864), 17 C. B. N. S. 122; 34 L. J. C. P. 28; 144 E. R. 50.

*Annotations*:—*Consd.* Smith v. Accident Insee. (1870), L. R. 5 Exch. 302. *Refd.* Winspear v. Accident Insee. (1880), 42 L. T. 900; Cole v. Accident Insee. (1889), 5 T. L. R. 736.

**3170. Disease—Accident giving rise to disease.]**

—A policy of insurance against death from accidental injury contained the following condition: "This policy insures against all forms of cuts, etc., when accidentally occurring from material & external cause operating upon the person of the insured, where such accidental injury is the direct & sole cause of death to the insured, but it does not insure against death arising from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before or at the time of or following such accidental injury, whether causing such death directly or jointly with such accidental injury." The assured on Saturday, Apr. 24, accidentally cut his foot against the broken side of an earthenware pan. On the Thursday following erysipelas supervened, & of that disease he died on the next Saturday. The erysipelas was caused by the wound, & but for the wound he would not have suffered from it. In an action by his extrix. against the insurers to recover the amount insured:—*Held*: the insurers were protected by the above condition, & were not liable.—*SMITH v. ACCIDENT INSURANCE CO.* (1870), L. R.

**3170 i. Disease—Accident giving rise to disease.]**—After an accident pltf. was found to be suffering from a disease of the heart; if there was a previous infection, pltf. was not aware of it:—*Held*: the disability from which pltf. suffered dated from the accident; & previously he had enjoyed good health; & even if his heart was affected before that date, without his knowledge, the disablement resulted "from bodily

injuries effected directly & independently of all other causes through accidental means, & as the direct result of some cause not attributable to the assured's state of health."—*MORRAN v. RAILWAY PASSENGERS ASSURANCE CO. OF LONDON, ENGLAND* (1919), 43 O. L. R. 561; 44 D. L. R. 647.—CAN.

**3170 ii.** — — —.] — *BAKER v. ONTARIO EQUITABLE LIFE & ACCIDENT*

5 Exch. 302; 39 L. J. Ex. 211; 22 L. T. 861; 18 W. R. 1107.

*Annotation*:—*Folld.* Winspear v. Accident Insee. (1880), 42 L. T. 900.

**3171.** — — —.]—Where by the policy of an accident assurance co. the liability of the co. was limited to claims in respect of "injuries occasioned directly & solely by external & material causes visibly, operating upon the person of the assured," & liability from "death or disablement arising from or accelerated or promoted by any disease or bodily infirmity, or any natural cause arising within the system of the assured, whether accelerated by accident or not," was excluded:—*Held*: (1) the co. were not liable in an action upon a policy, it being shown that the policyholder's death was caused by the dislodgment, in consequence of a fall, of a gall stone, & its subsequent impaction in the gall duct; (2) upon the construction of the policy the giving notice of any accident within seven days was a condition precedent to the right to recover on the policy, & the "assured" included his personal representative.—*CAWLEY v. NATIONAL EMPLOYERS' ACCIDENT & GENERAL ASSURANCE ASSOCN., LTD.* (1885), 1 T. L. R. 255; Cab. & El. 597.

**3172.** — — —.]—The assured, under a policy granted by the deft. co. against "death from the effects of injury caused by accident," fell & dislocated his shoulder. He was at once put to bed & died in less than a month from the date of the accident, having been all the time confined to his bedroom. In a case stated in a reference under defts.' special Act the umpire found that the assured died from pneumonia caused by cold, but that he would not have died as & when he did had it not been for the accident; that as a consequence of the accident he suffered from pain & was rendered restless, unable to wear his clothing, weak, & unusually susceptible to cold, & that his catching cold & the fatal effects of the cold were both due to the condition of health to which he had been reduced by the accident:—*Held*: the death of the assured was due to the "effects of injury caused by accident" within the meaning of the policy.—*ISITT v. RAILWAY PASSENGERS ASSURANCE CO.* (1889), 22 Q. B. D. 504; 37 W. R. 477; *sub nom.* *Re ISITT & RAILWAY PASSENGERS ASSURANCE CO.*, 58 L. J. Q. B. 191; 60 L. T. 297; 5 T. L. R. 194.

*Annotations*:—*Consd.* *Re Etherington & Lancashire & Yorkshire Accident Insee.*, [1909] 1 K. B. 591. *Mentd.* Ystradowen Colliery Co. v. Griffiths, [1909] 2 K. B. 533; Harnett v. Bond, [1924] 2 K. B. 517.

**3173.** — — —.]—A person insured himself with defts. under a policy whereby defts. agreed to pay him a certain sum in case he should be injured by accidental violence & should die within three months of its occurrence, if the injury should be the "direct & sole cause" of his death. The policy was subject to the condition that it should not apply to "death . . . caused by or arising wholly or in part from" any "intervening cause." The assured on July 2 accidentally inflicted a wound on his leg with his thumb-nail. His leg became inflamed, & on July 2 erysipelas had set in. This was followed on July 12 by

*INSURANCE CO.*, [1925] 3 D. L. R. 720; 2 W. W. R. 378; 19 Sask. L. R. 571; *affg.*, [1925] 1 D. L. R. 694.—CAN.

**p. Poisoning—Through poisonous insect.]**—The bite of a poisonous insect causing death of the person bitten a month after the bite is an accident within the terms of a policy insuring against "bodily injury by violent, accidental, external & visible means.—



septicæmia, & on July 16 by septic pneumonia, of which complaint he died on July 22. It was conceded by defts. that the septic germs, the development of which resulted in the man's death, were introduced into his system at the time of the infliction of the wound:—*Held*: the erysipelas, septicæmia, & septic pneumonia were not "intervening causes" within the meaning of the policy, but merely different stages in the development of the septic condition which was immediately brought about by the introduction of the poison, & the man's death was directly & solely caused by the accidental injury to his leg.—*MARDORF v. ACCIDENT INSURANCE CO.*, [1903] 1 K. B. 584; *sub nom. Re MARDORF & ACCIDENT INSURANCE CO.*, 72 L. J. K. B. 362; 88 L. T. 330; 19 T. L. R. 274.

**3174.** ———.]—*Re ETHERINGTON & LAN-CASHIRE & YORKSHIRE ACCIDENT INSURANCE CO.*, No. 3148, *ante*.

**3175.** ———.]—*FIDELITY & CASUALTY CO. OF NEW YORK v. MITCHELL*, No. 3140, *ante*.

**3176. Poison—Poison accidentally taken.**—*COLE v. ACCIDENT INSURANCE CO., LTD.* (1889), 5 T. L. R. 736, C. A.

*Annotation*:—*Fold. Re United London & Scottish Insce., Brown's Claim*, [1915] 2 Ch. 167.

**3177. Injury by stooping.**—*Pltf.* effected an insurance with defts. against "any bodily injury caused by violent, accidental, external, & visible means." The policy contained a proviso, excepting, among other things, injuries arising from "natural disease or weakness, or exhaustion consequent upon disease." In stooping to pick up a marble dropped by a child, *pltf.* dislocated the cartilage of his knee. Before the accident, *pltf.* had not suffered from any weakness of the knee or knee-joint. In an action to recover compensation under the policy:—*Held*: the word "external" must be taken in contradistinction to the internal causes of injury, such as disease, mentioned in the proviso, & so reading the policy, the injury was caused by external means; it was also caused by means that were violent, accidental & visible, & was covered by the policy.—*HAMLIN v. CROWN ACCIDENTAL INSURANCE CO., LTD.*, [1893] 1 Q. B. 750; 62 L. J. Q. B. 409; 68 L. T. 701; 57 J. P. 663; 41 W. R. 531; 9 T. L. R. 427; 4 R. 407, C. A.

*Annotations*:—*Distd. Re Scarr & General Accident Assce. Corp.*, [1905] 1 K. B. 387. *Apld. Burridge v. Haines* (1918), 87 L. J. K. B. 641. *Mentd. Hensey v. White* (1899), 63 J. P. 804.

**3178. Nervous shock through fright—Accident sustained in course of duty.**—*Pltf.* was a signalman in the employment of defts., a railway co., who entered into a contract of insurance with him, by which they agreed to pay a weekly allowance in case of his being incapacitated from employment by reason of accident sustained in discharge of his duty in the co.'s service, such insurance to be absolute for all accidents, however caused, occurring to the insured in the fair & ordinary discharge of his duty. *Pltf.* in the discharge of his duty endeavoured to prevent an accident to a train by signalling to the driver, & the excitement & fright arising from the danger to the train produced a nervous shock which incapacitated him from employment. In an action to recover from defts. the weekly allowance:—*Held*: *pltf.* had been incapacitated by accident within the meaning of the policy.—*PUGH v. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, [1896] 2 Q. B. 248; 65

L. J. Q. B. 521; 74 L. T. 724; 44 W. R. 627; 12 T. L. R. 448; 40 Sol. Jo. 565, C. A.

*Annotations*:—*Reid. Clover, Clayton v. Hughes*, [1910] A. C. 242. *Mentd. Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Hensey v. White* (1899), 69 L. J. Q. B. 188; *Dulleu v. White*, [1901] 2 K. B. 669; *Yates v. South Kirby, etc. Collieries*, [1910] 2 K. B. 538; *Coyle (or Brown) v. Watson*, [1915] A. C. 1; *Hambrook v. Stokes*, [1925] 1 K. B. 141.

**3179. Heart failure—Caused by physical exertion.**—A policy of insurance provided for the payment of a sum by the insurers in case the assured should "sustain any bodily injury caused by violent, accidental, external & visible means," & the injury so sustained should be "the sole & immediate cause of death of the assured" within three months of the occurrence of the accident. The assured died on Jan. 25, 1904, whilst the policy was in force, the following circumstances having led up to his death: On the morning of Dec. 26, 1903, he was in the apparent enjoyment of good health, & able to discharge the duties of his employment, which were duties requiring some bodily activity. In fact, however, on that day & for a considerable time prior thereto his heart was in a weak & unhealthy condition, although he did not know that fact. During the morning of Dec. 26, being apparently in his usual state of health, he attempted to eject a drunken man from his master's premises, using some physical exertion for that purpose by pushing or pulling in order to overcome the man's passive resistance. The effect of this physical exertion was to cause a strain on the assured's heart, & the increased work of the heart under this strain rendered it, owing to its weak & unhealthy state, incapable of recovering its ordinary condition when the immediate strain ceased, the consequence being that the heart began to dilate, & the dilatation so set up was the cause of death. But for his exertions in attempting to eject the drunken man the assured might have lived a considerable time longer. A claim to receive the policy moneys having been made by the assured's personal representative:—*Held*: the injury which resulted in the death of the assured was not caused by "accidental means" within the meaning of policy, & the insurers were therefore not liable.—*Re SCARR & GENERAL ACCIDENT ASSURANCE CORPN.*, [1905] 1 K. B. 387; 92 L. T. 128; *sub nom. SCARR v. GENERAL ACCIDENT ASSURANCE CORPN.*, 74 L. J. K. B. 237; 21 T. L. R. 173.

**3180. Strangulation—No visible external injury.**—A policy of insurance provided that an insurance co. should indemnify the insured against death solely attributable to accidental external & visible injury to any horse the property of the insured, duly certified by a veterinary surgeon, & further provided that the due observance & fulfilment of the conditions of the policy should be a condition precedent to any liability of the co. under the policy. The insured's horse, drawing a loaded van, got out of the driver's control, bolted, & fell into a ditch with the van on top of it, & died in consequence of the pressure of a shaft upon its windpipe. There was no mark visible on the skin of the horse, & no certificate of a veterinary surgeon was obtained:—*Held*: it was not necessary that there should have been any mark visible on the skin of the horse, & the injury was external & visible; & it was a condition precedent to the insured's right to recover that the death of the horse should be duly certified by a veterinary surgeon, but that, on the facts of the

*Sect. 1.—Accident insurance: Sub-sect. 4, B.;*  
*5, 6, 7 & 8. Sect. 2: Sub-sect. 1.]*

case, the co. had waived compliance with such condition.—*BURRIDGE & SON v. HAINES (F. H.) & SONS, LTD. (1918), 87 L. J. K. B. 641; 118 L. T. 681; 62 Sol. Jo. 521.*

*Accident within Workmen's Compensation Act.]—*  
*See MASTER & SERVANT.*

**SUB-SECT. 5.—KNOWLEDGE OF AGENT IMPUTED TO INSURANCE COMPANY.**

*See Part I., Sect. 14, ante.*

**SUB-SECT. 6.—NOTICE OF ACCIDENT.**

**3181. Notice condition precedent to recovery.]—**  
*CAWLEY v. NATIONAL EMPLOYERS' ACCIDENT & GENERAL ASSURANCE ASSOCN., LTD., No. 3171, ante.*

**3182. — Omission through ignorance of injury.]—**A policy of insurance against accidents contained a proviso that the assured should give the insurers notice of the occurrence of the accident & of the injuries received within fourteen days of the date of the accident. The assured met with an accident in July, but was not aware that he had received injury until the Mar. following, when he at once gave notice to the co. In an action upon the policy:—*Held*: this was not notice within the time limited by the policy, & therefore the assured was not entitled to recover.—*CASSEL v. LANCASHIRE & YORKSHIRE ACCIDENT INSURANCE CO., LTD. (1885), 1 T. L. R. 495.*

**3183. — Impossibility of compliance.]—**A policy of insurance covered death caused by accident happening within the United Kingdom, & was made subject to a condition that in case of fatal accident notice thereof must be given to the insurers within seven days. The assured was accidentally drowned in Jersey. It was impossible to give notice within seven days. In an action on the policy:—*Held*: the accident happened within the United Kingdom, & notice was not a condition precedent to the right to recover, & the insurers were liable.—*STONEHAM v. OCEAN RY. & GENERAL ACCIDENT INSURANCE CO. (1887), 19*

*Q. B. D. 237; 57 L. T. 236; 51 J. P. 422; 35 W. R. 716; 3 T. L. R. 695.*

**3184. Notice "as soon as possible"—Interpretation of chance.]—**A policy of insurance, covering (*inter alia*) the death of the insured by accident, contained the following condition: "In case of any accident, injury, damage or loss . . . the insured or the insured's representative for the time being shall give notice . . . in writing to the head office of the co. of such accident, injury, damage or loss as soon as possible after it has come to the knowledge of the insured or of the insured's representative for the time being."

During the currency of the policy, namely, on Jan. 14, 1923, the insured was killed in a motor accident in India. Knowledge of her death reached her personal representative in England within a month, but the personal representative did not know of the existence of the policy of insurance till Jan. 1924. Notice was given to the insurance co. as soon as possible thereafter. The insurance co. repudiated liability on the ground that notice was not given "as soon as possible" within the meaning of the condition:—*Held*: in considering whether notice was given "as soon as possible" within the meaning of the condition, all existing circumstances must be taken into account, including the available means of knowledge of the insured's personal representative of the existence of the policy & the identity of the insurance co.; & the arbitrator, to whom the dispute had been submitted, was entitled to find that notice had been given "as soon as possible."—*VERELST'S ADMINISTRATRIX v. MOTOR UNION INSURANCE CO., LTD., [1925] 2 K. B. 137; 94 L. J. K. B. 659; 133 L. T. 364; 41 T. L. R. 343; 69 Sol. Jo. 412; 30 Com. Cas. 256.*

**SUB-SECT. 7.—SETTLEMENT OF CLAIMS.**

**3185. Reference to arbitration—Whether condition precedent to action on policy—Condition indorsed on policy.]—***BRAUNSTEIN v. ACCIDENTAL DEATH INSURANCE CO., No. 3097, ante.*

**3186. — Stay of proceedings.]—**A local & personal Act contained provisions by which any question arising on any contract of insurance should, if either party required it, be referred to arbn. Sect. 33 of the Act provided,

**PART V. SECT. 1, SUB-SECT. 6.**

**3181 i. Notice condition precedent to recovery.]—***ACCIDENT INSURANCE CO. OF NORTH AMERICA v. YOUNG (1892), 20 S. C. R. 280.—CAN.*

**3181 ii. —.]—**Notice in conformity with the condition in an accident policy is a condition precedent to action.—*EMPLOYERS' LIABILITY ASSURANCE CORPN. v. TAYLOR (1898), 29 S. C. R. 104.—CAN.*

**3181 iii. —.]—***WARNE v. LONDON GUARANTEE & ACCIDENT CO. (1900), 20 C. L. T. 227.—CAN.*

**3181 iv. —.]—**An accident policy contained a condition that written notice must be immediately given to the co., & "that if in any other respect the conditions of this insurance are disregarded all rights hereunder are forfeited to the corpn.":—*Held*: the giving of notice forthwith was not thereby made a condition precedent to the right of recovery on the policy.—*SHERA v. OCEAN ACCIDENT & GUARANTEE CORPN. (1900), 21 C. L. T. 138; 32 O. R. 411.—CAN.*

**3181 v. —.]—***EVANS v. RAILWAY PASSENGER ASSURANCE CO. (1912), 21 O. W. R. 442; 3 O. W. N. 881; 3 D. L. R. 61.—CAN.*

**3181 vi. —.]—***YOULDEN v. LONDON GUARANTEE & ACCIDENT CO. (1912), 21 O. W. R. 674; 3 O. W. N. 832; 26 O. L. R. 75.—CAN.*

**3181 vii. —.]—***PATTON v. EMPLOYERS' LIABILITY ASSURANCE CORPN. (1887), 20 L. R. Ir. 93.—IR.*

**3181 viii. —.]—***HOLLISTER v. ACCIDENT ASSOCN. OF NEW ZEALAND (1886), 5 N. Z. L. R. 49 (S. C.).—N.Z.*

**3182 i. — Omission through ignorance of injury.]—**An accident policy contained a condition that notice of the death should be given by or on behalf of the insured within ten days thereafter:—*Held*: a notice within ten days after discovery of the body was sufficient.—*HAINES v. CANADIAN RAILWAY ACCIDENT INSURANCE CO. (1910), 20 Man. L. R. 69.—CAN.*

**3183 i. — Impossibility of compliance.]—***GAMBLE v. ACCIDENT ASSURANCE CO., LTD. (1869), 1 R. 4 C. L. 204.—IR.*

**q. — Waiver of condition by company.]—***DONNISON v. EMPLOYERS' ACCIDENT & LIVE STOCK INSURANCE CO., LTD. (1897), 24 R. (Ct. of Sess.) 681; 34 Sc. L. R. 510.—SCOT.*

**r. Notice distinguished from proof.]—**A condition in a personal acci-

dent insurance policy provided that "immediate written notice is to be given to the co. of any accident, & unless affirmative proof is furnished within thirteen months from the time of such accident, no claim based thereon shall be valid":—*Held*: the notice & proof required in this condition were two separate & distinct things, & although proof may amount to notice, mere notice is not proof.—*JOHNSTON v. DOMINION OF CANADA GUARANTEE & ACCIDENT INSURANCE CO. (1908), 17 O. L. R. 462; 11 O. W. R. 363; 12 O. W. R. 980.—CAN.*

**t. By whom notice may be given.]—**Notice may be effectually given by any person appointed by the assured for the purpose, or by any person acting on behalf of the persons interested in the policy.—*PATTON v. EMPLOYERS' LIABILITY ASSURANCE CORPN. (1887), 20 L. R. Ir. 93.—IR.*

**a. Notice to agent.]—***SHIELLS v. SCOTTISH ASSURANCE CORPN. LTD. (1889), 16 R. (Ct. of Sess.) 1014; 26 Sc. L. R. 702.—SCOT.*

**PART V. SECT. 1, SUB-SECT. 7.**

**b. Proofs of loss — Delay of insurers in objecting—Waiver.]—***FOWLER v. OCEAN ACCIDENT & GUARANTEE*



that, if any policyholder or his representatives should begin an action against the co. in respect of the matters to be referred to arbn. under the provisions of the Act, the ct. or a judge, on application by the co., might make an order staying all proceedings in the action. This Act was repealed by a consolidating Act of the co. passed in 1892, but all contracts in force at the date of the repeal were to be valid & effectual as if the consolidating Act had not passed.

The representative of the holder of a policy issued under the Act of 1864, & containing a condition that questions arising under it should, if the co. or the assured or his representatives required it, be referred to arbn. in the manner specified in the co.'s Act, made a claim against the co., who gave notice that they required the question to be referred to arbn. The representative named an arbitrator, to whom the co. objected. No further steps were taken, & this action upon the policy was commenced. The co. took out a summons to stay the proceedings in the action, & an order was made to that effect. On appeal:—*Held*: by virtue of the reservation in the consolidating Act, there was a subsisting submission to arbn. to which Arbitration Act, 1889 (c. 49), s. 4, was applicable, & the ct. or a judge had jurisdiction to make an order staying the proceedings in the action.—*HODSON v. RAILWAY PASSENGERS' ASSURANCE CO.*, [1904] 2 K. B. 833; 73 L. J. K. B. 1001; 91 L. T. 648, C. A.

3187. ———.]—In a proposal for insurance against accident the intending assured stated his occupation & signed a declaration that the answers to the questions therein were true, & that he agreed that the declaration should be the basis of the contract between him & the insurance co. whose policy, subject to the terms & conditions thereof, he agreed to accept. The policy recited the proposal & declaration "which proposal & declaration warranted to be true it is agreed shall be the basis of this contract . . . & be considered as incorporated herein, & any suppression, misrepresentation, or misstatement of fact in such written proposal & declaration shall *ipso facto* render this policy null & void"; & it provided that it was a condition precedent to the recovery of any sum under the policy that the conditions indorsed thereon should be strictly observed. Condition 8 provided that the policy might be renewed from year to year, but only upon condition that nothing had happened to increase the risk, & if the risk was increased by (*inter alia*) the assured engaging in some other occupation, then "unless notice in writing of such increased risk is given to the co. . . . & any extra premium that may be required paid . . . the policy is void & no claim can be made." By condition 11, "If any question shall arise touching this policy or the liability of the co. thereunder, or the extent or nature of such liability, or otherwise howsoever in connection herewith, then the assured & all persons claiming through the assured may refer & shall be bound, if the co. shall so require, to refer

the same to arbn., by one arbitrator to be agreed on or in default of agreement by two arbitrators & their umpire under the Arbitration Act, 1889 (c. 49) . . . & no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbn."

During the currency of the policy the assured was killed by an accident. To co. denied liability on the policy on the ground that the assured either had misstated his occupation in the proposal, or, if not, had changed his occupation for one involving increased risk of which notice as required by condition 8 had not been given to the co., & contended that the policy was therefore void, & they required the dispute to be referred to arbitration under condition 11. In an action on the policy:—*Held*: (1) upon the co. requiring arbn. condition 11 made the obtaining of an award a condition precedent to a right of action; (2) the co. by relying on the terms of the policy which rendered it void in certain events did not thereby repudiate the policy as a binding contract between the parties, & were entitled to rely upon the arbn. clause as a defence to the action.—*WOODALL v. PEARL ASSURANCE CO.*, [1919] 1 K. B. 593; 88 L. J. K. B. 706; 120 L. T. 556; 83 J. P. 125; 63 Sol. Jo. 352; 24 Com. Cas. 237, C. A.

*Annotation*:—As to (2) *Refd.* *Macaura v. Northern Assce.* [1925] A. C. 619.

—.]—*See, generally*, Part I., Sect. 13, *ante*.

3188. Agreement in satisfaction of claim—Further claim for subsequent disablement.]—*PROSSER v. LANCASHIRE & YORKSHIRE ACCIDENT INSURANCE CO., LTD.* (1890), 6 T. L. R. 285, C. A.

*Annotation*:—*Consd.* *Ellen v. G. N. Ry.* (1901), 49 W. R. 395.

Marine insurance.]—*See* Part II., Sect. 26, *ante*.

Fire insurance.]—*See* Part III., Sect. 10, *ante*.

Life insurance.]—*See* Part IV., Sect. 15, *ante*.

#### SUB-SECT. 8.—MEASURE OF DAMAGES.

3189. Proportion between injury & loss of life.]—*THEOBALD v. RAILWAY PASSENGERS ASSURANCE CO.*, No. 3133, *ante*.

3190. Expenses & suffering through injury—Not loss of time or profit.]—*THEOBALD v. RAILWAY PASSENGERS ASSURANCE CO.*, No. 3133, *ante*.

### SECT. 2.—INSURANCE AGAINST LIABILITY FOR ACCIDENTS TO THIRD PERSONS.

#### SUB-SECT. 1.—MEANING OF "ACCIDENT."

3191. Time policy—From & to certain date—What dates included.]—(1) A policy insured against "claims for personal injury in respect of accidents caused by vehicles for twelve calendar months from Nov. 24, 1887," to the amount of "£250 in respect of any one accident." A tramcar

*CORPN.* (1902), 22 C. L. T. 280; 4 O. L. R. 146; *affd.*, 33 S. C. R. 253.—CAN.

a. Time for commencement of action.]—*ATKINSON v. DOMINION OF CANADA GUARANTEE & ACCIDENT CO.* (1908), 16 O. L. R. 619; 11 O. W. R. 449.—CAN.

d. Death through means excepted from risk—Necessity for special pleading.]—Where the insurer who made a contract of accident insurance relies upon the alleged fact that the assured

came to his death through some means which are excepted from the risk, such as suicide, that defence should be specifically pleaded.—*MORETTI v. DOMINION OF CANADA GUARANTEE & ACCIDENT INSURANCE CO.*, [1923] 3 W. W. R. 1.—CAN.

#### PART V. SECT. 1, SUB-SECT. 8.

a. Composition accepted—Further injury developing subsequently.]—Pltf. sustained injuries which he thought were merely temporal & accepted \$125

in settlement in full of his claim against deft. co. under a certain policy of accident insurance. More serious results developed after settlement & pltf. brought action to set aside above settlement & claimed payment of \$300 per year during his lifetime, or, in the alternative \$2,600 for permanent disability:—*Held*: defts. were liable to pay indemnity for subsequent illness notwithstanding receipt.—*KENT v. OCEAN ACCIDENT & GUARANTEE CORPN.* (1910), 15 O. W. R. 177; 20 O. L. R. 226.—CAN.



**Sect. 2.—Insurance against liability for accidents to third persons: Sub-sects. 1 & 2.]**

was overturned, forty persons injured, & compensation to the amount of £833 claimed. Defts. said the overturning was one accident, & refused to pay more than £250:—*Held*: “any one accident” meant “injury in respect of which a person claimed compensation,” & defts. were liable for the £833.

(2) “From” held to exclude Nov. 21, 1887, & to include Nov. 24, 1888, the day of the accident.—*SOUTH STAFFORDSHIRE TRAMWAYS CO. v. SICKNESS & ACCIDENT ASSURANCE ASSOCN.*, [1891] 1 Q. B. 402; 60 L. J. Q. B. 260; 64 L. T. 279; 55 J. P. 372; 39 W. R. 292; 7 T. L. R. 267, C. A.

*Annotations*:—As to (1) *Appld.* *Allen v. London Guarantee & Accident Co.* (1912), 28 T. L. R. 254. As to (2) *Consd.* *Sheffield Corpn. v. Sheffield Electric Light Co.*, [1898] 1 Ch. 203.

**3192. “Any one accident or occurrence” — Two injured by same occurrence.]**—By a policy of insurance defts. insured the assured in respect of accidents caused by his employees when in charge of his horse-drawn vehicles. The total liability of defts. was limited to £300 for all claims for compensation & costs, charges, & expenses, paid or payable in respect of or arising out of any accident or occurrence, & defts. were to be entitled, in the name & on behalf of the assured, to take over & have the absolute control of all negotiations & proceedings which might arise in respect of any accident or claim. There was a further provision that defts. might pay the maximum sum to the assured in the case of any one accident or occurrence, & thereupon their liability in respect of that accident or occurrence should cease; but if the assured desired defts. to continue the defence he should pay & make good all costs & expenses incurred thereby. Two persons who had been injured by an accident caused by a cart belonging to the assured brought actions against him claiming damages. The assured gave notice thereof to defts., & they defended the actions, the assured not being consulted nor having anything to say as to the advisability of defending the actions. The actions resulted in verdicts against the assured for £200 & £175 respectively. The costs in these actions recoverable by two pltfs. against the assured amounted to £218; & as he did not pay those costs an execution was levied on his goods, & to get rid of this he had to pay the £218, which he now claimed to recover from defts.:—*Held*: although there were two accidents there was only one “occurrence” within the meaning of the policy, & therefore defts.’ limit of £300 applied; but defts. having defended the actions in the name of the assured without his consent they incurred a common law liability for the costs, & were therefore, liable to repay the £218 which the assured had been compelled to pay.—*ALLEN v. LONDON GUARANTEE & ACCIDENT CO., LTD.* (1912), 28 T. L. R. 254.

**PART V. SECT. 2, SUB-SECT. 1.**

**3194 i. Accident through negligence of assured—Motor accident.]**—Deft. co. agreed to indemnify pltf. against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries accidentally sustained, including death. Pltf. while driving his automobile upon a public highway struck & injured a man who died as the result of his injuries. Pltf. suffered judgment for damages in respect of the injury to the man &, having paid the amount, sued deft. co. therefor. Pltf. was drunk when he struck the man & was driving at an excessive speed:—*Held*: contrary to public policy that pltf. should be indemnified against his

own criminal act.—*O’HEARN v. YORKSHIRE INSURANCE CO.* (1921), 67 D. L. R. 735; 51 O. L. R. 130.—*CAN.*

**i. Accident to employee—Common employment.]**—Pltf. sued for a personal injury, which by his statement of claim he alleged he had received when acting as conductor of a street railway car operated by defts., by reason of the negligence of a servant of defts., who was driving a scavenger waggon used by defts.:—*Held*: the policy did not cover injuries accruing by reason of the negligence of defts. or their servants in other branches of their service.—*FERGUSON v. TORONTO (CITY)* (1891), 14 P. R. 358.—*CAN.*

**g. —.]**—An insurance policy

**3193. Accident through negligence of assured—Boating accident.]**—Pltfs. were the proprietors of a water show consisting of a large lake & a water-chute. By a policy of insurance defts. agreed to pay to pltfs. any sums up to £1,000 for which they might become liable “for personal injury caused to any person not in the service of the assured, by any accident to the boats & chutes used in the show.” A man who had hired a water bicycle on the lake was injured by a collision between a boat coming down the chute & the water bicycle, owing to pltfs.’ negligence:—*Held*: this was an accident to the chute boat within the policy, & defts. were liable.—*CAPTAIN BOYTON’S WORLD’S WATER SHOW SYNDICATE, LTD. v. EMPLOYERS’ LIABILITY ASSURANCE CORPN., LTD.* (1895), 11 T. L. R. 384, C. A.

**3194. — Motor accident.]**—*TINLINE v. WHITE CROSS INSURANCE, No. 3214, post.*

*Compare Part V., Sect. 1, sub-sect. 4, B., ante.*

**SUB-SECT. 2.—LIMITATION OF INSURERS’ LIABILITY.**

**3195. Any one accident—Several injured by one occurrence—Several claims for compensation.]**—*SOUTH STAFFORDSHIRE TRAMWAYS CO. v. SICKNESS & ACCIDENT ASSURANCE ASSOCN.*, No. 3191, *ante*.

**3196. Express conditions in policy—Workmen’s compensation insurance—Keeping of wages book.]**—An employer insured against his liability under the Workmen’s Compensation Act, 1897 (c. 37), or at common law, in respect of accidents to his workmen. The proposal stated that the total estimated amount of wages paid annually by the assured was £3,000, & he agreed to pay a premium of 5s. 6d. per cent. on the total amount of wages paid, & to render at the end of each year an account of the wages paid. The first payment “on account of premium” was £8 5s., which was 5s. 6d. on the £3,000 estimated amount of wages. The assured ceased to insure at the end of the second year:—*Held*: the assured was bound to render an account of the wages actually paid during the two years.—*GENERAL ACCIDENT ASSURANCE CORPN., LTD. v. DAY* (1904), 21 T. L. R. 88.

**3197. — — — Whether condition precedent.]**—Claimant effected a policy of insurance with an insurance society against liability under the Workmen’s Compensation Act, 1906 (c. 58). He only employed one person, his son, who was paid £75 a year. The son having been injured in the course of his employment, claimant had to pay him compensation under the Act. The society refused to pay on the ground of non-compliance with the following condition in the policy, which declared it & other clauses to be conditions precedent to the society’s liability under the policy:—“The first premium & all renewal

against loss for “damages” paid to an employee covers the case of moneys paid under Workmen’s Compensation Act.—*CHAMBERLAIN v. NORTH AMERICAN ACCIDENT INSURANCE CO.* (1916), 34 W. L. R. 556; 10 W. W. R. 687; 28 D. L. R. 248; 9 Alta. L. R. 538.—*CAN.*

**h. —.]**—*AFRICAN GUARANTEE & INDEMNITY CO., LTD. v. MONI* (1916), App. D.—*S. AF.*

**PART V. SECT. 2, SUB-SECT. 2.**

**k. Express conditions in policy—Workmen’s compensation insurance.]**—Defts. agreed by an employer’s indemnity policy of insurance to indemnify pltfs. against their liability,

premiums that may be accepted are to be regulated by the amount of wages & salaries & other earnings paid to employees by the insured during each period of insurance. The name of every employee & the amount of wages, salary, & other earnings paid to him shall be duly recorded in a proper wages book. The insured shall at all times allow the society to inspect such books, & shall supply the society with a correct account of all such wages, salaries, & other earnings paid during any period of insurance within one month from the expiry of such period of insurance, & if the total amount so paid shall differ from the amount on which premium has been paid, the difference in premium shall be met by a further proportionate payment to the society or by a refund by the society, as the case may be." No wages book was kept by claimant:—*Held*: claimant was entitled to indemnity by the society from liability to pay compensation, as the sole object of the condition was to provide for the adjustment of premiums, & compliance with the clause was not a condition precedent to liability.

As the policy clearly & unmistakably pronounced the clause to be a condition precedent, there was no reason why it should be declared to be otherwise, & the society, therefore, was not liable (*FLETCHER MOULTON, L.J.*).—*Re BRADLEY & ESSEX & SUFFOLK ACCIDENT INDEMNITY SOCIETY*, [1912] 1 K. B. 415; 81 L. J. K. B. 523; 105 L. T. 919; *sub nom. BRADLEY v. ESSEX & SUFFOLK ACCIDENT INDEMNITY SOCIETY, LTD.*, 28 T. L. R. 175, C. A.

*Annotation*:—*Reid. Re United London & Scottish Insce.* (1915), 31 T. L. R. 202.

**3198.** ——— **Forwarding every notice or information regarding claim—Request for arbitration.**—By the terms of a policy of insurance against claims arising under the Workmen's Compensation Act, 1906 (c. 58), it was provided that the assured should forward to the insurance co. "every written notice or information as to any verbal notice of claim arising through any accident" covered under the policy, & should also give all such information & assistance as the co. might require to enable the co. to settle or resist any claim as the co. might think fit.

An accident having happened to a workman in the employment of the assured, proceedings under the Workmen's Compensation Act were instituted against him in the county ct., & a notice of claim, accompanied by a request for arbitration, were sent to him by the registrar. The assured forwarded the notice of claim to the insurance co., but not the request for arbn. In arbn. proceedings by the assured under the policy to recover the amount of compensation which he had been compelled to pay, the co. resisted liability, on the ground that the assured had not complied with the conditions of the policy by reason of the fact that he had not forwarded to them the request for arbn. A special case for the opinion of the ct. having been stated by the arbitrator:—*Held*: the request for arbn., being only a step in procedure, was not a written notice of claim within the meaning of the policy & the award must be in favour of the assured.—*WILKINSON v. CAR & GENERAL INSURANCE CORPN.*,

*LTD.* (1913), 110 L. T. 468; *sub nom. Re WILKINSON & CAR & GENERAL INSURANCE CORPN.*, 58 Sol. Jo. 233, D. C.

**3199.** ——— **Notice of accident—Sufficiency of notice.**—Appls. took out a policy of insurance against liability in respect of injury to any workmen in their employ under (*inter alia*) the Workmen's Compensation Act, 1897 (c. 37), with resp. co.

Clause 3 of the policy provided that the employer was "to give immediate notice to the co. of any accident causing injury to a workman," & that "time should be the essence of this condition." At the foot of the policy there was a notification that every notice to be given by the assured should be in writing sent by post to, or delivered at, the head office of the co.

An accident having happened to a workman of applts. on Oct. 10, 1900, on Oct. 16 applts. notified the fact of the accident by telephone to the person who had introduced the insurance co. to them. Applts. received a notice in writing from the workman of his intention to claim compensation on Dec. 1, 1900, & they forwarded that notice to resp. co. on Dec. 4.

An award under the Act of 1897 having been made in favour of the workman, applts., the employers, claimed to be indemnified by the insurance co.:—*Held*: the giving of immediate notice of the accident was a condition precedent to the employers' right to indemnity under the policy, the communication to the person who had introduced applts. to the co. was no notice to the co. at all, & under the circumstances the co. were not liable.—*Re WILLIAMS & LANCASHIRE & YORKSHIRE ACCIDENT INSURANCE CO.'S ARBITRATION* (1902), 51 W. R. 222; 47 Sol. Jo. 110.

**3200.** ——— **Impossibility of compliance.**—A policy of insurance covering the liability of an employer to compensate his workmen for injuries by accident in the course of their employment was made subject to a condition that the employer should give immediate notice of any accident causing injury to a workman, & to a further condition that the observance & performance by the employer of the times & terms set out in the policy, so far as they contained anything to be done by the employer, were the essence of the contract.

On Dec. 28, 1904, the employer signed a proposal form for the insurance & received a covering note, to which no conditions were attached. On Jan. 3, 1905, the insurers sealed, & on Jan. 9 delivered to the employer, the policy in question, which expressed that it was to be in force from Jan. 1, 1905, to Jan. 1 in the following year. On Jan. 2, 1905, a workman in the employ of the assured was injured by an accident which was believed to be slight, & of which notice was not given at the time to the insurers. Dangerous symptoms supervened, & the injured workman died on Mar. 15; notice of the accident was given by the employer to the insurers on Mar. 14, the day before the workman's death. The insurers repudiated all liability under the policy, on the ground, among others, that immediate notice of the accident was not given by the employer in accordance with the condition in the policy, &

under Workers' Compensation Act, 1905. A workman was run over & killed. It was a condition of the policy that pltf. should take all reasonable precautions to prevent accidents:—*Held*: the accident having been caused by the negligence & want of care on pltf.' part, they were not entitled to succeed.—*ROCKHAMPTON CORPN. v.*

*YORKSHIRE INSURANCE CO., LTD.* (1910), 11 C. L. R. 594.—*AUS.*

1. ———.]—The implication from a condition in an employer's liability accident policy that "the employer shall at the cost of the co., insurers, render them every assistance in his power in carrying on any suit they shall undertake" is that the

employer shall not assist the opposite side.—*TALBOT v. LONDON GUARANTEE & ACCIDENT CO.*, 17 C. L. T. Occ. N. 216.—*CAN.*

m. ———.]—*WYTHE v. MANUFACTURERS' ACCIDENT INSURANCE CO.* (1894), 26 O. R. 153.—*CAN.*

n. ———.]—*MORRISON & MASON*



**Sect. 2.—Insurance against liability for accidents to third persons: Sub-sects. 2 & 3.]**

that the condition was a condition precedent to the right of the employer to recover. A claim for compensation by the widow was properly settled by the employer for a reasonable sum, & the claim of the latter against the insurers was referred to an arbitrator under the arbn. clause in the policy. The arbitrator held that the condition as to giving immediate notice of injury was a condition precedent, but stated his award in the form of a special case for the opinion of the ct., which reversed the arbitrator's decision. Upon appeal by the insurers:—*Held*: (1) in the absence of evidence that the employer either knew of, or had the opportunity of knowing of, the existence of the condition at the date of the accident, the condition was one with which it was impossible to comply; (2) as regards a risk which resulted in a claim before the insured had knowledge of the condition, the true inference was that the insurers never imposed the condition on the employer, & the latter was therefore entitled to recover on the policy.

*Qu.*: whether upon the construction of the policy as a whole, apart from the particular circumstances, the condition was a condition precedent.—*Re COLEMAN'S DEPOSITORIES, LTD. & LIFE & HEALTH ASSURANCE ASSOCN.*, [1907] 2 K. B. 798; 76 L. J. K. B. 865; 97 L. T. 420; 23 T. L. R. 638, C. A.

**3201. — Proviso against admission of liability —By agent of assured—Admissibility of signed admission.]**—An admission of liability, made by a driver of a traction engine after a collision caused by his negligence, is not a breach of a condition contained in a policy of insurance made with his employer that the assured shall not by his agent make any admission of liability, unless the admission is authorised by the employer.

Under a policy of insurance defts. were to be indemnified against damage for which they might be liable by reason of a collision with their traction engine, provided that the assured should not, by himself or his agent, make any admission of liability to any person in respect of whom indemnity might be claimed under the policy. After a collision between the traction engine & plaintiff's motor car, caused by the negligence of defts.' driver, pltf. wrote out, & the driver, who was illiterate, signed with a cross, a document in which the driver admitted that he was negligent & responsible for the collision. In an action for damages brought by pltf. against defts., & which was settled by defts. paying him a reasonable sum therefor, defts. claimed from the insurers, as third parties, indemnity for such payment, & the insurers repudiated liability on the ground that the driver's admission of liability was a breach of the proviso in the policy:—*Held*: as the driver had not defts.' authority to make the admission of liability, & the document signed by him was not part of the *res gestæ* & therefore was not admissible in evidence against the defts., the insurers must indemnify defts. in respect of the moneys paid to the plaintiff. *Semble*: an agent's admission of liability, if part of the *res gestæ*, would not be a breach of such proviso, unless expressly authorised

by the principal.—*TUSTIN v. ARNOLD & SONS* (1915), 84 L. J. K. B. 2214; 113 L. T. 95; 31 T. L. R. 368.

**3202. — Truth of statements in proposal—Misstatement.]**—*DAWSONS, LTD. v. BONNIN*, No. 2553, *ante*.

**3203. Reinsurance of risk—Notice by reinsured as to defending action & incurrence of costs.]**—Pltfs., an insurance co., insured a tramway co. against liability for accidents & litigation expenses, & deft. & other underwriters reinsured pltfs.' liability in excess of £250 in respect of any one accident up to £750 in any one year. A clause attached to the reinsurance policy provided that in the event of a claim occurring likely to exceed £250 no costs should be incurred without the consent of the underwriters, & that if the claim became adjustable before going into ct. for not more than £150 no costs should be payable by the underwriters, but if it became so adjustable for more than £250 the underwriters, if they consented to the continuance of the proceedings, should contribute a proportion of the costs. In Apr. 1914, a claim for £1,750 was made against the tramway co. by the dependants of a man who died as the result of an accident, & notice of the claim was given to pltfs. In Nov. 1914, the dependants began an action against the tramway co. to recover £1,750, & the co. put in a defence. In Apr. 1915, after the date of the trial had been fixed, pltfs. for the first time gave notice to the underwriters, & the latter replied that having had no previous notice they must not be taken to acquiesce in the litigation. Ultimately, in Feb. 1917, judgment was given against the tramway co. for £200 & £431 costs. Pltfs. paid to the tramway co. these sums, together with the tramway co.'s costs, a total of £952, & claimed from deft. his proportion of £702, being the excess over £250:—*Held*: as no notice of the intention of pltfs. to defend the action, or that pltfs. were incurring costs, had been given by pltfs. to deft., pltfs. could not recover.—*BRITISH GENERAL INSURANCE CO. v. MOUNTAIN* (1919), 36 T. L. R. 171; 64 Sol. Jo. 170, H. L.

**SUB-SECT. 3.—SUBROGATION OF WORKMEN ON BANKRUPTCY OF EMPLOYERS.**

*See Workmen's Compensation Act, 1906 (c. 58), s. 5.*

**3204. Workmen's rights against insurers—Extent of right—No greater rights than employer.]**—The effect of Workmen's Compensation Act, 1897 (c. 37), is to subrogate the workman to the rights of the employer against his insurers; the workman has no larger rights against the insurers than the employer has.—*MORRIS v. NORTHERN EMPLOYERS' MUTUAL INDEMNITY CO.* (1902), as reported in 71 L. J. K. B. 733; 18 T. L. R. 635; 4 W. C. C. 38, C. A.

**3205. — — —.]**—In the case of bkpcy. or winding up of an employer, who is insured, Workmen's Compensation Act, 1906 (c. 58), s. 5, only gives the workman the same right against the insurers as the employer would have had. Where a policy of insurance contains a clause that any dispute between the insured & the insurers

*v. SCOTTISH EMPLOYERS' LIABILITY, ETC. ASSURANCE CO.* (1888), 16 R. (Ct. of Sess.) 212; 26 Sc. L. R. 151.—SCOT.

*o. Notice that employee has left service acted upon by insurers—Insurers not liable.]*—*WOJCIK v. ANTHER*

56 O. L. R. 600.—CAN. 2 D. L. R. 840;

*p. Measure of damages.]*—*NOVA SCOTIA TRAMWAYS, ETC. CO., LTD. v. EMPLOYERS' LIABILITY, ETC. CO., LTD.* (1918), 40 T. L. R. 122; 118 N. S. R. —CAN.

**PART V. SECT. 2, SUB-SECT. 3.**

*q. Workmen's rights against insurers —Extent of right.]*—A workman raised an action of damages for personal injury against the employer, & obtained decree against him for a



shall be referred to arbn. under the Arbitration Act, 1889 (c. 49), & that an award under that Act shall be a condition precedent to any right of action against the assured, & there is a *bond fide* dispute, a workman cannot take proceedings in the county ct. to have compensation awarded until the matter has been referred to arbn. under the Arbitration Act, 1889 (c. 49), & an award obtained.—**KING v. PHOENIX ASSURANCE CO.**, [1910] 2 K. B. 666; 80 L. J. K. B. 44; 103 L. T. 53; 3 B. W. C. C. 442, C. A.

*Annotations*:—**Reid. Daff v. Midland Colliery Owners' Mutual Indemnity Co.** (1913), 82 L. J. K. B. 1340; **Craig v. Royal Insee.** (1914), 84 L. J. K. B. 333; **Pailin v. Northern Employers' Mutual Indemnity Co.**, [1925] 2 K. B. 73.

**3206. — Mutual insurance society—Accident while protection existing.**—A colliery co. were members of resp. co., & as such members were entitled to an indemnity against all proceedings, costs, damages, claims & demands in respect of compensation resulting from any accident to their workmen. By the arts. of assocn., "Whenever a member's protection has been determined . . . he shall not be entitled to any indemnity in respect of any accident." The colliery co. made default in payment of a call, & resp. co. removed their name from the list of protected mines & works. The colliery co. was afterwards wound up. Resp. co. had become liable to pay an indemnity to the colliery co. in respect of an accident to applt., one of their workmen, which occurred while the colliery co. were still members of resp. co.:—**Held**: the cause in the arts. of assocn. referred to accidents happening after the protection had been determined, not to accidents which had happened while it was existing, & on the winding up of the colliery co. resp. co. were liable to pay compensation to applt. under Workmen's Compensation Act, 1906 (c. 58), s. 5.—**DAFF v. MIDLAND COLLIERY OWNERS' MUTUAL INDEMNITY CO.** (1913), 82 L. J. K. B. 1340; 109 L. T. 418; 29 T. L. R. 730; 57 Sol. Jo. 773; 6 B. W. C. C. 799; 20 Mans. 363, H. L.

*Annotation*:—**Expld. & Distd. Pailin v. Northern Employers' Mutual Indemnity Co.**, [1925] 2 K. B. 73. The accident in *Daff's Case* was the subject of a real insurance of extraordinary accidents, not like this, an ordinary accident with its consequences (**SCRUTTON, L.J.**).

**3207. — Right to prove in employer's estate.**—The effect of Workmen's Compensation Act, 1906 (c. 58), s. 5 (1), is to give to the workman a right to enforce the policy against the insurance co., in substitution for the right which he possessed before the Act of proving against the estate of a bkpt. employer. The sect. does not give the workman merely an additional right, or, in other words, an option either to prove against the bkpt. employer's estate or to claim against the insurance co.—**CRAIG v. ROYAL INSURANCE CO., LTD.** (1914), 84 L. J. K. B. 333; 112 L. T. 291; 8 B. W. C. C. 339; [1915] H. B. R. 57.

**3208. —**—The effect of Workmen's Compensation Act, 1906 (c. 58), s. 5, is that where an employer has entered into a contract with any insurers in respect of any liability under the Act, in the event of the employer becoming bkpt., or, being a co., having commenced to be wound up, the claim of a workman for compensation is against the insurers only. He has no right to prove in the bkpcy. or liquidation of the employer except in the case provided for by sub-sect. 2, which applies only when the insurance does not cover the whole of the employer's

liability.—**Re PETHICK, DIX & CO., BURROWS' CLAIM**, [1915] 1 Ch. 26; *sub nom. Re PETHICK, DIX & CO., LTD., BURROWS v. PETHICK, DIX & CO., LTD.*, 84 L. J. Ch. 285; 112 L. T. 212; 59 Sol. Jo. 74; 8 B. W. C. C. 337; [1915] H. B. R. 59.

*Annotation*:—**Apld. Re Renishaw Iron Co.** (1916), 61 Sol. Jo. 147.

**3209. —**—The effect of Workmen's Compensation Act, 1906 (c. 58), s. 5, is that, where an employer has entered into a contract with any insurers in respect of any liability under the Act, in the event of the employer becoming bkpt., or, being a co., having commenced to be wound up, the claim of the workman is against the insurers only, whether in liquidation or not. He has no right to prove in the bkpcy. or liquidation of the employer, except in the case provided for by sub-sect. 2, which applies only when the insurance does not cover the whole of the employer's liability. It makes no difference that the insurers have gone into liquidation before the bkpcy. or liquidation of the employer.—**Re RENISHAW IRON CO., LTD.**, [1917] 1 Ch. 199; 86 L. J. Ch. 190; 115 L. T. 755; 61 Sol. Jo. 147; *sub nom. Re RENISHAW IRON CO., WILSON v. RENISHAW IRON CO.*, 10 B. W. C. C. 20.

**3210. — Must arise in respect of insurance contract.**—The workman was injured by an accident arising out of & in the course of his employment in 1913. The employers were members of applt. Indemnity Co., who paid compensation thereafter until Sept. 1921, when in consequence of the employers being in default in their contributions, applts., by virtue of powers contained in their arts. of assocn., determined the employers' protection & ceased making the payments. In respect of accidents of the nature of this one, these payments were made out of a fund to which the employers were liable to contribute all sums which were paid on their behalf, an account of disbursements & receipts being kept. On Oct. 5, 1921, a receiver was appointed on behalf of the debenture holders of the employers' co., but the Indemnity Co. were, for the purposes of the arbn., prepared to assume that the employers were in fact in liquidation:—**Held**: (1) the contract between the employers & the Indemnity Co. in respect of this accident was not one of insurance & therefore Workmen's Compensation Act, 1906 (c. 58), s. 5 (1), did not apply in favour of the workman; (2) since the money ultimately payable as compensation was in fact payable by the employer himself, & since under the proviso to sect. 5 (1) of the Act of 1906, the workman could not establish a greater liability against the Indemnity Co. than the latter would be under to his employer, the Indemnity Co. were not liable to the workman.—**PAILIN v. NORTHERN EMPLOYERS' MUTUAL INDEMNITY CO.**, [1925] 2 K. B. 73; 133 L. T. 77; 69 Sol. Jo. 427; 18 B. W. C. C. 32, C. A.

**3211. — Insurers in liquidation before employers.**—An employee of a colliery co., which had taken out a policy indemnifying it against all sums payable under the Workmen's Compensation Act, 1906 (c. 58), met with an accident permanently injuring him in a mine on Aug. 28, 1910. On Dec. 20, 1910, the assurance co. went into liquidation. The colliery co. went into liquidation in Feb. 1912. The employee claimed the value of an annuity of £46 *per annum*, £979. The liquidator

sum of damages & for his expenses. The defence was in fact conducted & controlled by the insurance co. in name of the employer. The employer having

become insolvent the workman raised a separate action against the insurance co. for the purpose of recovering his expenses in the original action:—**Held**:

the action was competent.—**KERR v. EMPLOYERS' LIABILITY ASSURANCE CO.** (1899), 37 Sc. L. R. 21.—**SCOT.**

**Sect. 2.—Insurance against liability for accidents to third persons: Sub-sects. 3 & 4. Part VI. Sect. 1.]**

admitted the claim as to £697 11s. 7d., deducting £54 paid by the colliery co. before it went into liquidation from £751 11s. 7d., the value of the annuity after deducting 25 per cent. in accordance with the Assurance Companies Act, 1909 (c. 49), s. 17, which enacts that where an assurance co. is being wound up the value of the policy shall be estimated as provided by the sixth schedule, & in the sixth schedule (D) as respects employers' liability policies provides for the purchase of an annuity equal to 75 per cent. of the annual value of the weekly payment. The question was whether the workman was entitled to the full value of the annuity as from the date when the colliery co. went into liquidation, or whether he was only entitled to 75 per cent. from the date the assurance co. went into liquidation:—*Held*: the liability of the assurance co. must be ascertained at the date it went into liquidation & the deduction of 25 per cent. was right, but the deduction of the £54 was wrong.—*Re LAW CAR & GENERAL INSURANCE CORPN., LTD.* (1913), 110 L. T. 27; 58 Sol. Jo. 251.

**3212.** ———.]—*Re RENISHAW IRON CO., LTD.*, No. 3209, *ante*.

**3213. Insurers' rights against workmen—Enforcement of arbitration proviso.]**—*KING v. PHOENIX ASSURANCE CO.*, No. 3205, *ante*.

**SUB-SECT. 4.—MOTOR INSURANCES.**

**3214. Validity—Not against public policy.]**—By a policy of insurance the assured was entitled to be indemnified against (*inter alia*) sums which he should become legally liable to pay to third parties as compensation for "accidental personal injury" caused through the driving of his motor car. While driving his car at an excessive speed the assured knocked down three persons, injuring two & killing one, & in respect of this occurrence he was convicted of manslaughter on his own confession. Actions having been commenced against him by the injured persons & by the representative of the person who was killed for damages, the assured sued the insurance co. for a declaration that he was entitled to be indemnified in respect of those claims:—*Held*: (1) the policy protected

the assured against the civil consequences of accidents due to negligence, whether slight or great; (2) the injuries to the two persons & the death of the third were due to an "accident" within the meaning of the policy; (3) a policy covering risks of this nature was not void as against public policy; (4) the assured was entitled to the declaration claimed.—*TINLINE v. WHITE CROSS INSURANCE*, [1921] 3 K. B. 327; 90 L. J. K. B. 1118; 125 L. T. 632; 37 T. L. R. 733; 26 Com. Cas. 347.

**3215. — Life Insurance Act, 1774 (c. 48).]**—The owner of a motor car took out a policy of insurance by which the insurers agreed to indemnify him against damage to, or loss of, his motor car, & by clause 2 against all sums for which the insured or any licenced personal friend or relative of the insured while driving the car with the insured's general knowledge & consent shall become legally liable in compensation for . . . accidental bodily injury caused to any person.

During the currency of the policy, & while the car was being driven by the insured's sister, a licenced driver, with his general knowledge & consent, an accident happened which caused personal injuries to third persons, & in respect of which those persons recovered damages against her. The insured claimed that the insurers were liable under the policy to indemnify his sister & to pay to her or to him as trustee for her the amount of those damages:—*Held*: (1) the terms of the policy applied to the event that happened; (2) the policy was an insurance on goods—namely, the motor car—within sect. 4 of above Act, & only incidentally against third party risks, & did not come within the earlier sects. of that statute; (3) the insurers were therefore liable to pay to the insured as trustee for his sister the amount payable under the judgment against her.—*WILLIAMS v. BALTIC INSURANCE ASSOCN. OF LONDON, LTD.*, [1924] 2 K. B. 282; 93 L. J. K. B. 819; 131 L. T. 671; 40 T. L. R. 668; 68 Sol. Jo. 814; 29 Com. Cas. 305.

**3216. Protection against civil consequences—Whether slight or great.]**—*TINLINE v. WHITE CROSS INSURANCE*, No. 3214, *ante*.

**3217. Motor driven by relation of assured—With assured's authority.]**—*WILLIAMS v. BALTIC INSURANCE ASSOCN. OF LONDON, LTD.*, No. 3215, *ante*.

**Right of assured to prove in liquidation of insurers.]**—*See COMPANIES*, Vol. X., p. 1089, No. 7623.

**PART V. SECT. 2, SUB-SECT. 4.**

**r. Condition as to bringing action—Giving third party notice sufficient.]**—*PIPER v. SPENCE*, [1925] 1 D. L. R. 334; 1 W. W. R. 521.—*CAN.*

**t. Unlicenced driver knowingly employed.]**—The fact that a taxicab owner employed a chauffeur knowing that he was not a licenced driver & thereby violated a city bye-law:—*Held*: not to prevent him from recovering under a policy of indemnity insurance the amount of a judgment obtained against him in an action for damages for personal injuries caused by the negligence of such driver.—*MACLURE v. GENERAL ACCIDENT AS-*

*SURANCE CO. OF CANADA*, [1925] 3 D. L. R. 133; 2 W. W. R. 145; 35 B. C. R. 33.—*CAN.*

**a. "Sole & unconditional owner"—Buyer under conditional sale agreement.]**—An insured under an automobile liability policy who is in possession of the automobile under a conditional sale agreement is the sole & unconditional owner thereof within the meaning of a condition in the policy which provides that "the insurers shall not be liable if the interest of the insured is other than unconditional & sole ownership."—*FORSYTH v. IMPERIAL GUARANTEE & ACCIDENT INSURANCE CO. OF CANADA*, [1925] 4 D. L. R. 479; 3 W. W. R. 669.—*CAN.*

**b. Misstatement as to previous accident.]**—Where a proposal in writing for the insurance against accident of a motor car-a-banc was made & signed with a warranty that the statements & particulars therein contained were true, & reference was made to a previous accident but it was not stated that there had been any damage to the car:—*Held*: this was a wilful misstatement invalidating the policy.—*FUREY v. EAGLE, STAR & BRITISH DOMINIONS INSURANCE CO.* (1922), 56 I. L. T. 109.—*IR.*

**c. Construction of policy.]**—*INGLIS BROTHERS & CO., LTD. v. LIVERPOOL, LONDON & GLOBE INSURANCE CO., LTD.*, [1924] N. Z. L. R. 455.—*N.Z.*

## Part VI.—Guarantee Policies.

## SECT. 1.—IN GENERAL.

**3218. Contract of indemnity.]**—MACVICAR v. POLAND (1894), 10 T. L. R. 566.

**3219. —.]**—In Nov. 1897, a guarantee society granted a policy of insurance of a mtge. on a public-house. By a treaty of reinsurance made in June, 1898, between the guarantee society & a reinsurance co., & fixed to commence from May 16, 1888, the co. agreed, subject to certain stipulations, to reinsure certain risks, including those under mtge. insurance policies. The liability of the co. was to commence simultaneously with that of the society provided that advice of the issue of fresh policies or cover notes was dispatched to the co. within a certain time, it being however agreed that if through inadvertence reinsurance was omitted the co. would, on certain conditions, hold the society covered for twelve months. Notification of reinsurances was to be forwarded to the co. on a certain form at least once a week & notification of renewals was to be forwarded to the co. on a similar form. In Nov. 1901, the original mtgors. of the public-house were released & a fresh mtge. to the same mtgees. was executed by a new mtgor., there being several variations in the new as compared with the old mtge., & a fresh policy of insurance of the new mtge. was granted by the society. Reinsurance of the new policy was effected by the society with the co., but all material facts relating to the risk were not disclosed by the society to the co. In 1908 the mtgees. called in their mtge. & the society became liable to make a payment under the policy. In the following year the co. repudiated liability to the society. On a case stated in an arbn. between the society & the co.:—*Held*: the reinsurance treaty was a contract of indemnity only & did not create a fiduciary relationship between the parties, the right of the society to call for an indemnity did not include risks undertaken before the date fixed for the commencement of the contract, but the substance of the insurance of Nov. 1901, was not the same as that of the insurance of Nov. 1897, & the co. was liable under the treaty to pay their quota of the loss due from the society to the insured.—**LAW GUARANTEE TRUST & ACCIDENT SOCIETY, LTD. v. MUNICH REINSURANCE CO.** (1915), 31 T. L. R. 572.

*See, further*, GUARANTEE, Vol. XXVI., p. 12, Nos. 14, 15.

**3220. Uberrima fides—Whether applicable.]**—There are some contracts in which our cts. of law & equity require what is called *uberrima fides* to be shown by the person obtaining them. . . . Of these ordinary contracts of marine, fire & life insurance are examples, & in each of them the person desiring to be insured, must, in setting forth the risk to be insured against, not conceal any material fact affecting the risk known to him. On the other hand, ordinary contracts of guarantee are not amongst those requiring *uberrima fides* on the part of the creditor towards the surety & mere non-communication to the surety by the creditor of facts known to him affecting the risk to be

undertaken by the surety will not vitiate the contract, unless there be fraud or misrepresentation, & misrepresentation undoubtedly might be made by concealment. But the difference between these two classes of contract does not depend upon any essential difference between the word "insurance" & the word "guarantee." There is no magic in the use of these words. The words to a great extent have the same meaning & effect; & many contracts like the one in the case before us may with equal propriety be called contracts of insurance or contracts of guarantee. Whether the contract be one requiring *uberrima fides* or not must depend upon its substantial character & how it came to be effected (ROMER, L.J.).—**SEATON v. HEATH, SEATON v. BURNAND**, [1899] 1 Q. B. 782; 68 L. J. Q. B. 631; 80 L. T. 579; 47 W. R. 487; 15 T. L. R. 297; 4 Com. Cas. 193, C. A.; *on appeal, sub nom. SEATON v. BURNAND, BURNAND v. SEATON*, [1900] A. C. 135, H. L.

*Annotations*:—**Consd.** *Parr's Bank v. Albert Mines Syndicate* (1900), 5 Com. Cas. 116; *Re Denton's Estate, Licenses Insee. Corp'n. & Guarantee Fund v. Denton*, [1904] 2 Ch. 178. **Refd.** *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72; *Yorke v. Yorkshire Insee.*, [1918] 1 K. B. 662. **Mentd.** *Floyd v. Gibson* (1909), 100 L. T. 761; *Cantlere Meccanico Brindisino v. Janson*, [1912] 3 K. B. 452; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Wilson v. United Counties Bank*, [1920] A. C. 102; *Yorkshire Insee. v. Craine*, [1922] 2 A. C. 541.

**3221. Reinsurance of risk—Fiduciary relationship—Whether created between assured & reinsured.**

—A brewery co. made a debenture issue with a trust deed of which an assurance society were the trustees. By a contract indorsed on each debenture the society guaranteed the registered holder payment of the principal & interest secured by the debenture if the brewery co. should make default. The society received for this guarantee a consideration in the nature of an annual premium, & also an annual fee for acting as trustees, the payment of which was provided for by the trust deed. The society then reinsured part of their risk under their guarantee with another insurance co. Subsequently both the brewery co. & the society went into liquidation, & the debentures remained unpaid.

A purchaser of all the debentures of the brewery co. proved in the liquidation of the society for the amount due under the debentures after deducting the value of his securities & his proof was admitted. He also claimed to be entitled, as against the general creditors of the society, to the benefit of all reinsurances effected by the society in connection with the debentures:—*Held*: he was not so entitled. Although under the trust deed there was a fiduciary relation between the society & the debenture-holders, there was no fiduciary relation between them under the contract by which the payment of the debentures was guaranteed.—**Re LAW GUARANTEE TRUST & ACCIDENT SOCIETY, GODSON'S CLAIM**, [1915] 1 Ch. 340; 84 L. J. Ch. 510; 112 L. T. 537; 59 Sol. Jo. 234; [1915] H. B. R. 103.

**3222. —.]**—**LAW GUARANTEE TRUST & ACCIDENT SOCIETY, LTD., v. MUNICH REINSURANCE CO.**, No. 3219, *ante*.

## PART VI. SECT. 1.

**3220 i. Uberrima fides—Whether applicable.]**—**LONDON WEST VILLAGE v. LONDON GUARANTEE & ACCIDENT CO.** (1895), 26 O. R. 520.—CAN.

**3220 ii. —.]**—Contracts in-

suring the honesty of an employee call for the same degree of good faith & full disclosure by the employer as is called for in contracts of life or fire insurance, & parties applying for this form of insurance may be called to

strictest account for statements made by them inducing the contract.—**FERTILE VALLEY RURAL MUNICIPALITY No. 285 v. UNION CASUALTY CO.**, [1921] 3 W. W. R. 26; 14 Sask. L. R. 413; 61 D. L. R. 19.—CAN.



*Sect. 1.—In general. Sects. 2 & 3.]*

**3223. Distinguished from ordinary guarantee.]—**SEATON *v.* HEATH, SEATON *v.* BURNAND, No. 3220, *ante*.

Contracts of guarantee generally, *see* GUARANTEE, Vol. XXVI., pp. 9 *et seq.*

**3224. Subrogation—Insurer's right after payment to assured.]—**DANE *v.* MORTGAGE INSURANCE CORPN., No. 3244, *post*.

**3225. ———.]—**FINLAY *v.* MEXICAN INVESTMENT CORPN., No. 3242, *post*.

**3226. ———.]—**An instrument addressed to pltf. bank, but in respect of which deft. syndicate paid the premium, was subscribed by underwriters at Lloyd's & handed to the bank by the syndicate as security for a loan made to the syndicate upon the personal guarantee of two of the directors of the syndicate. By the instrument it was witnessed that the underwriters agreed to "guarantee" to the bank the repayment of the loan. Default having been made in the repayment of the loan by the syndicate & the sureties, the underwriters paid to the bank the amount thereof, & brought an action in the name of the bank against the syndicate & the sureties:—*Held*: the contract of the underwriters was one of insurance & not of suretyship, the underwriters, having paid the loss, were thereby subrogated to the rights of their assured, & were entitled to sue in the name of the assured, & to recover from the principal debtor & the sureties the amount of the loan & interest; & the underwriters & the sureties did not stand in the relation of co-sureties.—PARRS BANK *v.* ALBERT MINES SYNDICATE (1900), 5 Com. Cas. 116.

*Annotation*:—*Reid. Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Co.'s Case*, [1914] 2 Ch. 617.

**3227. Risk not insured against—Defalcations in account not covered by policy.]—**A. was appointed assistant overseer of the parish of H., & by virtue of his appointment under Local Government Act, 1894 (c. 73), s. 17 (2), he became clerk to the parish council of H. Defts. entered into a bond guaranteeing the faithful performance of his duties as assistant overseer. A. committed defalcations in respect of moneys received by him as clerk to the parish council.

In an action to recover the amount of such defalcations under the guarantee given by defts.:—*Held*: the defalcations of A. in relation to the parish council accounts were not covered by the terms of the bond guaranteeing the faithful performance of his duties in the office of assistant overseer.—COSFORD UNION *v.* POOR LAW & LOCAL GOVERNMENT OFFICERS' MUTUAL GUARANTEE ASSOCN., LTD. (1910), 103 L. T. 463; 75 J. P. 30; 8 L. G. R. 995, D. C.

**3228. Contribution between co-insurers.]—**Pltfs., an American insurance co., issued a policy by which they covenanted to pay an American bank for any loss or damage occasioned by the dishonesty of any of the employees according to an amount appended to each name in a schedule.

Among the employees guaranteed was one K. who was guaranteed up to 2,500 dollars. The bank also took out a policy at Lloyd's for £40,000, by which the underwriters were to be liable for loss caused by the dishonesty of employees, & also for loss sustained by the loss or destruction on the owners' premises of bonds, banknotes, etc., owing to fire or burglary. K. made defalcations to the extent of 2,680 dollars, & the bank claimed from

pltfs. the full amount of the insurances, viz. 2,500 dollars, leaving a balance of 180 dollars. The bank claimed 180 dollars on the Lloyd's policy, which was paid. The present action was brought by pltfs. against deft., who was one of the underwriters on the Lloyd's policy, for contribution in respect of the loss:—*Held*: deft. was liable to pay a proportion of the whole loss of 2,680 dollars in the ratio of 2,680 & 2,500.—AMERICAN SURETY CO. OF NEW YORK *v.* WRIGHTSON (1910), 103 L. T. 663; 27 T. L. R. 91; 16 Com. Cas. 37.

*Annotation*:—*Mentd.* The Colorado, [1923] P. 102.

**SECT. 2.—COMMENCEMENT AND DURATION OF RISK.**

**3229. Commencement—Premium not paid until after loss.]—**Pltfs., who carried on business in various towns, including Paris, requested defts. to issue a bond guaranteeing pltfs. against loss through the dishonesty of L., their Paris manager. On the application form pltfs., in answer to the question "From what date is it [the bond] to be in force & for what amount?" answered thus: "From insurance, £1,000." On Mar. 7, 1912, the rate of premium was arranged, & on Mar. 8, the bond was drawn up & executed at defts.' London office. It recited that in consideration of the premium paid to defts. they agreed to reimburse pltfs. for any loss they might sustain by the larceny or embezzlement of L. "during the period from Mar. 8, 1912, to Mar. 7, 1913." The premium had not then been paid, nor by the terms of the bond was its payment a condition precedent to liability upon the bond. The bond was forwarded the same day to defts.' French agents, who on Mar. 9 sent it to pltfs.' Paris office; it was, however, returned to the agents with a request that they should deliver it at pltfs.' London office, & this was done on Mar. 18, with a request for a cheque for the premium. Pltfs.' London manager was then absent, & it was finally arranged that the matter should stand over till his return. On Apr. 13 L. left his office in Paris, & by Apr. 18 pltfs. were in a state of suspicion about him, although not sure that his absence was incapable of a satisfactory explanation. On that day pltfs.' London manager returned, & on being informed of the facts paid the premium to defts. & obtained the bond from them. A few days later pltfs. discovered defalcations by L., & made a claim on the bond, but defts. repudiated liability on the ground that the contract was not complete till Apr. 18 & that there had been concealment of material facts:—*Held*: at the date of L.'s defalcations pltfs. were not covered.—ALLIS-CHALMERS CO. *v.* MARYLAND FIDELITY & DEPOSIT CO. (1916), 114 L. T. 433; 32 T. L. R. 263, H. L.

**3230. Duration—Proviso for notice to discontinue—No notice given.]—**By a memorandum of agreement a guarantee co. agreed with defts., traders, that if they should pay to the co. the sums thereafter mentioned, then the funds of the co. should be liable to make good to defts. nine-tenth parts of the loss occasioned in respect of goods sold by them during the term of three years & one month, from Dec. 1, 1853, to Dec. 31, 1856, by reason of the bkpcy. or insolvency of purchasers, & during any further period in respect whereof

**3224 i. Subrogation—Insurer's right after payment to assured.]—**CROWN BANK *v.* LONDON GUARANTEE & ACCIDENT CO. (1908), 10 O. W. R.

1070; 12 O. W. R. 349; 17 O. L. R. 95.—CAN.

*d. Reference as to amount of loss.]*

—REICHNITZER *v.* EMPLOYERS' LIABILITY ASSURANCE CORPN. (1913), 24 O. W. R. 157; 4 O. W. N. 875; 9 D. L. R. 685.—CAN.

defts. should contribute to the funds of the co., & the co. should consent to receive further payments, but subject to the provisions indorsed thereon. One of the provisions indorsed was, that every guarantee should from the expiration of the original term, be treated as a renewed contract of the like nature & conditions, unless either the member interested therein or the board of directors should give two months' notice of intention not to renew it, & defts. in consideration agreed to pay to the co. £43 yearly during the term of the guarantee:—*Held*: upon the expiration of the original term, without notice, there was a binding contract on defts. to pay like premiums for another term, & it was not open to him to cease or refuse to contribute to the funds of the co.—*SOLVENCY MUTUAL GUARANTEE CO. v. YORK* (1858), 3 H. & N. 588; 27 L. J. Ex. 487; 157 E. R. 603.

**3231.** — — — — —.]—Plaintiffs, a joint stock co., by deed, guaranteed defts., upon their gross annual returns, against loss in their business, during the term of two years, by purchasers of goods becoming bkpt. The guarantee was subject to the following condition: "Every guarantee shall be made for a specified term, but all guarantees upon gross annual returns, floating risks, or rent, whatever may be the original term of the same, shall from the expiration of such original term, be treated as a renewed contract of the like nature & conditions, unless either the member interested therein or the board of directors shall give two calendar months' notice of an intention not to renew the same":—*Held*: in the event of no notice being given, the guarantee became a renewed contract for only one period of two years from the expiration of the original term, & was not from time to time renewable.—*SOLVENCY MUTUAL GUARANTEE CO. v. FROANE* (1861), 7 H. & N. 5; 31 L. J. Ex. 193; 7 Jur. N. S. 899; 158 E. R. 369.

*Annotation*:—*Consd. Re Solvency Mutual Guarantee Co. & Winding Up Acts, 1848 & 1849, Hawthorne's Case* (1862), 6 L. T. 574.

**3232.** — — — — — *Sufficiency of notice.*]—The policies of insurance against bad debts of a mutual guarantee society were subject to a condition that "notice" of withdrawal of any member should be given. An insurer made a parol statement to an agent, through whom he insured, that he should have nothing more to do with the co.:—*Held*: this notice was sufficient, & the agent was authorised to receive it.—*Re SOLVENCY MUTUAL GUARANTEE SOCIETY, HAWTHORN'S CASE* (1862), 31 L. J. Ch. 625; 6 L. T. 574; 8 Jur. N. S. 934; 10 W. R. 572.

### SECT. 3.—CONSTRUCTION OF POLICIES.

**3233.** *Representation—Whether amounting to warranty—Statement of intention—Inspection of accounts.*]—Defts. granted to pltf., the treasurer of a literary institution, a policy of guarantee against loss occasioned by the want of integrity of

W., the secretary of the institution. The policy recited, that, as the basis of the contract for such guarantee, pltf. had lodged at the office of defts. a certain statement in writing, containing a declaration, signed by pltf., of the truth of the answers thereby given to the questions therein contained. This statement contained, amongst others, the following questions & answers:—Q. "First. Is the appct. at present in your employment, & if so, in what capacity; & has he hitherto performed the duties of his situation faithfully & to your satisfaction? A. He is secretary of the Marylebone Literary Institution. Q. Secondly. Is appct. personally known to you or any of your firm; or by whom has he been introduced or recommended to you? A. Only as above. Q. Thirdly. In what capacity do you intend to employ appct., & with reference to this question, state, as far as circumstances will permit, the nature of his intended duties & responsibilities? A. He is secretary of the Marylebone Literary Institution, of which I am treasurer. Q. The checks, which will be used to secure accuracy in his accounts, & when & how often they will be balanced & closed? A. Examined by finance committee every fortnight. Q. The salary or emolument, & when it will be paid to him, & how & when it will be paid? A. £80 a year, at present":—*Held*: the statement that the accounts would be examined by the finance committee every fortnight did not amount to a warranty, but was a mere representation of the intention of pltf.; & consequently, he was entitled to recover in respect of a loss arising from the want of integrity of W., although such loss was occasioned by the neglect to examine the accounts in the manner specified.—*BENHAM v. UNITED GUARANTEE & LIFE ASSURANCE CO.* (1852), 7 Exch. 744; 21 L. J. Ex. 317; 19 L. T. O. S. 206; 17 J. P. 9; 16 Jur. 691; 155 E. R. 1149.

*Annotations*:—*Refd. Towle v. National Guardian Assce. Soc. & Albert Life Assce. & Guarantee Co.* (1861), 5 L. T. 193; *Re Universal Non-Tariff Fire Insce., Forbes' Claim* (1875), L. R. 19 Eq. 485.

**3234.** — — — — — *By person not party to contract.*]—According to the terms of proposal by a tax collector, A., for a guarantee policy, answers were required by the guarantee society not only from appct., but also from his intended employers. Those employers were the comrs. of taxes, & instead of resorting to them, the society accepted the answer of the overseer of taxes, who, in reply to inquiries from the society, stated that the collector's accounts would be checked weekly, & that he would not be allowed at any time to hold in his hands more than from £100 to £200. A. absconded in default to the amount of £654, & it appeared in evidence that although it had been the practice prior to A.'s appointment to check weekly the accounts of the collector who had preceded him, such practice was not continued after his appointment. Upon a bill, by A.'s sureties for the purpose of obtaining payment of the money assured by the policy:—*Held*: (1) the statement of the surveyor of taxes did not amount

### PART VI. SECT. 3.

**3233 i.** *Representation — Whether amounting to warranty—Statement of intention—Inspection of accounts.*]—*R. v. NATIONAL INSURANCE CO.* (1887), 13 V. L. R. 914.—*AUS.*

**3233 ii.** — — — — —.]—A policy had been issued on the faith of the statements & answers to questions in the written application or proposal for insurance signed on behalf of pltf.

containing the condition that "if any suppression, misstatement or material omission shall have been made by the employer in his proposal . . . affecting the risk of the corp'n. . . this ment shall be null & void":—*Held*: defts. were entitled to rely on the two statements in the answers as to the receipt pass-books & the monthly examination of the bank pass-book as indicating & promising the existence of safeguards against loss by embezzlement; & upon principles of equity, the

surety should be considered as discharged from his liability by a departure from a course of business indicated by the answers, whether or not the incorporation of the application in the policy should be treated as creating a warranty that the employer would adhere to the indicated course.—*GLOBE SAVINGS & LOAN CO. v. EMPLOYERS' LIABILITY ASSURANCE CORPN.* (1901), 13 Man. L. R. 531.—*CAN.*



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to a warranty, inasmuch as it was a representation by a third person, who was not a party to the contract, as to the course intended to be pursued by another person; (2) the representation in question being not to a past or existing state of things, but to the future acts of other persons, had no application to the case of a guarantee policy, & as the representation was made fairly & honestly, & was substantially correct, it did not vitiate the policy.—*TOWLE v. NATIONAL GUARDIAN ASSURANCE SOCIETY* (1861), 3 Giff. 42, n.; 30 L. J. Ch. 900; 5 L. T. 193; 7 Jur. N. S. 1109; 10 W. R. 49; 66 E. R. 315, L. JJ.

*Annotation* :—**Consd.** *Re Universal Non-Tariff Fire Insko, Forbes' Claim* (1875), L. R. 19 Eq. 485.

*See, further*, GUARANTEE, Vol. XXVI., pp. 188–190, Nos. 1448–1465.

**3235. Condition precedent to recovery—Notice of liability incurred—Sufficiency of compliance.]**—Where, in a guarantee policy, there is a condition to the effect that the insurer is to give notice within six days of any liability being incurred, or the policy to be void:—*Held*: this meant, notice of any criminal misconduct whereby it is clear that a liability has been incurred; & therefore pltf., on receipt of evidence that the party against whose criminal misconduct the policy had been granted had been guilty of embezzlement, was not bound to give notice thereof until he had ascertained that a liability had actually been incurred.—*WARD v. LAW PROPERTY ASSURANCE & TRUST SOCIETY* (1856), 27 L. T. O. S. 155; 4 W. R. 605; *previous proceedings* (1855), 26 L. T. O. S. 167, N. P.

**3236. — Prosecution of defaulting party by assured—Fidelity guarantee.]**—F., who was about to employ M. in a situation of trust & confidence effected a policy with a guarantee co. to secure himself against fraud by embezzlement of money by M. The policy, which was for £1,000, declared that “subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy,” the co. undertook to reimburse any pecuniary loss sustained by the employer from “the fraud or dishonesty of the employed, as should amount to embezzlement of money, as should be discovered within three months of the death, dismissal, or retirement of the employed.” The employer was to give notice of the claim; & proofs were to be given such as the directors for the time being might require. Then followed this proviso: “Provided that the employer shall if, & when, required by the co., but at the expense of the co., if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty, as aforesaid, in consequence of which a claim shall have been made under this policy, & shall, at the co.’s expense, give all information & assistance to enable the co. to sue for & obtain reimbursement, by the employed, or by his estate, of any moneys which the co. shall have become liable to pay.” F. claimed under this policy a sum of money alleged to have been lost by M.’s embezzlement. The directors pleaded that they had required F. to prosecute M., but that F. had not done so.

*Demurrer*: because it did not appear that there was any obligation on F. to prosecute M., or that the non-performance of any such obligation was a condition precedent to F.’s right to recover:—*Held*: the proviso did constitute a condition precedent, & furnished a defence to the action.—*LONDON GUARANTEE CO. v. FEARNLEY* (1880), 5 App. Cas. 911; 43 L. T. 390; 45 J. P. 4; 28 W. R. 893, H. L.

*Annotations* :—**Distd.** *Re Bradley & Essex & Suffolk Accident Indemnity Soc.*, [1912] 1 K. B. 415. **Consd.** *Kidner v. Stimpson* (1918), 34 T. L. R. 434. **Refd.** *Dawsons v. Bonnin* (1922), 91 L. J. P. C. 210.

**3237. — Liability of all of several underwriters—On policy forming collateral security.]**—Pltfs. agreed to discount acceptances of G. & Sons provided that G. & Sons obtained the following security:—First, a policy or guarantee by which the underwriters agreed that if G. & Sons failed to meet the acceptances the underwriters would pay the amount, the liability of the underwriters respectively being limited to certain specified amounts; secondly, a policy from defts. by which defts. guaranteed the solvency of the underwriters of the first policy. The first policy was obtained for a total amount of £3,750 & purported to be underwritten by five names, each for £750, but, in fact, the name of one underwriter was signed without his authority, & he, therefore, never became liable upon the policy. The second policy contained a recital that certain underwriters had signed the first policy & that their names & signatures or those of their attorneys were known to defts. G. & Sons went into liquidation & failed to meet their acceptances & the four underwriters who were liable on the first policy became insolvent. In an action against defts. on the second policy:—*Held*: in the absence of evidence of an express agreement to that effect, the fact that one underwriter to the first policy never became liable to pltfs. did not discharge the remaining four from their liability upon that policy.—*ANGLO-CALIFORNIAN BANK, LTD. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., LTD.* (1904), 20 T. L. R. 665; 10 Com. Cas. 1.

*See, further*, GUARANTEE, Vol. XXVI., pp. 67 *et seq.*

**3238. Liquidation of party subject of guarantee—Insurance on deposits—Partial repayment before stipulated time—Liability of assured for premium.]**—*SIMPSON v. MORTGAGE INSURANCE CORPN., LTD.* (1893), 38 Sol. Jo. 99, D. C.

**3239. — — — Liability of insurer before final dividend.]**—Pltf. insured certain sums deposited in the M. bank with defts. who undertook to pay him interest on such deposits should default be made by the bank “until the principal was paid by the bank &/or the undertakers; & the principal sums, less any portion of the principal previously received from the bank when the final dividend in bkpcy. or liquidation is declared.” A few days after the policy was entered into the M. bank went into liquidation. It was reconstructed, & subsequently again went into liquidation. Under this second liquidation dividends to the extent of 5s. 7d. in the pound were paid to pltf. The last of such dividends did not purport to be a final dividend, but practically the assets were exhausted,

**3235 i. Condition precedent to recovery—Notice of liability incurred—Sufficiency of compliance.]**—*NATIONAL BANK OF AUSTRALASIA v. BROCK* (1864), 1 W. W. & A.B. 208.—**AUS.**

**3235 ii. — — —.]**—One of the conditions of the guarantee policy sued on required the employer,

immediately after the discovery of any fraud or dishonesty on the part of the employee, to give notice thereof in writing to the insurer stating the cause, nature & extent of the loss. No formal notice, fully complying with this condition was ever given, but information of the loss was promptly

communicated to defts. & they took steps themselves to ascertain the facts fully:—*Held*: defts. could waive strict performance of this condition & had in fact waived it.—*GLOBE SAVINGS & LOAN CO. v. EMPLOYERS' LIABILITY ASSURANCE CORPN.* (1901), 13 Man. L. R. 531.—**CAN.**



& what remained had been taken over by a new co. for realisation. This new co. offered shares to pltf. in payment of the balance of his deposits which he in accordance with the provisions of the insurance policy rejected. Pltf. then sued defts. for payment of the balance of the deposits. Defts. contended that they were not liable to repay until the final dividend was paid on the liquidation of the M. bank, & the last paid dividend was not final, & the liquidation was not yet completed:—*Held*: they were liable.—*MURDOCK v. HEATH* (1899), 80 L. T. 50.

**3240. Insurance against fraud—What constitutes fraud within policy.]—***RAVENSCROFT v. PROVIDENT CLERKS' & GENERAL GUARANTEE ASSOCN.* (1888), 5 T. L. R. 3.

**3241. Amount recoverable—Deduction of amount due to employer.]—***FIFTH LIVERPOOL STARR-BOWKETT BUILDING SOCIETY v. TRAVELLERS ACCIDENT INSURANCE CO., LTD.* (1893), 9 T. L. R. 221.

**3242. What amounts to default—Postponement of date of payment—Insurance of debentures.]—**Pltf., the holder of a debenture in a co. which matured for payment on Nov. 4, 1895, effected a policy of insurance with defts. which, after reciting that the debenture matured on that day & that pltf. had paid a premium for insurance until that date, guaranteed to pltf. the due payment of the principal money secured by the debenture, if the debtors should make default for more than three calendar months in payment of any principal money due "under the debenture." Subsequently, by a special resolution of the debenture-holders, which was neither assented to nor dissented from by pltf. the date for payment of the debentures of the co. was postponed. Pltf.'s debenture was not paid off on Nov. 4, 1895, nor in three calendar months after that date:—*Held*: (1) assuming the special resolution to be valid, the contract was nevertheless one of insurance against the default of the co. to pay the amount of the debenture on the original date; (2) there had been a default by the co. to pay money due under the debenture within the meaning of the policy; (3) pltf. was therefore entitled to recover the amount of the policy from defts., who were entitled on payment to be subrogated to pltf.'s rights as modified by the special resolution.—*FINLAY v. MEXICAN INVESTMENT CORPN.*, [1897] 1 Q. B. 517; 66 L. J. Q. B. 151; 76 L. T. 257; 13 T. L. R. 63.

*Annotations*:—As to (1) *Appld. Parr's Bank v. Albert Mines Syndicate* (1900), 5 Com. Cas. 116; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Co.'s Case*, [1914] 2 Ch. 617. *Reid. Seaton v. Heath, Seaton v. Burnand*, [1899] 1 Q. B. 782; *Shaw v. Royce*, [1911] 1 Ch. 138. As to (3) *Folld. Parr's Bank v. Albert Mines Syndicate* (1900), 5 Com. Cas. 116.

**3243. Embezzlement—How construed.]—**By a fidelity policy defts. undertook to reimburse the assured in respect of loss sustained by any act of larceny or embezzlement upon the part of their employee.

The word "embezzlement" in the policy is to be construed in the same way as it would be construed when used in an indictment (*HAMILTON, J.*).—

*DEBENHAMS, LTD. v. EXCESS INSURANCE CO., LTD.* (1912), 28 T. L. R. 505.

#### SECT. 4.—AVOIDANCE OF POLICIES.

*See, generally, GUARANTEE, Vol. XXVI., pp. 151 et seq.*

**3244. Statutory discharge of debtor.]—**By a document headed "policy of insurance" defts. guaranteed to pltf. the "assured" payment of a deposit with a bank in a colony if the bank should make default in payment. The bank made default. Subsequently a scheme of arrangement was sanctioned by a meeting of creditors & the colonial ct. Under a colonial statute the scheme was binding on pltf. who, however, did not assent to the scheme:—*Held*: defts. were liable on their contract notwithstanding the scheme of arrangement.

The contract was one of insurance against the default of the bank to pay. Therefore defts. were liable to pay, but were entitled to be subrogated to the rights of pltf. under the scheme of arrangement.—*DANE v. MORTGAGE INSURANCE CORPN.*, [1894] 1 Q. B. 54; 63 L. J. Q. B. 144; 70 L. T. 83; 42 W. R. 227; 10 T. L. R. 86; 9 R. 96, C. A.

*Annotations*:—*Folld. Finlay v. Mexican Investment Corpn.*, [1897] 1 Q. B. 517. *Appld. Parr's Bank v. Albert Mines Syndicate* (1900), 5 Com. Cas. 116. *Distd. Re Denton's Estate, Licenses Insee. Corpn. & Guarantee Fund v. Denton*, [1904] 2 Ch. 178. *Appld. Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Co.'s Case*, [1914] 2 Ch. 617. *Reid. Seaton v. Heath, Seaton v. Burnand*, [1899] 1 Q. B. 782; *Shaw v. Royce*, [1911] 1 Ch. 138.

**3245. Non-disclosure of material fact—What amounts to material fact—Rate of interest & circumstances of loan.]—**On the application of applt. resp., an underwriter at Lloyd's, underwrote an instrument in the form of a policy whereby he guaranteed the solvency of a person who was surety for the repayment by the borrower of money lent by applt. Resp. made no inquiry as to the rate of interest payable by the borrower or as to the circumstances of the loan, & no information was given to him on those points. In fact the interest was over 30 per cent. & the borrower was unable to repay the loan. In an action on the policy the jury found that the transaction was not one of exceptional risk:—*Held*: the non-disclosure of the rate of interest & the circumstances of the loan did not constitute a defence, there being no evidence that those facts were material to the only risk undertaken by resp., namely, the insolvency of the surety.—*SEATON v. BURNAND, BURNAND v. SEATON*, [1900] A. C. 135; 69 L. J. Q. B. 409; 82 L. T. 205; 16 T. L. R. 232; 44 Sol. Jo. 276; 5 Com. Cas. 198, H. L.; *reversg. S. C. sub nom. SEATON v. HEATH, SEATON v. BURNAND*, [1899] 1 Q. B. 782, C. A.

*Annotations*:—*Consd. Re Denton's Estate, Licenses Insee. Corpn. & Guarantee Fund v. Denton*, [1904] 2 Ch. 178; *Cantiere Meccanico Brindisino v. Janson*, [1912] 3 K. B. 452. *Reid. Parr's Bank v. Albert Mines Syndicate* (1900),

**3240 i. Insurance against fraud — What constitutes fraud within policy.]—***FANNING v. LONDON GUARANTEE & ACCIDENT CO.* (1884), 10 V. L. R. 8.—AUS.

**3240 ii. ———.]—***NEW ZEALAND UNIVERSITY v. STANDARD FIRE & MARINE INSURANCE CO.*, [1916] N. Z. L. R. 509.—N.Z.

**3242 i. What amounts to default—Postponement of date of payment—Insurance of debentures.]—***EMPLOYERS' INSURANCE CO. OF GREAT BRITAIN (LIQUIDATORS) v. BENTON* (1897), 24

R. (Ct. of Sess.) 908; 34 Sc. L. R. 686; 5 S. L. T. 37.—SCOT.

**e. ———.]—***YOUNG v. ASSETS & INVESTMENT INSURANCE CO.'S TRUSTEE* (1893), 21 R. (Ct. of Sess.) 222.—SCOT.

**f. ———.]—***LAIRD v. SECURITIES INSURANCE CO., LTD.* (1895), 22 R. (Ct. of Sess.) 452.—SCOT.

**g. ———.]—***COLONIAL BANK OF AUSTRALASIA v. EUROPEAN INSURANCE & GUARANTEE SOCIETY* (1864), 1 W. W. & A'B. 15.—AUS.

#### PART VI. SECT. 4.

**h. Breach of condition precedent.]—**A policy contained a clause declaring that it was executed "upon the following express conditions, which shall be conditions precedent to the right of the employer to recover hereunder." The first was:—"The surety shall be notified in writing of any non-performance or non-observance on the part of the contractors of any of the stipulations or provisions contained in the said contract which may involve a loss for which the surety is responsible":—*Held*: as the delays by the contractors

**Sect. 4.—Avoidance of policies. Part VII. Sect. 1.]**

5 Com. Cas. 116; London General Omnibus Co. v. Holloway, [1912] 2 K. B. 72. *Mentd.* Floyd v. Gibson (1909), 100 L. T. 761; Banbury v. Bank of Montreal, [1918] A. C. 626; Yorke v. Yorkshire Insce., [1918] 1 K. B. 662; Wilson v. United Counties Bank, [1920] A. C. 102; Yorkshire Insce. v. Craine, [1922] 2 A. C. 541.

*See, further,* GUARANTEE, Vol. XXVI., pp. 213–215, Nos. 1685–1695.

**3246. Alteration of risk—Increase—Addition to duties of clerk.]—**An insurance co. by a fidelity policy undertook with an urban council that the clerk to the council would faithfully discharge the duties of his office & account for all sums of money received by him whilst in that office. At the date of the policy the council had a surveyor under whom certain works were being carried out, & the surveyor paid the men their wages. The surveyor subsequently left the council's employment & the men were then paid by the clerk. In connection with these payments the clerk failed to account for certain moneys:—*Held*: the loss was not covered by the policy as the clerk's duties had been increased & there was an increase of risk.—**WEMBLEY URBAN DISTRICT COUNCIL v. POOR LAW & LOCAL GOVERNMENT OFFICERS' MUTUAL GUARANTEE ASSOCN., LTD.** (1901), 65 J. P. 330; 17 T. L. R. 516.

*See, also,* GUARANTEE, Vol. XXVI., pp. 165–171, Nos. 1247–1281.

**3247. — Liquidation of original insurers—Policy of reinsurance.]—**When a co. guarantees the payment of the principal & interest on debentures & reinsures a proportion of the risk, the reinsurer is not released from liability for such proportion by reason of the guarantor co. having entered into a scheme of arrangement with its creditors or gone into liquidation. In such a case there is no alteration of the risk, the contingency of such arrangement or liquidation being an element in the acceptance of the risk within the contemplation of the parties.

In 1903 deft. co. entered into a treaty of reinsurance with pltf. society under which it agreed to accept in reinsurance a certain proportion of the risks which pltf. co. desired to reinsure arising (*inter alia*) under debenture guarantees issued or renewed by pltf. society. The treaty provided that deft. co.'s liability should commence simultaneously with that of pltf. society & should follow it in every case, & that all settlements of claims in which deft. co. might be interested, whether by payment or otherwise, should be unconditionally binding on deft. co. In 1904 pltf. society guaranteed an issue of debentures bearing interest at 4½ per cent. made by R. & Co. The debentures were secured by a trust deed which

was in the usual form. By it pltf. society was appointed trustee for the debenture-holders, & the realisation of the security on default of R. & Co. to pay principal & interest on the debentures thereby secured was left in the absolute & uncontrolled discretion of pltf. society, & it was thereby specially provided that that discretion was to be exercised not only for the benefit of the debenture-holders, but of pltf. society as guarantor of the debentures. The debentures provided that the interest should be payable half-yearly, & the principal on Sept. 30, 1918, or if default was made for three months in payment of interest or an effective resolution was passed for winding up. Each debenture had indorsed on it a guarantee by which pltf. society guaranteed the payment of interest, if R. & Co. made default in payment thereof for thirty days, on demand, & of principal, if R. & Co. made default in payment thereof, on Sept. 30, 1918, or on the day after the securities for the debenture-holders should have been enforced & completely realised & distributed. Pltf. society under the treaty of 1903 reinsured two-thirteenths of this risk with deft. co. On Dec. 13, 1909, pltf. society passed an extraordinary resolution to wind up, & on the following day the winding-up was ordered to be continued under the supervision of the ct., & in the liquidation a scheme of arrangement was sanctioned by the ct. The scheme provided (*inter alia*) that the interest on the debentures should be payable at 3 per cent. only till a fixed date; that the securities should be realised under the direction of the ct.; & that the debenture-holders should be placed on the same footing as secured creditors of pltf. society with the rights of such creditors under the Bkpcy. Acts. On Mar. 6 an order was made to wind up R. & Co. compulsorily; & on Apr. 1, R. & Co. made default in payment of the interest on the debentures. Deft. co. disclaimed liability for the risk reinsured on the ground that its character had been radically altered by the liquidation & scheme of arrangement:—*Held*: the risk insured was that of the default of R. & Co. to pay the principal & interest secured by the debentures, & not that arising from a deficiency of the security; that risk had not been altered by the liquidation of pltf. society or by the subsequent scheme of arrangement, & therefore deft. co. still remained liable to pltf. society as reinsurer for the proportion of the risk undertaken by it.—**LAW, GUARANTEE, TRUST & ACCIDENT SOCIETY v. MUNICH REINSURANCE Co.**, [1912] 1 Ch. 138; 81 L. J. Ch. 188; 105 L. T. 987; 56 Sol. Jo. 108.

*See, also,* GUARANTEE, Vol. XXVI., pp. 172, 173, Nos. 1294–1305.

were non-observance of stipulations of the contract which might reasonably involve the insurance co. in loss, the employers were bound to give notice

of them, & as they had failed to do so, they were in breach of a condition precedent to their right of recovery.—**CLYDEBANK & DISTRICT WATER TRUS-**

**TEES v. FIDELITY & DEPOSIT Co. OF MARYLAND**, [1915] S. C. 362; *affd.*, [1916] 3 C. (H. L.) 69; 53 Sc. L. R. 106; [1915] 2 S. L. T. 359.—**SCOT.**

## Part VII.—Insurance against Burglary and Theft.

### SECT. 1.—IN GENERAL.

**3248. Commencement of risk—Waiver of condition for prepayment of premium—Recital in policy.]—**A proposal for an insurance of goods against loss by burglary having been made by pltf. to deft. co. on Dec. 14, 1895, the seal of the co. was affixed to a policy in conformity with the proposal at a meeting of the directors upon Dec. 27, & the policy was signed by two directors of the co. & their secretary. The policy recited that a premium had been paid for an insurance against loss by burglary from Dec. 14, 1895, to Jan. 1897, & purported to insure pltf.'s goods accordingly. It contained a provision that no insurance by way of renewal or otherwise should be held to be effected until the premium due thereon should have been paid. Upon the night of Dec. 26, or early in the morning of Dec. 27, a loss of goods included in the policy by burglary had taken place. The policy remained in the hands of the co., & nothing was paid by way of premium:—*Held*: the policy constituted a completed contract of insurance; by the recital therein defts. had waived the condition for prepayment of the premium, & therefore the policy had attached.—*ROBERTS v. SECURITY CO.*, [1897] 1 Q. B. 111; 66 L. J. Q. B. 119; 75 L. T. 531; 45 W. R. 214; 13 T. L. R. 79; 41 Sol. Jo. 95, C. A.

*Annotations*:—*Reid*. *Allis Chalmers Co. v. Fidelity & Deposit Co. of Maryland* (1913), 29 T. L. R. 506. *Mentd*. *Equitable Fire & Accident Office v. Ching Wo Hong*, [1907] A. C. 96.

**3249. Avoidance of policy—Untrue statements in proposal—Burden of proof on insurers.]—**Where, in a proposal for a policy of insurance, it is agreed by the proposer that the statements therein shall form the basis of the contract of insurance, & a policy is granted containing conditions to that effect & an arbn. clause under which all difference arising out of the policy is to be referred to an arbitrator, questions as to the truth of statements contained in the proposal are matters for the determination of the arbitrator, & the burden of proving the statements to be untrue is upon the insurers.

Appct. made to resps., an insurance co., a proposal for insurance against loss by burglary which proposal contained a declaration by appct. that his statements in the proposal were true, & an agreement that the proposal should be the basis of the contract. The insurance policy recited that the proposal was the basis of the contract, provided that compliance with the conditions indorsed on it should be a condition precedent to resp.'s liability. One of the conditions was that if a false declaration was made in support of a claim all benefit under the policy should be forfeited. The policy also provided that all difference arising out of the policy should be referred to the decision of an arbitrator. Appct. made a claim under the policy in respect of an alleged loss by burglary, & resps. required that it should be referred to arbn. Before the arbitra-

tor resps. resisted the claim on the ground that appct. had made untrue statements in the proposal form, but appct. contended that the arbitrator had no power to determine any matters calling in question the validity of the policy. The arbitrator stated a case as to whether the truth or untruth of the statements in the proposal had been referred to him, & whether the claim to be indemnified for the loss necessarily failed unless appct. proved affirmatively that the answers in the proposals were true:—*Held*: as resps. were not seeking to avoid the policy but were relying on the provision that the truth of the statements should be the basis of the contract, the answer to the first question was in the affirmative, but to the second question in the negative.—*STEBBING v. LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD.*, [1917] 2 K. B. 433; 86 L. J. K. B. 1155; 117 L. T. 247; 33 T. L. R. 395, D. C.

*Annotations*:—*Consd*. *Woodall v. Pearl Assco.*, [1919] 1 K. B. 593. *Reid*. *Macaura v. Northern Assco.*, [1925] A. C. 619.

**3250. ——— Jurisdiction of arbitrator.]—***STEBBING v. LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD.*, No. 3249, *ante*.

**3251. ——— Material concealment—Nationality of assured.]—**Where an alien takes out a burglary insurance policy, the fact that he is an alien may be a circumstance the non-disclosure of which to the insurers will avoid the policy.—*HORNE v. POLAND*, [1922] 2 K. B. 364; 91 L. J. K. B. 718; 127 L. T. 242; 38 T. L. R. 357; 66 Sol. Jo. 368.

**3252. ——— Previous refusal by other insurance company.]—**Two persons, desiring to insure stock in trade from loss by burglary in a dwelling-house & shop where they carried on business in partnership, signed & tendered to an insurance co. a proposal form after filling with their names a space left in the form for "name of proposer." The form contained several questions which with the answers of the partners were:—Q. (a) are you the sole occupier of the premises? A. Yes; Q. (b) state how long you have occupied the premises? A. Occupied seven years; Q. (c) are the premises occupied by proposer at night? A. Yes; Q. (d) has any co. declined to accept, or refused to renew, your burglary insurance? If so, state name of co. A. Yorkshire accepted, but proposers refused. The partners also signed a declaration at the foot of the form pledging themselves that the above answers were true & that they had withheld no information that might tend to increase the co.'s risk, & agreeing that the declaration & answers should be the basis of the contract between them & the co., & further agreeing to accept a policy subject to the usual conditions prescribed by the co. The proposal was accepted & a policy was issued, wherein the partners were called the assured, containing a proviso that the statements made by the assured in the proposal & declaration were true in all respects, & that if the policy were obtained through any misrepresentation, suppression, concealment,

### PART VII. SECT. 1.

**k. Avoidance of policy—Breach of material warranty.]—**Defts. insured pltf.'s automobile against theft. By a clause in the policy pltf. in consideration of a reduction in premium, warranted that the automobile insured would be continuously equipped with a locking device, & undertook to use all

diligence & care in maintaining the efficiency of the device & in locking the automobile when leaving it unattended. Pltf.'s automobile was equipped with the proper device but their servant left the vehicle in the street for at least 5 minutes, unlocked & unattended, & the vehicle was stolen:—*Held*: the warranty was material & the breach of it was a bar to recovery on the policy.—

*WARD v. ALLIANCE INSURANCE CO. OF PHILADELPHIA* (1924), 55 O. L. R. 451.—CAN.

**l. Proof of loss—Sufficiency of evidence.]—***SCHWARTZ v. HARTFORD ACCIDENT & INDEMNITY CO.*, [1925] 2 W. W. R. 413.—CAN.

**m. Measure of damages.]—**In an action against an insurance co. for loss



**Sect. 1.—In general. Sect. 2.]**

or untrue averment whatsoever by the assured, then the policy should be void. The policy also contained a condition referring disputes to arbn.

If the word "you" in questions (b) & (c) meant "you or either of you," the answers were true. With regard to question (d) the fact was that an insurance office other than the co. mentioned in the answer had refused a proposal for a burglary insurance made by one of the two persons on a former occasion when he was carrying on the same business upon the same premises, but without a partner.

During the currency of the policy a burglary was committed on the premises. The person above mentioned, who was again carrying on the business alone, & in whom the benefit of the policy was then vested, made a claim. The insurance co. resisted the claim on the grounds: that a false answer had been given to question (d) & that the policy had been obtained by suppression or concealment of a material fact, namely, that an insurance office had refused a proposal for a burglary insurance made by the claimant on the former occasion.

The dispute having been referred to arbn., the arbitrator found that a false answer had been given to question (d), & that the policy had been obtained by suppression or concealment of a material fact, as the insurance co. contended. Upon a special case stated for the opinion of the ct.:—*Held*: there was sufficient ground to support the arbitrator's finding that the refusal by the insurance office of the proposal made by the claimant on the former occasion was a material fact, & there was sufficient evidence of concealment of that fact.—*GLICKSMAN v. LANCASHIRE & GENERAL ASSURANCE CO.*, [1925] 2 K. B. 593; 94 L. J. K. B. 797; 133 L. T. 688; 41 T. L. R. 566; 69 Sol. Jo. 777; 30 Com. Cas. 327, C. A.

**3253. Proof of loss—No provision for production of receipts—Sufficiency of evidence.]**—*WINICOFSKY v. ARMY & NAVY GENERAL ASSURANCE ASSOCN., LTD.*, No. 3262, *post*.

**SECT. 2.—CONSTRUCTION OF CLAUSES.**

**3254. "Forcible & violent entry"—Entry through unlocked door—Breaking open show case.]**—A policy of insurance on stock-in-trade recited that the assured was desirous of effecting an insurance "against loss or damage by burglary & housebreaking as hereinafter defined," & the risk insured against was expressed to be loss of the property insured "by theft following upon actual forcible & violent entry upon the premises wherein the same is herein stated to be situate." The insured property, which was stated in the policy to be situate on premises No. 78, Strand, was in a shop at that address, the front door of which was shut, but not locked or bolted, & access to the shop could be obtained by turning the handle of the door. In the early morning before business hours, during the temporary absence of a servant of the assured, some person opened the front door, entered the shop & breaking open a locked-up compartment or show

case within, which formed a portion of the shop, stole therefrom part of the insured property:—

*Held*: the loss which occurred as above mentioned was not covered by the policy.—*Re GEORGE & GOLDSMITHS & GENERAL BURGLARY INSURANCE ASSOCN., LTD.*, [1899] 1 Q. B. 595; 80 L. T. 248; 47 W. R. 474; *sub nom.* *GEORGE v. GOLDSMITHS & GENERAL BURGLARY INSURANCE ASSOCN.*, 68 L. J. Q. B. 365; 15 T. L. R. 230; 43 Sol. Jo. 295, C. A.

*Annotation*:—*Distd. Re Calf & Sun Insce. Office*, [1920] 2 K. B. 366.

**3255. ——— Breaking open inner door—House comprising shop & residence.]**—A policy of insurance, taken out with an insurance co. by a tailor carrying on business at 58 M. Street, London, & headed "Burglary & Housebreaking Policy (Business Premises only)," provided that if at any time during the currency of the policy "the property or any part thereof described & included . . . in the schedule hereto whilst contained within the premises (which expression shall not include any garden or outbuilding or other appurtenances) occupied by the insured & situate at the address mentioned in the said schedule shall be stolen by theft following upon an actual forcible & violent entry of the said premises by the person or persons committing such theft," then the co. would pay the loss. In the schedule the premises were described as "Shop situate 58 M. Street, London, W., & the property was described as "stock-in-trade as a tailor." The business premises of the assured at 58 M. Street, consisted of a shop on the ground floor, a fitting room on the first floor, & a trimming room in the basement. These three rooms were admittedly covered by the expression "shop" in the schedule. The upper floors were occupied partly by the assured & his family as a residence & partly by tenants of the assured. During the currency of the policy a person in the daytime entered the house in a normal way without any force or violence, & concealed himself in a coal cellar in the basement. At night, after the shop & trimming room had been locked up, he left the coal cellar & entered the trimming room from the passage, having by means of an instrument slid back the catch of the lock & so opened the door. He took a quantity of goods from the room & went up the stairs with the goods to the shop, which he entered by violently breaking open the door leading into the shop, & having taken more goods from the shop he left the house, with all the goods he had taken, by the front door. The insurance co. denied liability on the ground that there had been no actual forcible & violent entry of the premises. In an arbn. the arbitrator came to the conclusion that the thief had entered the premises when he had without any force or violence secreted himself in the cellar, & that it was not material to consider the nature of his subsequent entry into the trimming room & shop; but that, if material, the entry into the trimming room was not an actual forcible & violent entry, whereas the entry into the shop was. He accordingly made an award in favour of the insurance co.:—*Held*: the premises referred to in the policy meant the premises used by the assured as business premises only—namely, the shop, the trimming room, & the fitting room, & the thief

by reason of the theft of a motor car from a public garage, the difference between the value of the car before it was taken & the value after it had been wrecked in a collision is the measure of damages.—*BOYLE v. YORKSHIRE INSURANCE CO., LTD.*, [1925] 2 D. L. R.

596; 56 O. L. R. 564; *affu.*, [1925] 1 D. L. R. 344.—CAN.

**PART VII. SECT. 2.**

*n. Wines & liquors "common in residences generally"*—No restriction on amount kept.]—A contention that the

words "common in residences generally," in an application for burglary insurance, in themselves operated to restrict liability for wines & liquors, was rejected, on the ground that there was no evidence to show what amount of wines or liquors is

having made an actual & violent entry into the shop & removed the goods therefrom, the co. were liable.

Though not necessary to decide it, there was an actual forcible & violent entry into the trimming room.

Even if the premises included the whole house, inasmuch as there was an actual forcible & violent entry into a room in the premises, there was an actual forcible & violent entry of the premises within the meaning of the policy (*per* CUR.).—*Re CALF & SUN INSURANCE OFFICE*, [1920] 2 K. B. 366; 89 L. J. K. B. 691; 123 L. T. 128; 84 J. P. 153; *sub nom.* *CALF v. SUN INSURANCE CO.*, 36 T. L. R. 347, C. A.

**3256. "Theft by assured's servants excepted"—Admittance of thieves by porter.]—**A policy of insurance upon goods in business premises against loss by theft or burglary contained a proviso excepting loss by theft by members of the assured's business staff. A porter on the business staff of the assured, in pursuance of a preconceived scheme, admitted a member of a gang of thieves into the premises to enable him to commit a theft therein. The theft was committed in the porter's absence:—*Held*: the case fell within the proviso & the underwriters were not liable.—*SAQUI & LAWRENCE v. STEARNS*, [1911] 1 K. B. 426; 80 L. J. K. B. 451; 103 L. T. 583; 27 T. L. R. 105; 55 Sol. Jo. 91; 16 Com. Cas. 32, C. A.

**3257. — Exception strictly construed—Admissibility of evidence.]—**By a policy of insurance underwriters insured the assured, a jeweller, against loss of or damage to jewellery arising from any cause whatsoever save & except breakage & save & except loss by theft or dishonesty of any servant in the exclusive employment of the assured. In an action upon the policy by the assured against one of the underwriters the evidence established a loss by theft & tended to implicate in the theft a servant in the exclusive employment of *pltf.*:—*Held*: (1) it was incumbent on *pltf.* to prove a theft by some person other than a servant in his exclusive employment &, as he had failed to do this, he could not recover; (2) assuming the burden of proving a theft by *pltf.*'s servant to lie on *deft.*, he might establish such a theft by evidence which possibly might not be admitted or sufficient to convict in a criminal prosecution; & evidence that two days before the theft the servant was seen in conference with three notorious thieves was admissible to prove his complicity; but that evidence of his bad character was not admissible.—*HURST v. EVANS*, [1917] 1 K. B. 352; 86 L. J. K. B. 305; 116 L. T. 252; 33 T. L. R. 96.

*Annotations*:—*As to* (1) *Consd.* *Munro, Brice v. War Risks Assn.*, [1918] 2 K. B. 78. *Generally, Mentd.* *Compania Maritima of Barcelona v. Wishart* (1918), 87 L. J. K. B. 1027.

**3258. Theft by customers of assured excepted—In respect of goods entrusted to them—Goods delivered to agent of prospective customer.]—***Pltf.*, a jeweller, was insured under a Lloyd's policy against "theft" of jewels. The policy contained a clause exempting the insurers from liability in the case of "loss by theft or dishonesty committed by any . . . customer . . . in respect of goods entrusted to [her] by the assured." A woman, *E.*, one of *pltf.*'s customers, with intent to steal

them, induced *pltf.* to let her have two pearl necklets by fraudulently pretending that she wanted them for the purpose of showing them to two persons in fact non-existent, for their approval, with a view to purchase by them. *Pltf.* did not empower *E.* to pass the property in the necklets. *E.* disposed of the necklets for her own benefit:—*Held*: *E.* was guilty of larceny by a trick, & the larceny was "theft" within the meaning of the policy, & *defts.* were not protected against liability under the above clause, inasmuch as it only applied where the goods were delivered to a customer as such, & the pearls were only delivered to *E.* as an agent or messenger for the purpose of showing them to others who might or might not become customers.—*LAKE v. SIMMONS*, [1926] 1 K. B. 366; 42 T. L. R. 168.

**3259. "Taken out of possession by fraudulent means"—Payment by bank on forged notes—Insurance of coin & securities.]—**Under a policy dated Mar. 16, 1913, a bank insured for twelve months against loss occasioned to them "by reason of any . . . currency, coin, or other similar securities . . . which during the said period of twelve months may be in or upon their own premises, . . . being (while so in or upon such premises . . .) lost, destroyed, or otherwise made away with by robbery, theft, fire, embezzlement, burglary, or abstraction, or taken out of their possession or control by any fraudulent means." A co. having opened an account with the bank, the bank discounted five promissory notes for the co., on a representation, that they were drawn by customers of the co. in payment of amounts due to them, & credited the amount of the notes, less discount, to the co.'s current account. The whole amount was drawn out by the co. by cheques on the account honoured by the bank. The bank subsequently discovered that the notes were forgeries, & worthless:—*Held*: the loss so occasioned to the bank was not recoverable, under the terms of the policy, from the underwriters.—*CENTURY BANK OF CITY OF NEW YORK v. YOUNG* (1914), 84 L. J. K. B. 385; 31 T. L. R. 127; 20 Com. Cas. 90; *sub nom.* *CENTURY BANK OF CITY OF NEW YORK v. MOUNTAIN*, 112 L. T. 484, C. A.

**3260. — Delivery of share certificates on false statement—Insurance of share certificates.]—***Pltfs.*, stockbrokers, insured share certificates against loss by "theft" or by being "taken out of their possession or control by any fraudulent means." *P.*, a customer of *pltf.*s, in taking delivery of certain share certificates, induced *pltf.*'s manager to accept a post-dated cheque in payment by the false statement that the head of the firm had consented to give him credit in this particular transaction. The cheque was dishonoured, & the following day *P.*'s dead body was found in the sea. He was insolvent, & had sold the shares for cash:—*Held*: the certificates had been stolen by *P.* & had been taken out of *pltf.*'s possession or control by fraudulent means within the meaning of the policy & *pltf.*s were entitled to recover.—*PAWLE & CO. v. BUSSELL* (1916), 85 L. J. K. B. 1191; 114 L. T. 805.

**3261. "Loss occasioned by hostilities, loot, sack or pillage"—Isolated burglary during air raid.]—***WINICOFESKY v. ARMY & NAVY GENERAL ASSURANCE ASSOCN., LTD.*, No. 3262, *post*.

"common in residences generally," & it would be impossible to adduce satisfactory evidence on such a point.—*JAMES v. OCEAN ACCIDENT & GUARANTEE CO., LTD.*, [1921] 3 W. W. R. 55; 70 D. L. R. 576; 30 B. C. R.

207.—CAN.

o. "Disagreement as to amount of loss"—*Objection must be communicated to insured.*—A policy against theft provided that "in the event of disagreement the amount of loss or damage

must be determined by appraisers before recovery can be had":—*Held*: the fact that, after proof of loss, an officer of the co. had a mental objection to the proof as filed would not be enough to constitute a disagreement



*Sect. 2.—Construction of clauses. Part VIII.]*

**3262. Premises "occupied at night"—Temporary absence during air raid.]—**(1) An isolated case of burglary during an air raid is not a "loss occasioned by hostilities, or loot, sack or pillage in connection therewith." The mere going away from premises to an air raid shelter for an hour or two during an air raid at night, & leaving the premises unattended does not make them unoccupied at night within the meaning of a declaration in the proposal form by the assured that the premises are occupied at night by him. (2) In the absence of any provision in the policy for production of receipts the loss sustained may be proved by satisfactory evidence.—*WINICOFSKY v. ARMY & NAVY GENERAL ASSURANCE ASSOCN., LTD.* (1919), 88 L. J. K. B. 1111; 35 T. L. R. 283.

*Annotation:—As to (1) Reifd. Simmonds v. Cockell, [1920] 1 K. B. 843.*

**3263. Premises "always occupied"—Temporary absence on Sunday.]—**By a policy of insurance the contents of premises used for business & residential purposes by the assured & his wife were insured against loss by housebreaking or theft. The policy contained a clause: "Warranted that the said premises are always occupied." During a temporary absence of some hours of the assured & his wife on a Sunday the premises were left unattended & were broken into & some of the contents were stolen. In an action on the policy:—*Held*: the warranty did not mean that the premises should at no time be left unattended, but that they should be continuously occupied as a residence; there had in the circumstances been no breach of the warranty, & the assured was therefore entitled to recover the loss on the policy.—*SIMMONDS v. COCKELL, [1920] 1 K. B. 843; 89 L. J. K. B. 415; 123 L. T. 196; 36 T. L. R. 252; 25 Com. Cas. 167.*

**3264. Securities "supposed & believed to be on premises"—Securities believed by customer to be on premises—Withdrawal known to assured.]—**Pltfs. carried on the business of acting as custodians of securities deposited with them by customers for safe keeping. They were insured under a policy underwritten by deft. for a period of twelve months from Sept. 30, 1916, against all losses which they might, during the twelve months, discover that they had sustained at any time since Sept. 1909:—(a) "By reason of any bonds, debentures, scrip, certificates, warrants . . . or other similar securities . . . the custody of which they have undertaken, & which now are or are by them supposed or believed to be . . . in or upon their premises . . . being while so in or upon such premises . . . made away with by . . . theft . . . embezzlement, burglary or abstraction . . . whether by the officers, clerks & servants of the assured or any other person." (b) "By reason of any securities of the description above specified being . . . stolen, misappropriated or made away with by . . . fraud of their officers, clerks or servants . . . whilst in transit . . . between any houses or places within 100 miles from Philadelphia" where their business premises were situate. In May, 1917, during the currency of the policy, pltfs. discovered that W., one of their servants, had, between Sept. 1909, &

Sept. 23, 1916, fraudulently made away with large quantities of securities deposited with them by customers. Securities deposited with pltfs. were kept in strong rooms or "vaults" in the custody of a vault clerk. Customers desiring to withdraw securities frequently went to pltfs. premises themselves, or sent a person on their behalf, & the securities were taken from the vault to the customers' reception room & handed over to them there. W. obtained possession of the securities in question from the vault clerk by fraudulently pretending that he was authorised to receive them on behalf of their owners, & having forged the owners' receipts for them & delivered those receipts to pltfs., he misappropriated the securities to his own use. There was no evidence that the vault clerk when handing the securities to W. did not suppose that they were to be taken & delivered to the owners in the reception room:—*Held*: (1) in the sentence in clause (a) of the policy "by them supposed or believed to be," the words "by them" governed "believed" as well as "supposed"; it was not sufficient, to bring a loss within that clause, that the securities were believed by the customers to be on the premises at the date of the policy; & consequently, as pltfs. knew that the securities had been withdrawn before that date, clause (a) did not apply; (2) a "transit" between the vault & the customers' reception room was not a "transit between any houses or places" within the meaning of clause (b); a transit which was intramural only was not covered; & deft. was not liable on the policy.—*PENNSYLVANIA CO. FOR INSURANCES ON LIVES & GRANTING ANNUITIES v. MUMFORD, [1920] 2 K. B. 537; 89 L. J. K. B. 651; 123 L. T. 248; 36 T. L. R. 423, C. A.*

**3265. Loss "in transit"—Intramural transit.]—***PENNSYLVANIA CO. FOR INSURANCES ON LIVES & GRANTING ANNUITIES v. MUMFORD, No. 3264, ante.*

**3266. Loss by "civil commotion"—Theft of motor car by force—Civil commotion in neighbourhood.]—**Where loss or damage occasioned through riot or civil commotion is excepted from a policy of insurance, if the loss took place in consequence of a civil commotion it is not necessary to prove such commotion at the actual time & place at which the loss occurred in order to bring the case within the exception. A motor car belonging to applt., & insured by resp. co., was taken with a show of force, under circumstances not such as those of an ordinary theft, at a time when there was civil commotion in the neighbourhood, although not at the actual place, & there was evidence that motor cars were much used by those engaged in such commotion:—*Held*: the ct. was justified in drawing the inference that the loss was occasioned through civil commotion within the exception.—*COOPER v. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPN., LTD. (1923), 92 L. J. P. C. 168; 128 L. T. 481; 39 T. L. R. 113, H. L.*  
*Annotation:—Consd. Motor Union Insee. v. Boggan (1923), 130 L. T. 588.*

**3267. ——— Arm of the ordinary law paralysed.]—**Pltf. insured a motor car with deft. co. against loss or damage by fire, burglary, housebreaking, or theft. An exception in the policy provided that the insurers were not liable for

under said condition, but he must have communicated that objection to the insured, & a disagreement within the meaning of the condition, but not arising until after the time for payment of the loss had arrived, could be of no

avail to the co., as the rights of insured had then become established.—*GOLDBERG v. EMPLOYERS' LIABILITY ASSURANCE CO., [1922] 1 W. W. R. 529; 86 D. L. R. 716.—CAN.*

p. "Pilferage."]—"Pilferage" is a

word which belongs to the genus "pilferage" & taken in connection with the other words of the policy, includes within its scope the wanton destruction of property.—*HENDERSON v. NORTH WESTERN MUTUAL FIRE IN-*



"loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of . . . riot, civil commotion, military or usurped power." While the car was out on hire in Co. Wexford in Nov. 1920, the owner's chauffeur was held up by four armed men, who blindfolded & removed him, & took away the car. According to the evidence of the police sergeant there was no serious disturbance in the county at the time. The police had, however, been called in from a few outlying stations; motor cars had been "commandeered" & not returned, & receipts given in three cases; a post office motor cycle had been taken: there had been some raids for shot guns & for mails, & early in Jan. 1921, martial law was proclaimed in the county:—*Held*: the inference to be drawn from the proved & admitted facts was that the loss was due to civil commotion & riot, & deft. co. had discharged the *onus* which the exceptions clause in the policy imposed upon them.

In order to constitute those ingredients which in law amount to riot, it is not necessary that there should be noise.

I think that it is shown here that the ordinary law . . . was paralysed & there was a state of commotion, disturbance, or riot (LORD WRENBURY).—*MOTOR UNION INSURANCE CO., LTD. v. BOGGAN* (1923), 130 L. T. 588; 67 Sol. Jo. 656, H. L.

*Annotation*:—*Consd. London & Lancashire Fire Insee. v. Bolands*, [1924] A. C. 836.

**3268. — Armed raid on business premises—Theft itself constituting riot.**—By a policy of assurance appls. agreed to indemnify resps. against loss by burglary, housebreaking, & theft of cash in the cashier's office in resps.' bakery in Dublin, subject to the proviso that "this insurance does not cover loss directly or indirectly caused by or happening through or in consequence of (a) invasions, hostilities, acts of foreign enemy, riots, strikes, civil commotions, rebellions, insur-

rections, military or usurped power, or martial law, or the burning of property by order of any public authority. . . ." During the currency of the policy four armed men entered resps.' premises on a summer evening while it was still daylight, held up the employees with revolvers, & took possession of all the money they could find in the cashier's office. There was no disturbance in the neighbourhood at the time. In answer to a claim by resps. against appls. to recover the loss, appls. relied on the proviso in the policy. The dispute having been referred to arbn. under a clause in the policy, the arbitrators, by an award stated in the form of a special case, being of opinion that the circumstances in which the money was stolen constituted a riot, found that resps. were not entitled to recover:—*Held*: the proviso was not confined to the case where the theft was facilitated by an antecedent or simultaneous riot, but included a case where the theft itself in the manner in which it was conducted constituted a riot at law, & that the arbitrators were right in their conclusion.—*LONDON & LANCASHIRE FIRE INSURANCE CO., LTD. v. BOLANDS, LTD.*, [1924] A. C. 836; 93 L. J. P. C. 230; 131 L. T. 354; 40 T. L. R. 603; 68 Sol. Jo. 629, H. L.

**3269. Goods for which assured "responsible"—Goods in custody of assured as bailee.**—Appls. insured claimant, who was a furrier, against burglary, the policy covering not only goods belonging to claimant but goods which were on his premises & were in his possession on trust or on commission & for which he was "responsible." A burglary took place, & claimant lost both goods of his own & goods which were in his custody as a bailee. Claimant had not been guilty of any negligence as a bailee, & so was not liable to the owners of the bailed goods for their loss:—*Held*: "responsibility" in such a connection meant legal liability only, & therefore claimant could not recover on the policy in respect of the bailed goods.—*ENGEL v. LANCASHIRE & GENERAL ASSURANCE CO., LTD.* (1925), 41 T. L. R. 408; 69 Sol. Jo. 447; 30 Com. Cas. 202.

## Part VIII.—Other Kinds of Insurance.

**3270. Plate glass—Breakage from fire excepted—Breakage by crowd watching fire.**—*MARSDEN v. CITY & COUNTY ASSURANCE CO.*, No. 2633, *ante*.

**3271. — Arising from "civil commotion or rioting"—Organised conspiracy to commit criminal acts.**—An organised conspiracy to commit criminal acts without more, does not amount to "civil commotion." By a policy of reinsurance, underwritten by deft., plths. were insured against "damage to plate glass caused directly by or arising from civil commotion or rioting." During the currency of the policy a large number of women in different parts of London simultaneously broke windows with hammers. Each woman, when arrested, went quietly to the police station; there was no disturbance in the street, & no public

sympathy was shown for the women who broke the windows. No one of the women was charged with riot or unlawful assembly; the charge in each case was one of malicious injury, & each case was dealt with separately without any charge being preferred of acting in concert with others:—*Held*: (1) there was no evidence that the damage was caused directly by or arose from civil commotion or rioting, & deft. was not liable on the policy; (2) the fact that deft. had previously paid under another policy in the same words under similar circumstances did not estop him from raising the defence that the damage was not caused by civil commotion or rioting.—*LONDON & MANCHESTER PLATE GLASS CO., LTD. v. HEATH*, [1913] 3 K. B. 411; 82 L. J. K. B. 1183; 108

*SURANCE CO.*, [1925] 1 D. L. R. 339; 43 Can. Crim. Cas. 217; 34 B. C. R. 441.—*CAN.*

**q. "Theft."**—The word "theft" is not used in its narrow & technical sense: if the legislature created a statutory offence which might properly be regarded as theft, it would be covered by the policy.—*BOYLE v.*

*YORKSHIRE INSURANCE CO., LTD.*, [1925] 2 D. L. R. 596; 56 O. L. R. 564; *affg.*, [1925] 1 D. L. R. 344.—*CAN.*

### PART VIII.

**r. War risks.**—*NOBEL'S EXPLOSIVES CO. v. BRITISH DOMINIONS GENERAL INSURANCE CO.*, [1918] S. C. 373; 55 Sc. L. R. 296; [1918] 1

S. L. T. 205; *subsequent proceedings*, [1919] S. C. 455.—*SCOT.*

**t. Animals—Statutory declaration as to loss.**—*BEECK v. YORKSHIRE INSURANCE CO.* (1909), 11 W. A. L. R. 88.—*AUS.*

**a. — Disease existing before insurance complete.**—One of two horses insured was, before noon of the day

L. T. 1009; 29 T. L. R. 581; 6 B. W. C. C. N. 107, C. A.

*Annotations*:—As to (1) *Distd. Cooper v. General Accident, Fire & Life Assce. Corpn.* (1922), 92 L. J. P. C. 168. *Refd. Rogers v. Whittaker*, [1917] 1 K. B. 942.

**3272. Loss in transit by post office—Share certificates—Misappropriation by agents of assured.**—*BARING BROTHERS & CO. v. MARINE INSURANCE CO.* (1894), 10 T. L. R. 276, C. A.

**3273. War risks—Loss caused by war—Goods requisitioned by belligerent.**—*MOLINOS DE ARROZ v. MUMFORD* (1900), 16 T. L. R. 469.

**3274.** — — — — —.]—Pltf. effected an insurance on "the contents" of their clothing store at Johannesburg against "direct loss or damage to the above property by riot, rebellion, or war," no indirect loss being recoverable. During the war between Great Britain & the Transvaal the Transvaal Govt. seized the goods in the store for the use of the troops in the field. This seizure was in accordance with the laws of the Transvaal:—*Held*: the loss was covered by the policy.—*CURTIS & CO. v. HEAD* (1901), 17 T. L. R. 718; *on appeal* (1902), 18 T. L. R. 771, C. A.

**3275.** — — — — —.]—**Policy against declaration of peace—Before certain date.**—By a policy of insurance effected on Nov. 2, 1918, during the European War, deft. agreed to pay to pltf. a certain sum in the event of peace between Great Britain & Germany not being concluded on or before June 30, 1919. On June 28, 1919, these powers signed a Treaty of Peace, but they did not exchange & deposit ratifications of the Treaty until Jan. 1920. In an action brought by pltf. against deft. upon the policy in Aug. 1919:—*Held*: peace had not been concluded between these powers on or before June 30, 1919, within the meaning of the policy, & pltf. was therefore entitled to succeed in the action.—*KOTZIAS v. TYSER*, [1920] 2 K. B. 69; 89 L. J. K. B. 529; 122 L. T. 795; 36 T. L. R. 194; 15 Asp. M. L. C. 16.

*Annotation*:—*Folld. Lloyd v. Bowring* (1920), 36 T. L. R. 397.

**3276.** — — — — —.]—For the purpose of a contract to pay a sum of money "if peace is not declared" by a certain date between two nations at war, peace is not declared until the ratification of the treaty of peace.—*LLOYD v. BOWRING* (1920), 36 T. L. R. 397.

*Compare* Nos. 3281, 3282, *post*.

**3277. Animals—Recovery of loss by agent of assured—Deduction for other transactions as between agent & broker.**—Pltf. employed an insurance agent to effect an insurance of his mare & unborn foal. The agent sent a proposal form to defts., insurance brokers, who effected an insurance with underwriters at Lloyd's. A loss having occurred, pltf. informed the agent of the fact, & the agent obtained the policy from pltf. & sent it to defts. They collected the amount due from the underwriters, & paid to the agent the balance after deducting from the amount a sum due to

defts. from the agent in respect of other transactions. The agent did not pay to pltf. the sum received by him:—*Held*: pltf. was entitled to recover from defts. the whole amount received by them from the underwriters less 1 per cent. commission for collecting.—*LEGGE v. BYAS, MOSLEY & CO.* (1901), 18 T. L. R. 137; 7 Com. Cas. 16.

*Annotation*:—*Mentd. Bradford v. Price* (1923), 92 L. J. K. B. 871.

—.]—*See, further*, ANIMALS, Vol. II., pp. 221, 222, Nos. 143-146.

**3278. Mortgage Insurance—Proviso against assignment—Otherwise than by operation of law—Assignment by liquidator.**—A building society, which was registered under the Building Societies Acts, lent a sum of money upon mtge. & insured repayment of the loan. The policy of insurance contained a clause providing that the policy should cease to be in force if the whole or any part of the interest of the insured in the mtge. debt or mortgaged property or any part thereof should pass from the insured otherwise than by will, or operation of law, unless notice in writing should be given to the insurers, & the insurance should be declared to be continued to a successor in interest by a memorandum made on the policy by them; & the expression "the insured" was declared to include a successor in interest to whom the insurance should be so declared to be or be otherwise continued. The building society was ordered to be wound up by the ct., & the official receiver, as liquidator, gave notice to the insurers of his intention to assign the mtge. together with the policy; the insurers claimed the right to refuse their consent:—*Held*: upon the true construction of the condition referred to, the insurers could not withhold their consent to an assignment after receipt of notice thereof; & further, the official receiver being under an obligation to assign, the policy would pass to the assignee by operation of law, & therefore the consent of the insurers was not required.—*Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY, OFFICIAL RECEIVER v. LICENSES INSURANCE CORPN.*, [1913] 2 Ch. 34; 82 L. J. Ch. 386; 108 L. T. 664; 57 Sol. Jo. 559; 6 B. W. C. C. N. 150.

*Annotations*:—*Refd. Cohen v. Popular Restaurants*, [1917] 1 K. B. 480; *Re Farrows Bank*, [1921] 2 Ch. 164.

**3279. Motor car—Damages recovered by assured from third party—Rights of insurers to reimbursement.**—*HORSE, CARRIAGE & GENERAL INSURANCE CO., LTD. v. PETCH*, No. 166, *ante*.

**3280. Non-marine insurance on goods—Constructive total loss—Necessity for notice of abandonment.**—*Semble*: for the purpose of determining whether there has been a total loss under a policy on commercial goods on land, the same considerations must be taken into account as would be taken into account for the purpose of determining whether there has been a constructive total loss under a marine policy; with this exception, that under the former notice of abandonment is not

when the policy came into force, inoculated with the disease from which it died, although the symptoms were not noticed till the following day:—*Held*: pltf. was not entitled to recover in respect of this horse.—*DEMAL v. BRITISH AMERICAN LIVE STOCK ASSOCN.* (1910), 14 W. L. R. 250; *affd.* 17 W. L. R. 485.—CAN.

b. — — — — —.]—**Notice of death.**—*CLARKE v. BRITISH EMPIRE INSURANCE CO.* (1912), 21 W. L. R. 774; 2 W. W. R. 682, 958; 4 D. L. R. 444.—CAN.

c. — — — — —.]—A policy granted to the owner of a horse against its death stipulated that on the death of an insured animal notice should be

sent to the co.'s office. Notice to an agent of the co. should not be sufficient compliance with the condition. The horse died & the owner intimated this to an agent of the co. This intimation was sent to manager of the co. by agent. Manager repudiated liability at once:—*Held*: although notice had been sent to agent it had *de facto* reached manager & was sufficient.—*SHIELLS v. SCOTTISH ASSURANCE CORPN., LTD.* (1889), 16 R. (Ct. of Sess.) 1014; 26 Sc. L. R. 702.—SCOT.

d. — — — — —.]—**Notice of illness.**—*GILL v. YORKSHIRE INSURANCE CO.* (1913), 24 W. L. R. 389; 4 W. W. R. 692.—CAN.

e. *Motor insurance—Meaning of.*—Automobile insurance is merely a collection of various classes or species of insurance, some of which are not peculiarly or exclusively applicable to motor vehicles, but are appropriate to the dangers to which the use of such a vehicle may expose it or its owner.—*ROCKMAKER v. MOTOR UNION INSURANCE CO.* (1922), 52 O. L. R. 553; 70 D. L. R. 360.—CAN.

f. — — — — —.]—automobile policy is a combination of two policies, fire & transportation, & is a separate type of insurance from the ordinary fire policy.—*JOURNAY v. RAILWAY PASSENGERS ASSURANCE CO.*, [1924]



a necessary condition of a valid claim.—*MITSUI v. MUMFORD*, [1915] 2 K. B. 27; 84 L. J. K. B. 514; 112 L. T. 558; 31 T. L. R. 144; 59 Sol. Jo. 189; 20 Com. Cas. 107.

*Annotations*:—*Appld.* *Campbell & Phillipps v. Denman* (1915), 21 Com. Cas. 357. *Consd.* *Moore v. Evans*, [1918] A. C. 185.

**3281. ——— Loss of control by reason of war—Likelihood of recovery.**—*Pltfs.*, an English co., were insured by a non-marine Lloyd's policy for a period of three months from July 27, 1914, "against loss of &/or damage to" oil seeds & general merchandise at Antwerp "directly caused by . . . war . . . military or usurped power." The policy also provided that no claim was to attach for delay, deterioration, or loss of market. The property insured, which consisted of ground nuts, was stored during the currency of the policy in a warehouse in Antwerp. War broke out between Germany & Great Britain & Belgium at the beginning of Aug. 1914. The city of Antwerp was occupied by the Germans on Oct. 9, 1914, during the currency of the policy. On Oct. 18 the Germans published a proclamation that, "until the quantities necessary for the requirements of the army are ascertained the purchase & sale of all descriptions or stocks situated in Antwerp & district is forbidden." On Oct. 21 the Germans published another proclamation by which all owners & depositaries of goods of any kind in Antwerp were required to hand to the govt. an exact specified statement of the goods & of their owners, & it provided that the "goods must be neither shifted, nor worked, nor handled in any way whatsoever without permission." The owners of the warehouse where *pltfs.*' goods were stored sent a list of the goods in their warehouse to the German Govt. between Oct. 21 & 25, & a few days later, but subsequently to Oct. 26, when the policy expired, German officers searched the warehouse. The goods were in fact requisitioned by the Germans without making any payment therefor in Dec. 1914. *Pltfs.* gave notice of abandonment on Oct. 15, which was not accepted. They sued one of the underwriters on the policy, alleging that the goods insured had become a total &/or a constructive total loss, & that they had given notice of abandonment:—*Held*: *pltfs.*, had not, when the policy expired on Oct. 26, been irretrievably deprived of the goods nor of their possession, as the goods remained in the warehouse where they had been deposited by *pltfs.*, & therefore there had not been an actual total loss of the goods, & further, as *pltfs.* had not proved that it was unlikely, although it was uncertain, that they would recover the goods they had not proved that there had been a constructive total loss of the goods, & the action therefore failed.—*CAMPBELL & PHILLIPPS, LTD. v. DENMAN* (1915), 21 Com. Cas. 357.

*Annotation*:—*Consd.* *Moore v. Evans*, [1918] A. C. 185.

1 D. L. R. 308; 50 N. B. R. 501.—*CAN.*

**g. ———.**—*]*—A policy of "automobile insurance" insuring against loss by fire, theft & other mixed risks is, to the extent to which it insures against loss by fire, a contract, the subject-matter of which is fire insurance, & it is none the less a contract of fire insurance by reason that it is also a contract of insurance against other risks.—*KONOWSKY v. PACIFIC MARINE INSURANCE CO.*, [1924] 2 D. L. R. 1029; 2 W. W. R. 276; 34 Man. L. R. 149; *affg.*, [1923] 2 D. L. R. 1198; 2 W. W. R. 71.—*CAN.*

**h. Damage to motor car—Fire.**—Where an automobile is insured "while

in the storage house or on the road or owned by the insured," the assured can recover wherever the automobile is when damaged by fire, as long as it is still owned by him.—*FRETTS v. LENNOX & ADDINGTON MUTUAL FIRE INSURANCE CO.* (1914), 26 O. W. R. 82; 6 O. W. N. 13; 16 D. L. R. 863.—*CAN.*

**k. ———.**—*]*—*KOURZSWKI v. METROPOLITAN FIRE ASSCOON. OF CANADA* (1922), 63 D. L. R. 456; 55 N. S. R. 81.—*CAN.*

**l. ———.**—*]*—*STEWART v. HALIBURTON & FREEMAN & HALIFAX AUTO CO.* (1922), 55 N. S. R. 537.—*CAN.*

**m. ———.**—*]*—*VETERANS' SIGHT-*

**3282. ———.**—*]*—A London firm of jewellers insured their stock of jewellery by a non-marine policy for a year from Jan. 8, 1914, against "loss of &/or damages or misfortune to" the goods or any part thereof arising from any cause whatsoever whilst the goods were in the United Kingdom or any country in Europe or in transit from any part in the United Kingdom or Europe to any other port in the United Kingdom or Europe. In June & July, 1914, they consigned certain pearls so insured to trade customers in Frankfort-on-Main & Brussels on sale to return on the terms that the pearls remained the property of the consignors until invoiced by them. In the ordinary course of business jewellery so sent on approval remained with the consignee for a limited period to give him an opportunity of selling it. Owing to the outbreak of war between Great Britain & Germany on Aug. 4, & the occupation of Brussels by the Germans in the same month it became impossible for the consignors to recover possession of the pearls. There was no evidence that the pearls had been seized or specifically interfered with by the German authorities. As to the pearls sent to Frankfort, there was no evidence that they had not remained in the possession of the consignees; & as to the pearls sent to Brussels, the consignees had, with the subsequent assent of the consignors, placed them in a bank there for safe custody, & there was no evidence that they had not remained in the bank:—*Held*: the policy being on goods & not on an adventure, the evidence did not establish a loss under the policy.—*MOORE v. EVANS*, [1918] A. C. 185; 87 L. J. K. B. 207; 117 L. T. 761; 34 T. L. R. 51; 62 Sol. Jo. 69; 23 Com. Cas. 124, H. L.

*Annotations*:—*Refd.* *White, Child & Beney v. Simmons*, Same *v. Eagle, Star & British Dominions Insce.* (1922), 127 L. T. 571. *Mentd.* *Coldman v. Hill*, [1919] 1 K. B. 443.

**3283. Damage by aerial craft or missiles—Goods protected "until on board steamer"—Damaged while on lighter.**—An insurance policy against damage caused to goods by aerial craft or missiles discharged thereat contained a clause stating that it covered all consignments of goods for account of *pltfs.* or their clients, whilst in warehouse & from any port in the United Kingdom to any port in the United Kingdom "& until on board steamer." There was also a clause stating that the goods were to be insured "per land conveyance from anywhere in the United Kingdom to anywhere in the United Kingdom." *Pltfs.* intending to send certain goods from London to South Africa by steamer put them on a barge. The barge was taken down to the dock & when it was lying alongside the steamer an anti-aircraft shell sank the barge & damaged the goods. In an action on the policy:—*Held*: the words "until on board steamer" meant that the policy was to cover goods in warehouse, in transit by

*SEEING, ETC. CO. v. PHOENIX INSURANCE CO.*, [1924] 2 D. L. R. 674; 3 W. W. R. 782; 33 B. C. R. 428.—*CAN.*

**n. ———.**—*]*—*WESTERN ASSURANCE CO. v. CAPLAN*, [1924] 2 D. L. R. 935; [1924] S. C. R. 227; *affg.*, 24 O. W. N. 66.—*CAN.*

**o. ———.**—*]*—*DAWSONS, LTD. v. BONNIN*, [1921] S. C. 511.—*SCOT.*

**p. ——— Collision.**—*]*—*COLLINS v. GUARDIAN CASUALTY & GUARANTY CO.*, [1918] 2 W. W. R. 763; 40 D. L. R. 133.—*CAN.*

**-SOWARDS v. LONDON GUARANTEE & ACCIDENT CO.**, [1923] 2 D. L. R. 495; [1923] S. C. R.



land, & on the quay while awaiting shipment, & the policy was a land policy & the action failed.—*EWING & CO. v. SICKLEMORE* (1918), 35 T. L. R. 55, C. A.

**3284. Property in foreign country—Insurance against damage by usurped authority—Confiscation of bank securities—By de facto government.]—**Pltfs. were an English co., part of whose business was transacted, at the material time, in Russia. For the purposes of their Russian business, pltfs., through their London bankers, deposited in a bank at Petrograd money & Russian Treasury Bonds, & by a policy of insurance, dated Jan. 24, 1917, & a Lloyd's policy, dated Apr. 27, 1917, they took out an insurance on the Treasury Bonds & their balance at the Petrograd bank against (*inter alia*) loss or damage "directly caused by fire, rioters, civil commotions, war, civil war, revolutions, rebellions, military or usurped power." The policies excepted claims for "confiscation or destruction by the govt. of the country in which the property is situated." In Dec. 1917, the Bolsheviks, in pursuance of a decree of the Central Executive Committee of the Commissaries of the People, took possession of the Petrograd bank, & everything in it, including the insured property. In two actions claiming losses under the policies:—*Held*: the act complained of was a confiscation by the Govt. of Russia which was in existence at the time & which had since been recognised by the British Govt. as the *de facto* Govt. of Russia, & the act was not an act of a usurped authority, & therefore no claim could be made under the policies in respect of the losses.—*WHITE, CHILD & BENEY, LTD. v. SIMMONS, WHITE, CHILD & BENEY, LTD. v. EAGLE STAR & BRITISH DOMINIONS INSURANCE CO.* (1922), 127 L. T. 571; 38 T. L. R. 616, C. A.

**3285. Loss on contract for personal services—Non-fulfilment of lecture tour—Policy of indemnity.]—**Pltf. engaged Miss Ellen Terry to deliver fifty lectures in Australia & New Zealand in 1914, & took out a Lloyd's policy of insurance by which the underwriters agreed to pay pltf. £100 "for each & every performance &/or lecture in the United Kingdom &/or Australia &/or New Zealand [from] which Miss Ellen Terry is absent owing to illness &/or accident, except death, but no liability to attach hereto in respect of the first fifteen performances &/or lectures from which Miss Ellen Terry is absent," & the underwriters bound themselves to pay "all such loss as above stated not exceeding the sum of £100 for each performance missed & not exceeding £1,500 in all that the assured may sustain" during the period in

question. The policy warranted that Miss Terry was only to be paid for actual performances:—*Held*: the policy was not a valued policy, but a policy of indemnity.—*BLASCHECK v. BUSSELL* (1916), 33 T. L. R. 74, C. A.

*Annotation*:—*Reid. City Tailors v. Evans* (1921), 91 L. J. K. B. 379.

**3286. Funeral expenses—Expenses to be reasonable.]—***GOLDSTEIN v. SALVATION ARMY ASSURANCE SOCIETY*, No. 2986, *ante*.

**3287. Actions for libel—Incurrence of costs without consent of insurers—Unreasonable refusal.]—***HULTON (E.) & CO., LTD. v. MOUNTAIN* (1921), 37 T. L. R. 869, C. A.

**3288. Endowment—Payable in twenty-one years to daughter—Death of assured within period—Moneys part of assured's estate.]—**An endowment policy taken out by a person in his own name for the benefit of his daughter, to mature on her attaining a specified age, creates no legal estate in the daughter, & she cannot sue on the contract, nor does the assured thereby constitute himself a trustee for his daughter of the policy & of the moneys payable thereunder. If, therefore, the assured dies before the policy matures, the policy moneys belong, not to the daughter, but to the estate of the assured, & must be paid to his exors.—*Re ENGELBACH'S ESTATE, TIBBETTS v. ENGELBACH*, [1924] 2 Ch. 348; 93 L. J. Ch. 616; 130 L. T. 401; 68 Sol. Jo. 208.

**3289. — Payable to insured on certain date—Trust for wife on insured's death—Prior to such date.]—**A husband effected a life or twenty years' endowment policy with an insurance society, the money being payable on his death or on his surviving the twenty years. The policy was expressed to be for the benefit of his wife if he died within the twenty years leaving her surviving, otherwise for the benefit of himself or his estate. The husband died within the twenty years, leaving his wife surviving:—*Held*: (1) the policy though immediately payable if the husband survived the twenty years was a policy effected "on his own life" within Married Women's Property Act, 1882 (c. 75), s. 11; (2) in the event that had actually occurred a valid trust for the wife was created within that section.—*Re IOAKIMIDIS POLICY TRUSTS, IOAKIMIDIS v. HARTCUP*, [1925] 1 Ch. 403; 133 L. T. 796; 41 T. L. R. 486; 69 Sol. Jo. 662.

**National health insurance.]—See WORK & LABOUR.**

**Unemployment insurance.]—See WORK & LABOUR.**

365; 2 W. W. R. 113; *revers.*, [1923] 2 D. L. R. 441; 52 O. L. R. 39.—CAN.

**r. —.]—***WAMPLER v. BRITISH EMPIRE UNDERWRITERS AGENCY* (1920), 48 O. L. R. 13, 54; D. L. R. 657; 18 O. W. N. 312.—CAN.

**t. Theft of car.]—***GOLDBERG v. EMPLOYERS' LIABILITY ASSURANCE CO.*, [1922] 1 W. W. R. 529; 66 D. L. R. 716.—CAN.

**u. —.]—***BOGGAN v. MOTOR UNION INSURANCE CO.*, [1922] 2 I. R. 184.—IR.

**a. Damage by water—Effect of frost.]—**A policy of insurance covered loss by leakage or discharge from a sprinkler system for protection against fire, but provided that it would not cover injury resulting from freezing. The water in a pipe connected with the

system froze &, the pipe having burst, damage was caused by the consequent escape of water:—*Held*: the damage did not result from freezing & the insured could recover on the policy.—*CANADIAN CASUALTY & BOILER INSURANCE CO. v. BOULTER, DAVIES & CO. & HAWTHORNE & CO.* (1907), 39 S. C. R. 558.—CAN.

**b. Loss through breach of agreement by third party.]—**A co. sold a motor vehicle to M. & H. under a conditional agreement, duly registered, which provided that the vehicle was not to be sold without the previous written consent of the selling co. or its assigns. M. & H. wrongfully & without their consent sold the car to D. Pltfs. had an assignment of the agreement from the selling co. & took the

car from D. at the expense of \$75. D. sued pltfs. & his action was dismissed with costs. Pltfs.' party & arty costs of that action were paid. Pltfs. were insured by defts. against loss resulting from the sale of the vehicle without pltfs.' consent:—*Held*: pltfs. while entitled to recover from defts. the \$75 were not entitled to recover their additional solr. & client costs of the action brought by D. nor their loss on resale of the vehicle.—*BANKERS FINANCIAL CORPN. v. CANADA ACCIDENT & FIRE ASSURANCE CO.* (1923), 53 O. L. R. 620.—CAN.

**c. Damage to crops—By hail.]—***H. B. MACDONALD CO., LTD. v. BIHR*, [1923] 1 W. W. R. 1132; 16 Sask. L. R. 334.—CAN.

## Part IX.—Wagering Policies.

### SECT. 1.—IN GENERAL.

Gaming & wagering generally, *see* GAMING & WAGERING, Vol. XXV., pp. 394 *et seq.*

**3290. Wager policy defined.]**—(1) A policy of marine insurance which contains a p.p.i. or the like clause is made void by Marine Insurance Act, 1906 (c. 41), s. 4 (2) (b), whether it is a wagering contract in fact or not. Such a policy is not a contract of indemnity & gives no scope for the operation of the principle of subrogation.

(2) The assured under an honour policy does not by asking for & receiving payment thereunder from the insurer elect to treat the policy as a valid & binding contract. Under such a policy the insurance is made irrespective of interest & payment is made irrespective of indemnity.

“A wager (or honour) policy may be defined to be one in which the parties by express terms disclaim on the face of it the intention of making a contract of indemnity.” This statement I think puts the point forcibly & well. It matters not in what way the disclaimer be expressed, whether by the words “production of this policy to be deemed full & sufficient proof of interest” or by any like phrase (McCARDIE, J.).—EDWARDS (JOHN) & CO. v. MOTOR UNION INSURANCE CO., [1922] 2 K. B. 249; 91 L. J. K. B. 921; 128 L. T. 276; 38 T. L. R. 690; 16 Asp. M. L. C. 89; 27 Com. Cas. 367.

**3291. Distinguished from valued policies.]**—A valued policy is not to be considered as a wager policy.—LEWIS v. RUCKER (1761), 2 Burr. 1167; 97 E. R. 769.

*Annotations:*—*Consd.* Le Cras v. Hughes (1782), 3 Doug. K. B. 81; Murphy v. Bell (1828), 4 Bing. 567; Irving v. Manning (1847), 1 H. L. Cas. 287; Dawson v. Wrench (1849), 3 Exch. 359. *Refd.* Da Costa v. Firth (1766), 4 Burr. 1966; Johnson v. Sheddon (1802), 2 East, 581; Usher v. Nobile (1810), 12 East, 639; Hardy v. Innes (1822), 6 Moore, C. P. 574; Hills v. London Assce. Corp'n. (1839), 9 L. J. Ex. 25; Ralli v. Janson (1856), 6 E. & B. 422; Bruce v. Jones (1863), 1 H. & C. 769; Balmoral S.S. Co. v. Marten, [1901] 2 K. B. 896; Duus, Brown v. Binning (1906), 22 T. L. R. 529.

**3292. Effect of wagering policy—Recapture does not avail insurer.]**—On a policy interest or no interest, a recapture after being in an enemy's port will not avail the insurer.—DEAN v. DICKER (1746), 2 Stra. 1250; 93 E. R. 1162.

*Annotation:*—*Refd.* Edwards v. Motor Union Insce., [1922] 2 K. B. 249.

**3293. — No right of abandonment.]**—Money having been expended in reclaiming a cargo on

board a ship captured was insured by the owners upon the event of the ship's arrival at M.; the ship being captured, & restored upon appeal, relinquished her voyage & was afterwards lost; pending the appeal the goods were ordered to be sold, & the expenses of the appeal were afterwards defrayed therewith; yet an averment of a loss by capture is bad, because the ship might, notwithstanding the capture, have afterwards arrived at M.; & this being a wagering policy, the assured could not at any time abandon.—KULEN KEMP v. VIGNE (1786), 1 Term Rep. 304; 99 E. R. 1109.

*Annotation:*—*Refd.* Edwards v. Motor Union Insce., [1922] 2 K. B. 249.

Abandonment generally, *see* Part II., sect. 24,

### SECT. 2.—AT COMMON LAW.

*See, now,* Marine Insurance Act, 1906 (c. 41), s. 4; Marine Insurance (Gambling Policies) Act, 1909 (c. 12), s. 1, & generally, GAMING & WAGERING, Vol. XXV., pp. 394 *et seq.*

**3294. General rule.]**—It was by that case [*Lucena v. Craufurd*, No. 3303, *post*] solemnly determined without even a difference of opinion among the judges that at common law wager policies of insurances without interest were lawful & that it was impossible to say that any wager which was not, as it was said, contrary to the policy of the law, that is, contrary to morality, or hurtful in a political point of view was not a legal contract (*per* CUR.).—COUSINS v. NANTES (1811), 3 Taunt. 513; 128 E. R. 203, Ex. Ch.

*Annotations:*—*Foll.* Dalby v. India & London Life Assce. (1854), 15 C. B. 365. *Refd.* Cheshire v. Vaughan, [1920] 3 K. B. 240.

**3295. —.]**—DALBY v. INDIA & LONDON LIFE ASSURANCE CO., No. 2774, *ante*.

**3296. “Interest or no interest.”]**—One having no interest in a ship insures it, the insurance is void, though the policy runs, interest or no interest. But if he is interested in the ship, he may insure more than the value of his interest.—GODDART v. GARRETT (1692), 2 Vern. 269; 23 E. R. 774.

*Annotations:*—*Consd.* Craufurd v. Hunter (1798), 8 Term Rep. 13; *Lucena v. Craufurd* (1806), 2 Bos. & P. N. R. 269.

**3297. — Necessity for proof of interest.]**—When insurance is interest or no interest, pltf.

ance contracts of a wagering nature, which only applies when a person insures the life of another.—GRAVELLE v. RUDOLPH (1916), 34 W. L. R. 424; 10 W. W. R. 709; 28 D. L. R. 742.—CAN.

### PART IX. SECT. 2.

**3294 i. General rule.]**—A condition in a policy of life insurance by which the policy is declared to become incontestable upon any ground whatever after the lapse of a limited period, does not make the contract binding upon the insurer in the case of a wagering policy.—MANUFACTURERS LIFE INSURANCE CO. v. ANCTIL (1897), 28 S. C. R. 103; *affd. on appeal*, [1899] A. C. 604.—CAN.

**3294 ii. —.]**—A wagering policy upon the life of another is not illegal in Ireland.—BRITISH ASSURANCE CO. v. MAGEE (1834), Cooke & Al. 182.—IR.

**3294 iii. —.]**—KEITH v. PROTECTION MARINE INSURANCE CO. (1882), 10 L. R. Ir. 51.—IR.

### PART IX. SECT. 1.

**d. No intent to effect wager policy.]**—G. insured his life, & was unable to pay the premium for some time, but a third party, at the request of the agent, took an assignment of the policy & paid the premium. Subsequently, the policy was assigned to pltf. & the premiums were thenceforth paid by him:—*Held*: at the time the policy issued G. intended to effect a *bond fide* insurance for his own benefit, & as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy, & it was not therefore a wagering policy.—VEZINA v. NEW YORK LIFE INSURANCE CO. (1881), 6 S. C. R. 30.—CAN.

**e. —.]**—A life policy in pltf.'s co. was taken out by assured after it had been represented to him by pltf.'s agent that he could raise money upon it from deft. by selling the policy to him, & the policy was taken out by assured for that purpose. At the time

assured was too poor to pay the premium & was unable to carry the policy. Immediately upon the policy being issued, it was assigned to deft. for a small sum, & deft. paid the original & subsequent premiums. Assured stated that when he assigned the policy he expected to redeem it, & carry it for his own benefit:—*Held*: the policy was not a wagering policy.—MUTUAL LIFE ASSURANCE CO. OF NEW YORK v. ANDERSON (1897), 1 N. B. Eq. Rep. 466.—CAN.

**f. Insurance on own life—For benefit of another.]**—Two brothers agreed with each other that each was to insure his own life, paying the premiums in respect of the policy so issued & naming his brother as beneficiary. This was done, & the premiums duly paid until one brother died, leaving a will by which he bequeathed a part of such life insurance to R. The surviving brother elected to take under the policy:—*Held*: the policy was not within the prohibition against insur-



**Sect. 2.—At common law. Sects. 3 & 4.]**

has no occasion to prove his interest for deft. cannot controvert that.—**DEPABA v. LUDLOW** (1720), 1 Com. 360; 92 E. R. 1112.

*Annotations*:—**Consd.** Pole v. Fitzgerald (1750), Willes, 641. **Refd.** Pond v. King (1747), 1 Wils. 191; Goss v. Withers (1758), 2 Burr. 683; Lucena v. Craufurd (1806), 2 Bos. & P. N. R. 269.

**3298. — Partial loss.**—Goods insured by agreement, valued at £600, & the insured not to be obliged to prove any interest; yet the insured is ordered to discover what goods be put on board, that the value of his goods saved may be deducted out of the £600.—**LE PYPRE v. FARR** (1716), 2 Vern. 716; 23 E. R. 1070, L. C.

*Annotation*:—**Refd.** Nantes v. Thompson (1802), 2 East, 385.

**3299. — Effect of recapture.**—**DEAN v. DICKER**, No. 3292, ante.

**3300. Where proof of interest not disclaimed—Insured must prove interest.**—If a ship insured be taken by the enemy, & after a possession of nine days but before she is carried *infra præsidia* be retaken by an English man-of-war the property is not charged, but if it be found that pltf. in the policy is not concerned in point of interest he cannot recover against the underwriters.—**ASSIEVEDO v. CAMBRIDGE** (1712), 10 Mod. Rep. 77; 88 E. R. 634.

*Annotations*:—**Refd.** Goss v. Withers (1758), 2 Burr. 683. **Mentd.** R. v. Majaval Serva Alves, Ribeiro Francisco, Martinos, Joaquim, Santos, Antonio, Antonio (1845), 6 L. T. O. S. 188.

**SECT. 3.—UNDER MARINE INSURANCE ACT, 1745.**

See, now, Marine Insurance Act, 1906 (c. 41), ss. 4, 92.

**3301. What is a wagering policy within Act—Policy on safe arrival of ship—No reference to interest of insured.**—An agreement to pay £20 to deft. at the next port a ship should reach, provided that if she did not save her passage to China, deft. would pay to pltf. £1,000 at the end of one month after she arrived in the river Thames, without reference to any property, though one of the parties had some goods on board, liable to suffer by the loss of the season, is a wagering policy, within Marine Insurance Act, 1745 (c. 37).—**KENT v. BIRD** (1777), 2 Cowp. 583; 98 E. R. 1253.

*Annotations*:—**Folld.** Gedge v. Royal Exchange Assce. (1900), 2 Q. B. 214. **Refd.** Puller v. Glover (1810), 12 East, 124.

**3302. — — — — —**—(1) A policy of marine insurance whereby the assured is entitled to be indemnified against loss in respect of the non-arrival of a ship at a certain port by a certain date is a policy of insurance on the ship within Marine Insurance Act, 1745 (c. 37), s. 1.

(2) Where on the trial of an action, pltf.'s case discloses that the transaction which is the basis of his claim is illegal, the ct. cannot properly ignore the illegality or give effect to the claim, even if the illegality be not pleaded or relied on by defts. The ct. will therefore not enforce a policy of marine insurance which is illegal under Marine Insurance Act, 1745 (c. 37), s. 1, by reason of its containing a clause that the policy itself is to be deemed a full & sufficient proof of interest,

although that defence is not set up by the underwriters.—**GEDGE v. ROYAL EXCHANGE ASSURANCE CORPN.**, [1900] 2 Q. B. 214; 69 L. J. Q. B. 506; 82 L. T. 463; 16 T. L. R. 344; 9 Asp. M. L. C. 57; 5 Com. Cas. 229.

*Annotations*:—**As to** (1) **Refd.** Cheshire v. Vaughan (1920), 123 L. T. 487. **As to** (2) **Consd.** Kregor v. Hollins (1913), 109 L. T. 225; Soc. des Hôtels Réunis (Soc. Anon.) v. Hawker (1913), 29 T. L. R. 578.

**3303. — Policy on profits.**—An insurance upon the profits of any ship or goods by way of wager would be a mere evasion of the statute [19 Geo. 2, c. 37], & though not within the words must be taken to be within the spirit (*per CUR.*).—**LUCENA v. CRAUFURD** (1806), 2 Bos. & P. N. R. 269; 127 E. R. 630 H. L.; *subsequent proceedings* (1808), 1 Taunt. 325, H. L.

*Annotations*:—**Consd.** Routh v. Thompson (1809), 11 East, 428; Stirling v. Vaughan (1809), 11 East, 619; M'Swiny v. Royal Exchange Assce. Corpn. (1849), 14 Q. B. 634; Dalby v. India & London Life Assce. (1854), 15 C. B. 365; Ebsworth v. Alliance Marine Insce. (1873), 11 R. 8 C. P. 596; Mackenzie v. Whitworth (1875), 1 Ex. D. 36; Anderson v. Morice (1876), 1 App. Cas. 713; Allkins v. Jupe (1877), 2 C. P. D. 375; Moran, Galloway v. Uzielli, [1905] 2 K. B. 555; **Refd.** Hodgson v. Glover (1805), 6 East, 316. **Cousins v. Nantes** (1811), 3 Taunt. 513; Robertson v. Hamilton (1811), 14 East, 522; Routh v. Thompson, (1811), 13 East 274; Taylor v. Wilson (1812), 15 East, 324; Cohen v. Hannam (1813), 5 Taunt. 101; Hagedorn v. Oliverson (1814), 2 M. & S. 485; Bell v. Jutting (1817), 1 Moore, C. P. 155. **Devaux v. Steele** (1840), 6 Bing. N. C. 358; Wilson v. Jones (1867), L. R. 2 Exch. 139; Lloyd v. Fleming, Lloyd v. Spence (1872), L. R. 7 Q. B. 299; Macaura v. Northern Assce., [1925] A. C. 619. **Mentd.** Hull v. Pickersgill (1819), 1 Brod. & Bing. 282; Clement v. Lewis (1822), 10 Price, 181.

**3304. — — — — —**—An insurance on profits on goods laden on board a ship is an insurance on goods within Marine Insurance Act, 1745 (c. 37), s. 1, & therefore an insurance on profits containing clauses prohibited by that statute is illegal.—**SMITH v. REYNOLDS** (1856), 1 H. & N. 221; 25 L. J. Ex. 337; 27 L. T. O. S. 187; 4 W. R. 644. *Annotations*:—**Folld.** De Mattos v. North (1868), L. R. 3 Exch. 185; Mortimer v. Broadwood (1869), 20 L. T. 398. **Appld.** Allkins v. Jupe (1877), 2 C. P. D. 375. **Folld.** Berridge v. Man On Insce. (1886), 18 Q. B. D. 346. **Refd.** Gedge v. Royal Exchange Assce. Corpn., [1900] 2 Q. B. 214.

**3305. — — — — —**—A policy on profits is within Marine Insurance Act, 1745 (c. 37), s. 1, & if made "without benefit of salvage," although "free from average," it is avoided by the statute.—**DE MATTOS v. NORTH** (1868), L. R. 3 Exch. 185; 37 L. J. Ex. 116; 18 L. T. 797; 3 Mar. L. C. 141.

*Annotations*:—**Folld.** Mortimer v. Broadwood (1869), 20 L. T. 398. **Appld.** Allkins v. Jupe (1877), 2 C. P. D. 375. **Folld.** Berridge v. Man On Insce. (1886), 18 Q. B. D. 346. **Consd.** Gedge v. Royal Exchange Assce. Corpn., [1900] 2 Q. B. 214.

**3306. — — — — —**—A policy on profits is within Marine Insurance Act, 1745 (c. 37), s. 1, which avoids policies made "without benefit of salvage to the assurer." Therefore a policy on profits, "without benefit of salvage" is void, though the assured is interested to the full amount insured.—**MORTIMER v. BROADWOOD** (1869), 20 L. T. 398; 17 W. R. 653; 3 Mar. L. C. 229.

*Annotation*:—**Consd.** Allkins v. Jupe (1877), 2 C. P. D. 375.

**3307. — — — — — & commissions.**—A policy containing any of the words forbidden by Marine Insurance Act, 1745 (c. 37), s. 1, is illegal, if the insurance relates simply to "ship &/or ships, steamer &/or steamers," & does not exclude British vessels. Pltfs. effected a policy upon commission & profit upon "ship &/or ships, steamer

**PART IX. SECT. 3.**

**g. What is a wagering policy within Act.**—A marine policy containing a provision that the premises insured are warranted free from all average &

without benefit of salvage, & that no further proof of interest than the policy shall be required in case of loss, is a wagering policy. Such a policy is not void at common law. Marine Insur-

ance Act, 1745 (c. 37), avoiding such policies in Great Britain, does not purport to bind Ireland.—**KEITH v. PROTECTION MARINE INSURANCE CO.** (1882), 10 L. R. Ir. 51.—**IR.**



&/or steamers"; & the following clause was inserted: "Warranted free from all average & without benefit of salvage, but to pay loss on such part as shall not arrive." Deft. was an underwriter of the policy. The goods to which the commission & profit insured related were shipped on board a British vessel, which was lost by the perils of the seas. Pltfs. having sued to recover the amount of deft.'s subscription, or, if the policy were void, the premium paid by them:—*Held*: the policy was rendered illegal by Marine Insurance Act, 1745 (c. 37), s. 31, for the insurance was "without benefit of salvage," & the terms of the policy did not exclude British ships.

The subject-matter of insurance is "commission &/or profit." I think that we must look at the policy as consisting of one insurance, & that we cannot split it up & treat it as containing separate insurances on "commission" & "profit." My impression is that even if we could split it up, all the reasons going to show that a policy on profit may be rendered illegal by Marine Insurance Act, 1745 (c. 37), equally extend to a policy on commission; but in my view the policy before us contains but one insurance, & if it is illegal as to profit, it is likewise illegal as to commission (LINDLEY, J.).—*ALLKINS v. JUPE* (1877), 2 C. P. D. 375; *sub nom.* *ALLKINS v. JUPE, SAME v. PEMBROKE, SAME v. OPPENHEIM, SAME v. CHOISY*, 46 L. J. Q. B. 824; 36 L. T. 851; 3 Asp. M. L. C. 449, D. C.

*Annotations*:—*Consd.* *Berridge v. Man On Insee.* (1886), 18 Q. B. D. 346; *Gedge v. Royal Exchange Asso. Corpn.*, [1900] 2 Q. B. 214. *Refd.* *British Workman's & General Asso. v. Cunliffe* (1902), 18 T. L. R. 425.

**3308. — Policy on cash advances.**—A policy insuring cash advances on a ship is within Marine Insurance Act, 1745 (c. 37), s. 1. Such a policy containing the term "full interest admitted" is avoided by that statute.—*BERRIDGE v. MAN ON INSURANCE CO.* (1887), 18 Q. B. D. 346; 56 L. J. Q. B. 223; 56 L. T. 375; 35 W. R. 343; 6 Asp. M. L. C. 104, C. A.

*Annotation*:—*Consd.* *Gedge v. Royal Exchange Insee. Corpn.*, [1900] 2 Q. B. 214.

**3309. What amounts to disclaimer of interest—"Without any other voucher than policy"—Valued policy.**—Policy upon any kind of goods, etc., valued at £1,000, being on profits expected to arise on the cargo of the ship in the event of her safe arrival at Quebec, & in case of loss the insurers agree to pay the same without any other voucher than the policy:—*Held*: this policy was not void within Marine Insurance Act, 1745 (c. 37), but the insured were entitled to recover.—*GRANT v. PARKINSON* (1781), 3 Doug. K. B. 16; 99 E. R. 515.

*Annotations*:—*Consd.* *Le Cras v. Hughes* (1782), 3 Doug. K. B. 81; *Barclay v. Cousins* (1802), 2 East, 543; *Lucena v. Craufurd* (1806), 2 Bos. & P. N. R. 269; *Murphy v. Bell* (1828), 4 Bing. 567. *Refd.* *Hodgson v. Glover* (1805), 6 East, 316; *Truscott v. Christie* (1820), 5 Moore, C. P. 33; *Devaux v. Steele* (1840), 6 Bing. N. C. 358.

**3310. — "Policy proof of interest."**—A policy of insurance stipulated, "that the goods insured were & should be valued at five tierces coffee, valued at £27 per tierce, say £135; that policy to be deemed sufficient proof of interest"—*Held*: the policy was void under Marine Insurance Act, 1745 (c. 37).—*MURPHY v. BELL* (1828), 4 Bing. 567; 1 Moo. & P. 493; 6 L. J. O. S. C. P. 118; 130 E. R. 887.

*Annotations*:—*Consd.* *Mortimer v. Broadwood* (1869), 20 L. T. 398. *Apld.* *Allkins v. Jupe, Pembroke, Oppenheim & Choisy* (1877), 36 L. T. 851.

**3311. — — — — —**—*GEDGE v. ROYAL EXCHANGE ASSURANCE CORPN.*, No. 3302, *ante*.

**3312. — "Without benefit of salvage."**—*DE MATTOS v. NORTH*, No. 3305, *ante*.

**3313. — — — — —**—*MORTIMER v. BROADWOOD*, No. 3306, *ante*.

**3314. — — — — —**—*ALLKINS v. JUPE*, No. 3307, *ante*.

*See, now*, Marine Insurance Act, 1906 (c. 41), s. 4 (2).

**3315. "Full interest admitted."**—*BERRIDGE v. MAN ON INSURANCE CO.*, No. 3308, *ante*.

**Right of insured to return of premium.**—*See* Part II., sect. 4, sub-sect. 7, *ante*.

#### SECT. 4.—UNDER MARINE INSURANCE ACT, 1906.

*See* Marine Insurance Act, 1906 (c. 41), s. 4.

**3316. P.p.i. policy—Whether wagering policy.**—*EDWARDS (JOHN) & CO. v. MOTOR UNION INSURANCE CO.*, No. 3290, *ante*.

**3317. — Clause embodied in detachable slip.**—*Re LONDON COUNTY COMMERCIAL REINSURANCE OFFICE*, No. 3327, *post*.

**3318. Effect of wagering policy—On other policies effected by same insurer on same adventure.**—It is necessary to examine fundamentally the position of an owner who has made legitimate insurances upon ship, cargo, or freight & also made separate gambling insurances. It appears to me that, wherever owners enter into gambling transactions of this kind, these transactions themselves are not only invalid but they infect & invalidate the entire insurances which the same assured have made upon vessel, freight, or cargo. The reason of that is this: the voyage is one, & the ship, its earnings, its cargo, its crew, all are involved in that one & single hazard which has been undertaken & which is by the gambling transaction improperly weighted towards loss, a loss which, falling upon the ship, would not rest there, but spread to unsalved cargo & to freight, not to speak of the peril to human life which would be thus encountered. The line of plain duty for all parties to the contract is that the ship shall be preserved; but when a gamble has been made by one of the parties for gain upon the event of loss of ship, although the subject of the particular gamble be not the ship itself, the interest of that party is that the ship shall be destroyed. This hazard against the life of the vessel humbly appears to me to taint every policy entered upon by the same gambling adventurer, & no such policy thus depending upon the same hazard is enforceable. The rule governing this is simple & familiar, namely, that the law will not countenance or enforce a transaction which is thus tainted by conflict between duty & self-interest. The rarity & difficulty of a right adjustment of the wavering balance swayed by self-interest have been memorably phrased. But the law does not attempt the task; the penalty against such a conflict between interest & duty is the invalidation of the bargain. I remark, however, that the foregoing observations are not directed to the case of insurances upon ships in which third parties have acquired, in ignorance of the other & over insurances & in good faith & for valuable consideration, separate interests. The rights of such parties would require to be separately & fully considered (LORD SHAW).—*THAMES & MERSEY MARINE INSURANCE CO. v. GUNFORD SHIP CO.*, *SOUTHERN MARINE MUTUAL INSURANCE ASSOCN. v. GUNFORD SHIP CO.*, [1911] A. C. 529; 80 L. J. P. C. 146; 105 L. T. 312; 27 T. L. R.

4.—*Under Marine Insurance Act, 1906.*  
*Sects. 5 & 6.]*

518; 55 Sol. Jo. 631; 12 Asp. M. L. C. 49; 16 Com. Cas. 270, H. L.

*Annotations:—*Reid. *Edwards v. Motor Union Insee.*, [1922] 2 K. B. 249. *Mentd. Re Yager & Guardian Assce.* (1912), 108 L. T. 38.

*See, also, Marine Insurance (Gambling Policies) Act, 1909 (c. 12).*

SECT. 5.—**UNDER GAMING ACT, 1845.**

*See Gaming Act, 1845 (c. 109), s. 18; GAMING & WAGERING, Vol. XXV., pp. 394 et seq.*

**3319. Whether Act applicable—Where insured with interest.]—**This was an insurance on pltf.'s interest in the adventure. The argument . . . almost took the form of saying that such a contract would be a wager. If it is meant that it would be within Gaming Act, 1845 (c. 109), we must reject the argument, for that statute has no application to a contract upon a matter in which the parties have an interest (WILLES, J.).—*WILSON v. JONES* (1867), L. R. 2 Exch. 139; 36 L. J. Ex. 78; 15 L. T. 669; 15 W. R. 435; 2 Mar. L. C. 452, Ex. Ch.

*Annotations:—*Mentd. *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484; *Griffiths v. Fleming*, [1909] 1 K. B. 805; *Moore v. Evans*, [1917] 1 K. B. 458; *Re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67; *Samuel v. Dumas*, [1924] A. C. 431; *Macaura v. Northern Assce.*, [1925] A. C. 619.

*See, now, Marine Insurance Act, 1906 (c. 41), s. 4.*

SECT. 6.—**UNDER LIFE ASSURANCE ACT, 1774.**

Life insurance generally, *see Part IV., ante.*

*See Life Assurance Act, 1774 (c. 48).*

*See, generally, GAMING & WAGERING, Vol. XXV., pp. 397 et seq.*

**3320. General rule—Wagering contracts illegal.]—**DALBY *v. INDIA & LONDON LIFE ASSURANCE Co.*, No. 2774, *ante.*

**3321. Name of person interested must be inserted.]—**MOLLISON *v. STAPLES* (1778), Marshall on Marine Insurances, 4th ed. p. 88, n.; 2 Park's Marine Insurances, 7th ed. p. 640, n.

*Annotation:—*Reid. *Paterson v. Powell* (1832), 9 Bing. 320.

**3322. — Policy as to future price of shares.]—**Where, in consideration of 40 guineas for £100, & so according to that rate for every greater or less sum, several persons, each for themselves, severally engaged to pay the several sums set opposite their names, in case Brazilian mining shares should, on or before a certain day, be done at or above a certain sum:—*Held*: (1) this was a policy of insurance within Life Assurance Act, 1774 (c. 48), & void, the assured not being interested in the subject-matter insured on his name mentioned in the body of the instrument; (2) such contract was executed on the event taking place; & consequently, pltf. had no claim to a return of the premium paid.—*PATERSON v. POWELL* (1832), 9 Bing. 320; 2 Moo. & S. 399; 2 L. J. C. P. 13; 131 E. R. 635.

*Annotation:—*As to (1) *Reid. Morgan v. Pebrer* (1837), 3 Hodg. 3.

**3323. —.]—**Life Assurance Act, 1774 (c. 48), s. 2, which requires the name of the person for

whose benefit a policy of insurance is made, to be inserted therein, applies only to cases between the insurer & the insured, & does not preclude an exor. from recovering a sum of money from a party who received it upon a policy not in conformity with this provision.—*LYSONS v. BARROW* (1836), 2 Bing. N. C. 486; 1 Hodg. 390; 2 Scott, 721; 5 L. J. C. P. 102; 132 E. R. 191.

*Annotation:—*Mentd. *Easton v. Carter* (1850), 5 Exch. 8.

**3324. —.]—**Under Life Assurance Act, 1774 (c. 48), s. 2, in every policy on the life of another, whether a *bonâ fide* or a gaming or wager policy, the name of the person interested in such policy must be inserted therein at the time of making as that of the person interested; otherwise the policy is void.—*HODSON v. OBSERVER LIFE ASSURANCE SOCIETY* (1857), 8 E. & B. 40; 26 L. J. Q. B. 303; 29 L. T. O. S. 278; 3 Jur. N. S. 1125; 5 W. R. 712; 120 E. R. 15.

—.]—*See Part IV., Sect. 5, ante.*

**3325. What are wagering policies within statute—Policy on sex of person.]—**A policy upon the sex of a person, is a wagering policy within Life Assurance Act, 1774 (c. 48).—*ROEBUCK v. HAMMERTON* (1778), 2 Cowp. 737; 98 E. R. 1335.

**3326. — Policy in the events of war of peace.]—**MOLLISON *v. STAPLES* (1778), Marshall on Marine Insurances, 4th ed. p. 88, n.; 2 Park's Marine Insurances, 7th ed. p. 640, n.

*Annotation:—*Reid. *Paterson v. Powell* (1832), 9 Bing. 320.

**3327. — —.]—**In the winding up of a re-insurance co. claims were made under, first: a class of policy which was issued by the co. by way of reinsurance on a printed form adapted to marine insurance, to insure the payment of a sum of money in respect of a total loss "in the event of peace not being declared between Great Britain & Germany on or before Mar. 31, 1918." To that policy was attached a detachable p.p.i. slip, which expressly stipulated as follows: "This slip is no part of the policy, & is not to be attached thereto, but is to be considered as binding in honour on the underwriters; the assured however having permission to remove it from the policy should they so desire. In the event of claim it is hereby agreed that this policy shall be deemed sufficient proof of interest. Full interest admitted." Secondly: a class of marine policy to reinsure a ship therein named against marine risks, such policy having attached thereto a p.p.i. slip similar in all respects to that which was attached to the peace policies, which slip in some cases remained attached & in others had been detached at the date of the claim thereunder. Upon an application by the co. to have it determined by the ct., whether claims under either of those classes of policy ought to be admitted:—*Held*: (1) as to the peace policies: as the losses insured against were not incident to any marine adventure, those policies did not come within the definition of a contract of marine insurance in Marine Insurance Act, 1906 (c. 41), s. 1, although they were policies of insurance within Life Assurance Act, 1774 (c. 48), & were not mere wagers, yet, having regard to the description of the subject-matter of the insurance, the existence of the p.p.i. & f.i.a. clauses & the absence of proof of an insurable interest in the original assured, notwithstanding payment by the reassured under the original

PART IX. SECT. 6.

**3321 i. Name of person interested must be inserted.]—**NEW ZEALAND INSURANCE CO., LTD. *v. TYNESIDE PROPRIETARY, LTD.*, [1917] N. Z. L. R.

569.—N.Z.

**h. Want of insurable interest.]—**If the beneficiary of a life insurance policy who has no interest in the life of the insured has effected the insurance for his own benefit & pays all the

premiums himself the policy is a wagering policy & void under Life Assurance Act, 1774 (c. 48), s. 1.—*BROPHY v. NORTH AMERICAN LIFE ASSURANCE Co.* (1902), 32 S. C. R. 261.—CAN.



policy, the policies were by way of gaming & wagering & illegal & void under the Act of 1774; the premiums paid thereunder were irrecoverable; (2) as to the marine policies: the p.p.i. slip, having been attached to the policies at the time of signing & issuing the same, formed part of those policies in spite of the stipulation to the contrary on the slip, & consequently, such policies were void by Marine Insurance Act, 1906 (c. 41), s. 4, whether the slip remained attached to or was detached from the policy at the date of the claim thereunder; even assuming the voluntary liquidator occupied the position of an officer of the ct., he was not bound by any principle of equity or honourable dealing to admit claims under those policies which the legislature had declared void; as the "long slips" presented to the insurance co. by the assured's broker as the closing instructions contained instructions for the insertion of a p.p.i. clause, in the absence of evidence of a mutual or even a unilateral mistake, those policies ought not to be rectified by striking out the p.p.i. clause on the ground that the "short slip" did not stipulate for a p.p.i. clause; the consideration for the payment of the premium having wholly failed, claims for premiums paid thereunder ought by Marine Insurance Act, 1906 (c. 41), s. 48, to be allowed by the liquidator. Accordingly, the ct. declared that none of the claims under either of the two classes of policy, except in respect of the premiums on the marine policies, ought to be admitted.—*Re LONDON COUNTY COMMERCIAL REINSURANCE OFFICE*, [1922] 2 Ch. 67; 91 L. J. Ch. 337; 127 L. T. 20; 38 T. L. R. 399; 15 Asp. M. L. C. 553.

*Annotation*:—As to (1) *Refd. Edwards v. Motor Union Insce.*, [1922] 2 K. B. 249.

**3328. — Sale of expectancy—Proviso for return of purchase money on failure of expectancy.**—By agreement in writing between A. & B., reciting that A. was expecting to become seized in fee of a certain messuage, etc., on the death of E., widow, as the devisee under her will, which messuage, etc., were then in the occupation of lessees, under a lease of which A. was assignee, & that A. had contracted to sell all the possibility & expectancy of an estate & interest in the premises to B., for all A.'s estate & interest therein, expectant as aforesaid, for £2,000, which B. thereby agreed to pay him, A. promised & agreed with B. that he would, within three months from the decease of E., in case A. became devisee of the premises, convey the same to B., his heirs & assigns, & make him a good title, & that B. should in that event become entitled to the rents & profits from the day of E.'s decease. & that, in case A. should not become the devisee in fee of the premises, or should not make a good title within six months from the decease of E., A. should, within the latter period, repay the £2,000 without interest, to B. & that A. should execute a certain indenture, assigning a policy on his life, as a security for such repayment; B. to reassign if the conveyance should be perfected according to the agreement. The indenture was executed accordingly. Neither A. nor any person under whom he claimed had had possession of the premises, or the reversion or remainder thereof, or taken the rents or profits, within a year before such execution. B. was not the heir of E. & had no interest in her life or death, unless by the above agreement:—*Held*: the agreement was not illegal, as contravening public policy by creating an interest in E.'s death, or in the exercise of an undue influence over her mind as to the making of her will. Nor as a bargain, contrary to 32

Hen. 8, c. 9, for a grant of pretended right or title to hereditaments of which the grantor was not in possession. Nor as a wagering policy, prohibited by Life Assurance Act, 1774 (c. 48), or otherwise.—*COOK v. FIELD* (1850), 15 Q. B. 460; 19 L. J. Q. B. 441; 16 L. T. O. S. 2; 14 Jur. 951; 117 E. R. 534.

**3329. — Policy on father's life.**—J. H. effected with deft. co. two policies of insurance on the life of his father, J. H., in which he had no insurable interest; according to the policies the premiums were to be paid by weekly payments. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurance effected on his life, but when he became aware of them he objected to their being continued, & gave notice to that effect to the co. J. H., the son, then gave notice to defts. that the policies were at an end, & claimed the return of the amount of the premiums. Defts. refused to pay, & J. H., the son, brought his action for their recovery, & the county ct. judge gave judgment for pltf. Deft. appealed:—*Held*: under the circumstances of the case, the policies were wagering policies, & consequently the premiums paid in respect of them could not be recovered.—*HOWARD v. REFUGE FRIENDLY SOCIETY* (1886), 54 L. T. 644; 2 T. L. R. 474, D. C. *Annotations*:—*Refd. British Workman's & General Assee. v. Cunliffe* (1902), 46 Sol. Jo. 360; *Harse v. Pearl Life Assee.*, [1904] 1 K. B. 558. *Mentd. Parr v. London, Edinburgh & Glasgow Assee.* (1891), 8 T. L. R. 88.

**3330. — Policy must be in writing.**—Defts., the proprietors of a certain medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they promised to pay £100 to any person who contracted the influenza after having used one of their smoke balls, in a specified manner & for a certain specified period. Pltf., upon the faith of the advertisement, purchased one of defts.' smoke balls, & used it in the manner & for the period specified, but nevertheless contracted the influenza:—*Held*: that the above facts established a contract by the defts. to pay pltf. £100 in the event which happened; that such contract was neither a contract by way of wagering within Gaming Act, 1845 (c. 109), nor a policy within Life Assurance Act, 1774 (c. 48), s. 2, & pltf. was entitled to recover.

The [Life Assurance Act, 1774 (c. 48), s. 2] relates only to a policy which is a written document, & cannot apply to a contract like the present, which is created by a written proposal or offer accepted by the fulfilment by pltf. of the conditions attached to the offer (*HAWKINS, J.*).—*CARLILL v. CARBOLIC SMOKE BALL CO.*, [1893] 1 Q. B. 256; 62 L. J. Q. B. 257; 67 L. T. 837; 57 J. P. 325; 41 W. R. 210; 9 T. L. R. 124; 4 R. 176, C. A.

*Annotations*:—*Mentd. Stoddart v. Sagar, Sagar v. Stoddart* (1895), 73 L. T. 215; *World's Tea Co. v. Gardner, Same v. Same* (1895), 59 J. P. 358; *R. v. Riley*, [1896] 1 Q. B. 309; *Re Consort Deep Level Gold Mines, Ex p. Stark*, [1897] 1 Ch. 575; *Stollery v. Maskelyne* (1898), 15 T. L. R. 79; *Johnston v. Boyes*, [1899] 2 Ch. 73; *R. v. Stoddart* (1900), 70 L. J. Q. B. 189; *Hawke v. Hulton* (1905), 22 T. L. R. 169; *Chaplin v. Hicks* (1911), 27 T. L. R. 244; *Western Electric Co. v. G. E. Ry.*, [1914] 3 K. B. 554; *Lyons v. Fox*, [1919] 1 K. B. 11; *Reynolds v. Atherton* (1921), 125 L. T. 690.

**3331. Want of insurable interest—P.p.i. clause.**—*Re LONDON COUNTY COMMERCIAL REINSURANCE OFFICE*, No. 3327, *ante*.

**3332. Premiums irrecoverable.**—*PATERSON v. POWELL*, No. 3322, *ante*.

**3333. —**—*HOWARD v. REFUGE FRIENDLY SOCIETY*, No. 3329, *ante*.

**3334. —**—*Re LONDON COUNTY COMMERCIAL REINSURANCE OFFICE*, No. 3327,



## Part X.—Insurance Companies and Partnerships.

### SECT. 1.—IN GENERAL.

*See, generally, COMPANIES, Vol. X., pp. 1069 et seq.*

**3335. Statutory company—7 & 8 Vict. c. 110—Whether seal necessary—Policy signed by directors.]**

—In an action on a life policy granted by an assurance company established under above Act plff. produced the policy signed by three directors & gave evidence of the proposal & acceptance of the life, the delivery of the policy by the co., the receipt of premiums from time to time on the part of the co., & a letter received from the co. after the life had dropped, admitting the validity of the policy but setting up matters of defence to the claim which turned out untrue:—*Held*: it was the duty of the jury to presume from these facts that the contract was a valid & binding one, & in accordance with the power of the directors, & any matter of defence, such as that the contract was not executed in the manner required by the deed of settlement, or not under seal, must be shown by evidence on the part of the defence.

The argument in this case has been conducted as if this co. were a common law corpn.; but that is not so; it is a registered statutable co. & may contract without the contract being under seal (*ERLE, J.*).—*CHARLES v. NATIONAL GUARDIAN ASSURANCE SOCIETY* (1857), 29 L. T. O. S. 246; 5 W. R. 694.

**3336. ——— Policy signed by agent.]**—The Hull & London Fire Insurance co. was a co. completely registered under above Act. The deed of settlement gave the co. power (*inter alia*) to transact all the branches of business usually appertaining to marine insurance, & required that in every policy the funds of the co. should alone be made liable. The co. had a seal with their name of incorporation on it. For marine insurances the directors appointed an agent to issue policies. The marine policies were headed Hull & London Marine Assurance Co., & were signed by the agent, by order of the board of directors of the co., & had a stamp upon them with the words "Hull & London Marine Assurance company." They contained no stipulation that the funds of the co. should alone be liable:—*Held*: (1) the Hull & London Fire Insurance co. were not liable on such policies, because neither the directors, nor any one else, had authority to enter into such engagements on behalf of the co., as these policies purported to create; & there neither was nor could be any evidence that the signing of such policies by an agent in a name not that of the co. was in accordance with the usual mode of conducting the business of partnerships such as defts.; or within the scope of the ordinary authority of the directors or agents of such cos.; (2) no action lay

against the Hull & London Fire Insurance co. on an adjustment of losses on such policies by the directors.—*HAMBRO v. HULL & LONDON FIRE INSURANCE CO.* (1858), 3 H. & N. 789; 28 L. J. Ex. 62; 157 E. R. 686.

*See, now, Cos. Acts, 1862–1908.*

**3337. ——— Payment for excepted risk—Ordinary course of business.]**—The fire policies issued by an insurance co. provided that the co. would not be responsible for any losses by explosion, except explosion by gas. A vessel laden with gunpowder took fire & exploded, & the concussion of the air caused considerable damage to the property, more especially to the windows & glass, of persons who had effected insurances with the co. The directors having decided to pay the losses thus occasioned, a bill was filed by one of the shareholders seeking an injunction to restrain the directors from so applying the funds of the co.:—*Held*: assuming the co. not to be legally liable, yet, as the evidence proved that payment of such losses, as of favour, was in accordance with the course pursued by other companies in the particular case, & with the usual custom of fire insurance cos., the directors must be regarded as acting fairly within the limits of their authority for the benefit of the co., & the bill was dismissed with costs.—*TAUNTON v. ROYAL INSURANCE CO.* (1864), 2 Hem. & M. 135; 33 L. J. Ch. 406; 10 L. T. 156; 28 J. P. 374; 10 Jur. N. S. 291; 12 W. R. 549; 71 E. R. 413.

*Annotations:—Consd. Tomkinson v. S. E. Ry.* (1887), 35 Ch. D. 675. *Appld. Henderson v. Bank of Australasia* (1898), 40 Ch. D. 170. *Refd. Joint Stock Discount Co. v. Brown* (1866), L. R. 3 Eq. 130; *Hampson v. Price's Patent Candle Co.* (1876), 45 L. J. Ch. 437; *Rayner v. Preston* (1881), 18 Ch. D. 1; *Hutton v. West Cork Ry.* (1883), 23 Ch. D. 654; *Studdert v. Grosvenor* (1886), 33 Ch. D. 528; *Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179. *Mentd. A.-G. v. G. E. Ry.* (1879), 11 Ch. D. 449; *Breay v. Royal British Nurses' Assocn.*, [1897] 2 Ch. 272; *A.-G. v. Mersey Ry.* (1906), 76 L. J. Ch. 121.

**3338. ——— Industrial Assurance Companies Act, 1896 (c. 26)—Settlement of disputes—Jurisdiction of justices.]**—Sect. 7 of above Act provides that in all disputes between an industrial assurance co. & any member or person insured that member or person may apply to the ct. of summary jurisdiction for the place where that member or other person resides, & the ct. may settle the dispute:—*Held*: the sect. applied only to the settling of disputes between the assurance co. & its members, or persons insured, or under the rules of the society; & consequently, where a person, who had effected an insurance with an industrial assurance co. on the life of another person, afterwards claimed the return of premiums paid under the policy, on the ground that the insurance never was a valid insurance, & the policy was void

### PART X. SECT. 1.

**k. Power of Dominion Parliament to regulate fire insurance.]—PARSON v. SUNDRY INSURANCE COS.** (1881), 3 L. N. 25.—CAN.

**l. Office "valid in Canada."]**—A contract to procure fire insurance in some office valid in Canada means in some co. licensed to do business in Canada, & a premium paid under such a contract may be recovered back, as upon a failure of consideration, if the insurance is effected without the knowledge of the insured in the co. not so licensed.—*BARRETT v. ELLIOTT* (1904), 10 B. C. R. 461.—CAN.

**m. Provincial companies—Whether operation restricted.]**—A co. incorporated under the authority of a provincial legislature to carry on the business of fire insurance is not inherently incapable of entering, outside the boundaries of its province of origin, into a valid contract of insurance relating to property also outside those limits.—*CANADIAN PACIFIC RY. CO. v. OTTAWA FIRE INSURANCE CO.* (1907), 39 S. C. R. 405.—CAN.

**n. Necessity for licence.]**—Under 31 Vict. c. 48 (D), cos. confining themselves to ocean marine insurance were not bound to make a deposit or obtain

a licence.—*GREENE v. PROVINCIAL INSURANCE CO.* (1880), 4 A. R. 521.—CAN.

**o. ———.]—UNION FIRE INSURANCE CO. v. LYMAN** (1882), 46 U. C. R. 471.—CAN.

**p. ——— Fraternal society.]—R. v. STAPLETON** (1892), 21 O. R. 679.—CAN.

**q. ——— Foreign company.]—INSURANCE CASE** (1913), 25 W. L. R. 781.—CAN.

**r. ———.]—Held: policies effected with foreign cos. which had no licence to do business in Canada were**

for want of insurable interest, the sect. did not apply, & the ct. of summary jurisdiction had no jurisdiction to determine such claim, as claimant's case then was that he never was insured with the co. at all, &, therefore, he was estopped from saying that he was a person insured. In such cases the objection that there is no jurisdiction in the justices can be taken before the Div. Ct., although such objection was not taken or raised before the justices, & no question as to it is left to the ct. by the justices; but the party so taking the objection may have to pay the costs thrown away by not taking the objection at the proper time.—LONDON, EDINBURGH & GLASGOW ASSURANCE CO., LTD. v. PARTINGTON (1903), 88 L. T. 732; 67 J. P. 255; 10 T. L. R. 389; 47 Sol. Jo. 419, D. C.

*Annotations*.—**Reid**. *Harve v. Pearl Life Assce.* (1903), 72 L. J. K. B. 638; *Kettlewell v. Refuge Assce.* (1907), 97 L. T. 896.

**3339.** ——— **Jurisdiction of county court.]**—By sect. 1 (b) of above Act, that Act applies to industrial assurance cos. granting policies of life assurance for a less sum than £20, & receiving premiums by means of collectors at a greater distance than 10 miles from the registered office or principal place of business of the co. at less periodical intervals than two months. By sect. 7 disputes between an industrial insurance co. & a member or person insured or a person claiming through him may be settled by the county ct. or by a ct. of summary jurisdiction : —*Held* : the jurisdiction of a county ct. or court of summary jurisdiction was limited to disputes arising with regard to policies originally granted for a less sum than £20.

Qu.: whether an industrial assurance co. issuing policies for £20 & upwards, as well as policies for sums less than £20, comes within the provisions of sect. 7, so as to give any jurisdiction over disputes to a county ct. or ct. of summary jurisdiction.—COWLING v. TOPPING, [1906] 1 K. B. 466; 75 L. J. K. B. 176; 94 L. T. 209; 70 J. P. 95; 54 W. R. 423; 22 T. L. R. 219; 50 Sol. Jo. 191, D. C.

**3340. Chartered company—Alteration of objects by new charter & statute—Rights of assignee.]—**In 1822 defts. granted a policy of insurance, admitting A. a member of their society, & binding themselves to pay to his exors., administrators, or assigns such proportion or share of the joint stock & fund of the society as should become due on the death of the A., according to the charters & bye-laws of the society. Pltf. was the assignee of the policy, which became a claim on defts.' society in 1858. After the making of the policy, & before it became a claim, certain other charters were granted to the society, & Acts of Parliament were passed relating thereto, which modified & altered the manner of calculating the profits & apportioning them amongst the representatives of the lives insured: these provisions were in their terms general, without distinction to past or future policies:—*Held*: the policy in question was regulated by the later charters & Acts of Parliament, & the distribution of the profits of defts.' society on its becoming a claim must be in accordance therewith.—**DRAKE v. AMICABLE SOCIETY FOR A PERPETUAL ASSURANCE OFFICE** (1861), 4 L. T. 439.

**illegal & void.**—PACIFIC COAST INSURANCE Co. v. HICKS (1913), 13 E. L. R. 194.—CAN.

t. — *Payment of deposit on application.*—*Re* NORTH WESTERN LIFE INSURANCE CO. (1916), 33 W. L. R. 610; 9 W. W. R. 1072.—CAN.

Insurances by public corpns., *see* CORPORATIONS,  
Vol. XIII., p. 358, No. 938.

Insurance by national health society, *see* WORK & LABOUR.

Insurances by trade unions, *see* TRADE & TRADE UNIONS.

## SECT. 2.—INSURANCE PARTNERSHIPS AND SYNDICATES.

*See, generally, COMPANIES, Vol. X., pp. 1069 et seq.; PARTNERSHIP.*

**3341. General rule.]**—A contract to be jointly concerned in ship insurances is void by 6 Geo. 1, c. 18, s. 12, though the policies are subscribed by the underwriters in their separate names. But though the contract could not be executed, the ct. would not exclude the result of it in decreeing a general account.

There is nothing immoral in the transaction: but it is against a prohibitory statute. Where the parties have had dealings together upon a variety of transactions & losses have been incurred & paid, & a general account is sought, I do not execute the contract against law; but I should do injustice if I did not give the advantage, if any advantage has arisen, or charge any loss which has happened (*LORD LOUGHBOROUGH, C.*).—*WATTS v. BROOKS* (1798), 3 Ves. 612; 30 E. R. 1181, L. C.

**Annotations:—***Consd. Knowles v. Haughton* (1805), 11 Ves. 168. *Refd. Aubert v. Maze* (1801), 2 Bos. & P. 371; *Ewing v. Osbaldiston* (1837), 2 My. & Cr. 53.

**3342. Partnership—6 Geo. 1, c. 18, s. 12—Insurance in name of one—Recovery of premiums.]**  
—A., B. & C. became partners in insuring ships, contrary to above sect., but it was agreed that the policies should be underwritten in the name of A. only; several policies were effected & the premiums received by C. & D. as brokers:—*Held*: A. could not recover those premiums from C. & D.  
—*BOOTH v. HODGSON* (1795), 6 Term Rep. 405; 101 E. R. 619.

*Annotations*:—**Consd.** Aubert *v.* Maze (1801), 2 Bos. & P. 371; *Ex p.* Bulmer (1807), 13 Ves. 313. **Refd.** M'Callan *v.* Mortimer (1842), 9 M. & W. 636.

**3343.** ——— ——— ——— ———.]—Where one of two partners underwrites policies of insurance upon ships, etc., in his own name, but upon their joint account, contrary to above sect. no action can be maintained to recover the premiums upon such policies from the assured.

The law says that "no persons acting in partnership shall presume to underwrite any policy for assuring ships or merchandises at sea, but that every such policy shall be *ipso facto* void." How then can an action be maintained to recover these premiums? The statute would be mere waste paper, if one of several partners might underwrite a policy for the rest (MANSFIELD, C.J.).—BRANTON v. TADDY (1807), 1 Taunt. 6; 127 E. R. 731.

3844. ——— Necessity for signature of insurers—5 Geo. 4, c. 114.]—A declaration stated, that deft. & B., S. & O., & 500 other persons, were united in partnership, by the name of the General Maritime Assurance co. "for carrying on the business of insurers of ships." That the co. had

**2. Liability of foreign insurance company to file certificate.**—A policy of insurance, issued in New York & delivered in Boston to a broker, by whom it was sent to St. John to his agent, & by him handed to defts., who gave in return a premium note, was not complete until actually delivered. &

the transaction was illegal under the Act which prohibits any foreign insurance co. from doing business in the province without first filing a certificate in the provincial secretary's office.—**ALLISON v. ROBINSON** (1873), 15 N. B. R. (2 Pug.) 103.—**CAN.**

*2.—Insurance partnerships and syndicates.  
Part XI. Sect. 1.]*

a capital of £1,000,000, in 10,000 shares of £100 each; that deft. was proprietor of 100 shares, in respect of which only £5 per share had been paid up, & £95 per share remained due; that pltf. made with the co. a policy of insurance on the body tackle, etc., of the ship *Elizabeth*, & it was agreed that the capital stock of the co. should be alone liable to make good all claims under the policy; & that no proprietor should be liable to any claim by reason of that policy, beyond the amount of his shares, in witness whereof, & that the co. were content with that insurance for £1,500, B., S. & O., for & on behalf of the co., did then thereunto set their hands; that, in consideration that pltf., at the request of defts., being such shareholder, paid to the co. £94 as a premium for the insurance, deft. promised pltf. that he would become & be an insurer to them of £1,500 upon the ship, & would perform all things in the policy on his part as such insurer to be performed; & deft. then became & was an insurer to pltf. of the sum of £1,500 upon the ship, & B., S. & O., for & on behalf of deft., as such insurer, duly subscribed the policy. The declaration alleged a loss by storms, & averred, that, by reason of the premises the capital stock of the co. was liable to pay the loss; that the capital stock was sufficient to answer all claims in that action; & that the amount unpaid in respect of the shares of which deft. was proprietor was sufficient to answer all claims in that action. Breach, non-payment. Plea, that the policy was in writing, & made after the passing of 35 Geo. 3, c. 63; & that deft. did not subscribe the policy, nor was the name of deft. expressed or specified in or upon the policy, according to the intent & meaning of that Act. On special demurrer:—*Held*: the plea was bad in substance, for 6 Geo. 1, c. 18, which prohibited any partnership other than the two chartered cos. from underwriting a marine policy, having been repealed by 5 Geo. 4, c. 114, it is not necessary that the name of every individual subscriber constituting the assuring firm should be expressed on the policy; but a subscription in the name of the partnership firm is a sufficient compliance with 35 Geo. 3, c. 63, s. 11, which requires the names of the underwriters to be expressed or specified in or upon the policy.—*REID v. ALLAN, CROSS v. ALLAN* (1849), 4 Exch. 326; 19 L. J. Ex. 39; 7 L. T. 75; 13 Jur. 1082; 154 E. R. 1237.

*Annotations*:—*Reid*. Dowdall v. Allan, Dowdall v. Clark (1849), 19 L. J. Q. B. 41; Hallett v. Dowdall (1852), 18 Q. B. 2.

*See, now*, Cos. Acts, 1862–1908.

**3345. Syndicate — Liability of underwriters—Whether joint or several—Signature of manager.]—**

A number of underwriters, styling themselves the S. Syndicate, by their manager underwrote a policy of marine insurance, the form of their subscription of which was as follows: "The S. Syndicate, C., Manager." Then followed the names of the individual members of the syndicate, against each of which names was written a certain fractional proportion of the total sum insured. The policy contained a special clause entitling the assured "by way of security for the performance of the obligations of the subscribing underwriters & of each & every of them" to the benefit by way of charge upon any policies of reinsurance that might be effected by them. The policy was in other respects in the form of an ordinary Lloyd's policy, the assurers being thereby expressed to bind themselves "each one for his own part":

—*Held*: on the face of the policy the contract of the assurers was several & not joint, & they were individually liable only for the proportions standing against their respective names.—*TYSER v. SHIPOWNERS SYNDICATE (REASSURED)*, [1896] 1 Q. B. 135; 65 L. J. Q. B. 238; 73 L. T. 605; 44 W. R. 207; 12 T. L. R. 88; 40 Sol. Jo. 171; 9 Asp. M. L. C. 81; 1 Com. Cas. 224.

*Annotation*:—*Apprvd.* *Leo S.S. Co. v. Corderoy* (1896), 12 T. L. R. 395.

**3346.** — — — — —.]—*LEO S.S. CO., LTD. v. CORDEROY* (1896), 12 T. L. R. 395; 40 Sol. Jo. 496; 1 Com. Cas. 379, C. A.

**3347.** — — — — — **Reinsurance.]—**

A policy subscribed by a syndicate of underwriters & endorsed with the amount of the risk of each member of the syndicate contained this provision: "The assured are hereby entitled, by way of further security for the performance of the obligations of the subscribing underwriters, & of each & every of them, to the benefit by way of first charge of the policies of reinsurance." Some members of the syndicate having failed:—*Held*: the obligation of the members of the syndicate to reinsure was several & not joint, & where reinsurances were effected, the several liability of each member was the subject of reinsurance.—*GENERAL INSURANCE CO. OF TRIESTE v. MILLER* (1896), 12 T. L. R. 395; 1 Com. Cas. 379, C. A.

**3348.** — — — — — **Not signed by manager.]—**

A policy containing all the requisites of a contract of insurance is binding on a syndicate of underwriters, although it has not been formally signed by the manager of the syndicate or delivered to the assured or his broker.—*COPE v. MILLER* (1896), 1 Com. Cas. 296.

## Part XI.—Mutual Insurance Associations.

### SECT. 1.—IN GENERAL.

*See, now*, Marine Insurance Act, s. 85.

**3349. Who are contributories.]—**On mutual insurances all the parties are to be contributory.—*REED v. COLE* (1764), 3 Burr. 1512; 97 E. R. 954. *Annotation*:—*Consd.* *Mackenzie v. Whitworth* (1875), L. R. 10 Exch. 142.

—.]—*See COMPANIES*, Vol. X., pp. 1080–1084, Nos. 7563–7588.

**3350. Whether legal—Joint liability of members—In event of insolvency of one.]—**A co. of ship-

owners engaged to insure each other's ships, & covenanted severally, & not jointly, to pay a certain sum in case of loss in proportion to their respective shares, but in case of the insolvency of any one of the members all the others were to be responsible; ruled that this contract was void by 6 Geo. 1, c. 18, s. 12.—*LEES v. SMITH* (1797), 7 Term Rep. 338; 101 E. R. 1007.

*Annotation*:—*Reid.* *Watts v. Brooks* (1798), 3 Ves. 612; *Strong v. Harvey* (1825), 3 Bing. 304.

**3351.** — — — — — **Voluntary society by mutual guarantee—Transfer of shares to non-members.]—**A



voluntary society for insurance, by way of mutual guarantee, is or is not illegal, according as the shares of the money laid up are or are not transferable generally to persons not members.—*ELLISON v. BIGNOLD* (1821), 2 Jac. & W. 503; 37 E. R. 720, L. C.

*Annotation*:—*Mentd. Rose & Frank Co. v. Crompton*, [1923] 2 K. B. 261.

**3352.** — 35 Geo. 3, c. 63, s. 11.]—*BROMLEY v. WILLIAMS*, No. 3371, *post*.

**3353.** Jurisdiction of court to enforce contributions.]—*TAYLOR v. DEAN*, No. 3372, *post*.

**3354.** Against whom bill should be filed—Committee.]—*HUTCHINSON v. WRIGHT*, No. 3390, *post*.

**3355.** — Secretary & manager.]—*BROMLEY v. WILLIAMS*, No. 3371, *post*.

**3356.** — — — With power to pay claims & draw cheques.]—The secretary & manager of a mutual insurance co. is properly made a defendant to a bill to enforce a claim against the co. where the rules provide that claims are to be paid by means of cheques countersigned by him, & that the money to pay the claims is to be raised by bills to be drawn by him on the members of the assocn., notwithstanding that he is not a member of the assocn., & not personally liable to pay any part of the claim.—*PEPPER v. GREEN* (1865), 2 Hem. & M. 478; 71 E. R. 550.

*Annotation*:—*Folld. Pepper v. Henzell, Woods v. Henzell, Reed v. Henzell* (1865), 2 Hem. & M. 486.

**3357.** — — — Manager bankrupt.]—A bill can be sustained against the secretary & manager of a mutual insurance co. under circumstances similar to those described in *Pepper v. Green*, No. 3356, *ante*, notwithstanding his bkpcy.: & his assignees are not, as such, necessary parties to the suit.—*PEPPER v. HENZELL, WOODS v. HENZELL, REED v. HENZELL* (1865), 2 Hem. & M. 486; 34 L. J. Ch. 531; 13 L. T. 63; 11 Jur. N. S. 840; 13 W. R. 962; 71 E. R. 552.

**3358.** Members' knowledge of rules presumed.]—*TURNBULL v. WOOLFE*, No. 3391, *post*.

**3359.** Contributions of members—Payments to manager—Right to enforce payment.]—Pltf. & deft. were members of a mutual insurance society, & deft. with the other members of the society, were insured to pltf. upon his ship in a sum, specified in a policy of insurance, subscribed by deft. & the other members of the society. Annexed to the policy, & forming part of it, were the following, amongst other rules: The members of this association shall severally & respectively, & not jointly or in partnership, or the one for the other of them, but each only in his own name, insure each other's ships from the date of entry of each respectively until noon of Feb. 20, then next, & from that time until noon of Feb. 20, in the next succeeding year, & so on from year to year, against all losses, etc. In order more readily to provide for the payment of claims, the managers are hereby empowered to levy contribution of one-fourth part of the fixed annual premium which shall be drawn for, in a prescribed manner. Provided always that if the gross amount of losses & expenses during the year shall happen to exceed the amount of the premiums so realised, the deficiency shall be made good by an additional percentage, which the members, during the year shall be respectively bound to contribute & pay to the managers; but should the premiums so realised exceed the losses, etc., then the surplus shall be returned in proportion to the amount of premium respectively contributed by them. The managers' drafts on the members of the assocn. for their proportion of the annual fixed premium, & for any additional percentage shall be duly accepted & punctually paid when

due; & if any member shall neglect to accept any such drafts, or to pay his contributions thereto, on receiving notes from the managers, his respective ship or ships shall immediately cease to be insured in this assocn., & he shall thenceforth forfeit all claims in respect of any loss, etc., under his policy; but he shall still remain liable to contribute to all losses & averages which may occur during the period for which any such policy was originally granted, & the amount due from any defaulting member shall be considered as a debt due to the managers & shall be recoverable by them at law. To a declaration setting out the policy & rules & containing the usual averments of loss, etc., deft. pleaded, first, that he had paid the percentage required of him by the manager; & secondly, that the action was commenced before the managers' drafts on him were due:—*Held*: on the true construction of the rules, & under the circumstances as they appeared on the record, defendant was not individually liable.—*REDWAY v. SWEETING* (1867), L. R. 2 Exch. 400; 36 L. J. Ex. 185; 16 L. T. 495; 2 Mar. L. C. 514; *sub nom. RODWAY v. SWEETING*, 15 W. R. 908.

**3360.** — — —.]—An assocn. of ship-owners was formed for the mutual assurance of ships belonging to its members. The regulations subject to which the policies were effected, provided for the creation of a general fund by payment of premiums, etc., by the several members, & when these should be found insufficient, by payment of contributions in the shape of a percentage on the sums insured; & a manager, not a member of the assocn., was appointed by a power of attorney which authorised him to sign policies for & in the names of the members of the assocn., & in their several & respective names, etc., to demand & sue for all sums which should become due & payable for premiums & contributions from them respectively:—*Held*: the manager could not maintain an action against a member for premiums due from such member or for moneys paid by the manager out of the funds of the assocn. in respect of such member's share of losses due to other members.—*GRAY v. PEARSON* (1870), L. R. 5 C. P. 568; 23 L. T. 416.

**3361.** — — —.]—The manager of a mutual insurance assocn. cannot maintain an action for contributions due under the rules from any member, although those rules have been agreed to by the member & profess to give such a power. Declaration that deft. was a member of a mutual insurance co. & caused himself to be insured in respect of a vessel for a certain time, & that pltf., who was manager of the assocn., in consideration that deft. agreed to comply with certain rules which it was agreed between pltf. & deft. should form part of the policy, subscribed the policy on behalf of the several members of the assocn., every member bearing his equal proportion according to the sums mutually insured therein. The declaration set out the rules, which provided how the amount of contributions to be paid by members should be ascertained, & that the manager should have power to sue for the amount due from any defaulting member. Averment that certain contributions became due which the deft. did not pay. On demurrer:—*Held*: the action could not be maintained; for that pltf. signing on behalf of the members did not take upon himself any liability, & therefore there was no consideration, as between pltf. & deft., for the promise of deft.—*EVANS v. HOOPER* (1875), 1 Q. B. D. 45; 45 L. J. Q. B. 206; 33 L. T. 374; 24 W. R. 226, C. A.

## Sect. 1.—In general. Sects. 2 &amp; 3.]

**3362. Liability of assignor to pay premiums after assignment.]**—ALEXANDER v. CAMPBELL, No. 3392, *post*.

**3363. Issue of special rate policies to non members.]**—*Re* ARTHUR AVERAGE ASSOCN. FOR BRITISH, FOREIGN & COLONIAL SHIPS, *Ex p.* HARGROVE & Co., No. 3367, *post*.

**3364. Bankruptcy of assured—Undertaking to pay premiums by third party—No transfer—Liability of members.]**—T. insured ships, in which defts. were part owners, in pltf. assocn., which was a mutual assocn. On T.'s bkpey. O. undertook with pltf. to pay the premiums & calls. His undertaking was shown to a committee of which defts. were members, & they authorised O. to have the policies transferred into his name. This was never done:—*Held*: in an action to recover the premiums, O.'s undertaking had been ratified by defts., & they were liable.—NEWCASTLE STEAMSHIP INDEMNITY ASSOCN. v. NICHOLSON (1886), 2 T. L. R. 410, C. A.

**3365. Non-payment of contributions—Set off against loss.]**—In 1880 & 1881 pltf. was insured with deft. assocn. in respect of two ships, on one of which a loss occurred in 1880. In 1881 premiums & calls became due from pltf. to an amount ultimately exceeding what was due to him in respect of the loss. Pltf. claimed that these amounts might be set off against what was due to him & offered to pay the balance. Defts. objected, & commenced an action, pending which one of pltf.'s ships was totally lost. Defts. having repudiated liability for this loss on the ground that pltf.'s premiums had not been punctually paid, as required by the rules of the assocn.:—*Held*: pltf. was entitled to set off his claim for the loss incurred in 1880 against the premiums due from him in 1881, & the 1881 policy had, therefore, not been forfeited.—WILLIAMS v. BRITISH MARINE MUTUAL INSURANCE ASSOCN., LTD. (1886), 57 L. T. 27; 3 T. L. R. 274; 6 Asp. M. L. C. 134, D. C.; *affd.* (1887), 3 T. L. R. 314, C. A.

*See, also, COMPANIES, Vol. X., pp. 1085, 1088, Nos. 7593, 7609.*

## PART XI. SECT. 1.

**3362 i. Liability of assignor to pay premiums after assignment.]**—STORMS v. CANADA FARMERS' MUTUAL INSURANCE CO. (1871), 22 C. P. 75.—CAN.

**b. Avoidance of policy—Non-payment of premium.]**—JOHANSON v. CITY MUTUAL LIFE ASSURANCE SOCIETY, LTD., [1904] S. R. Q. 288.—AUS.

**c. ———.]**—LYONS v. GLOBE MUTUAL FIRE INSURANCE CO. (1877), 28 C. P. 62.—CAN.

**d. ———.]**—MCGUGAN v. MANUFACTURERS & MERCHANTS MUTUAL FIRE INSURANCE CO. (1879), 29 C. P. 494.—CAN.

**e. ——— Mortgage.]**—A mtge. by the insured in a mutual insurance co., without consent, will avoid the policy.—BURTON v. GORE DISTRICT MUTUAL INSURANCE CO. (1857), 14 U. C. R. 342.—CAN.

**f. ———.]**—RUSS v. MUTUAL FIRE INSURANCE CO. OF CLINTON (1869), 29 U. C. R. 73.—CAN.

**g. ——— Alienation of property.]**—NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO. v. GORDON (1879), 29 C. P. 611.—CAN.

**h. ——— Non-compliance with statutory condition.]**—WELSH v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO. (1876), 27 C. P. 134.—CAN.

**k. Reinsurance.]**—Deft. insured in the mercantile branch of the T.

Mutual co. on the mutual principle. After the amalgamation of that co. with the B. Mutual Assocn., the directors of the new co. transferred all cash system policies in their farmers' branch to the mercantile branch, crediting the latter branch at the time with the estimated value of all unexpired cash policies:—*Held*: this was unauthorised, it was not a "reinsurance" with "any mutual or other insurance co." within the meaning of the Acts, & deft. could not be assessed for losses on the policies so transferred.—BEAVER & TORONTO MUTUAL FIRE INSURANCE CO. v. TRIMBLE (1873), 23 C. P. 252.—CAN.

**l. ———.]**—BEAVER & TORONTO MUTUAL FIRE INSURANCE CO. v. SPIRES (1879), 30 C. P. 304.—CAN.

**m. ———.]**—DOYLE v. MINIOTA MUTUAL FIRE INSURANCE CO., [1924] 2 D. L. R. 471; 1 W. W. R. 1177; 34 Man. L. R. 249.—CAN.

**n. Cancellation of policy—Necessity for notice.]**—GUGGISBERG v. WATERLOO MUTUAL FIRE INSURANCE CO. (1876), 24 Gr. 350.—CAN.

**o. ———.]**—A resolution contained a recommendation that policies be sent in to the liquidator, & that members seek insurance elsewhere. One of the policy holders sent in his policy accordingly, but no notice of actual cancellation was given to him. Afterwards an assessment was made upon the policy by the directors

## SECT. 2.—REGISTRATION UNDER COMPANIES ACTS.

*See, now, Cos. Acts, 1906–1908.*

**3366. Necessity for registration—Companies Act, 1862 (c. 89), s. 4.]**—As regards the case of *Re Arthur Average Assocn. for British, Foreign & Colonial Ships, Ex p. Hargrove & Co.*, No. 3367, *post*, it is not perhaps absolutely necessary to determine the case whether the case of a mutual assurance assocn. is within the statute or not, but I cannot help saying that the reasoning which brings me to the conclusion that the present case is not within the statute appears to me to lead to the same conclusion with regard to a case of mutual assurance. I am inclined to think that no transaction within the assocn. or co. between the members of it can be taken into consideration in order to determine whether the co. or assocn. was one formed to carry on a business within the meaning of above sect. (BRETT, L.J.).—SMITH v. ANDERSON (1880), 15 Ch. D. 247; 50 L. J. Ch. 39; 43 L. T. 329; 29 W. R. 21, C. A.

*Annotations:—Dtd. Re Padstow Total Loss & Collision Assocn.* (1882), 20 Ch. D. 137. I must confess that the inclination of opinion which I expressed with regard to mutual insurance companies, in the case of *Smith v. Anderson*, cannot in my opinion be maintained (BRETT, L.J.). *Refd.* *Wigfield v. Potter* (1881), 45 L. T. 612; *I. R. Comrs. v. Cornish Mutual Assee.* (1924), 94 L. J. K. B. 237. *Mentd.* *Re Faure Electric Accumulator Co.* (1880), 40 Ch. D. 141; *Crowther v. Thorley* (1883), 50 L. T. 43; *Re Siddall* (1885), 29 Ch. D. 1; *Re Governments Stock Investment Co.*, [1891] 1 Ch. 649; *Re Jones, Clegg v. Ellison*, [1898] 2 Ch. 83; *Re Macfadyen, Ex p. Vizianagaram Mining Co.*, [1908] 2 K. B. 817; *Kirkwood v. Gadd*, [1910] A. C. 422; *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 87 L. J. K. B. 565; *South Behar Ry. v. I. R. Comrs.*, [1925] A. C. 476.

**3367. ———.]**—By the rules of a mutual marine insurance assocn. formed in 1867, the members severally & respectively agreed to insure each other's ships for a year from the day named as the commencement of the risk. The two managers were to sign the policies, & their signatures were to bind the members as if each member had signed. The premiums were to be paid in advance, losses were to be paid out of the reserved fund thus created, & if it proved insufficient, the

with the concurrence of the liquidator:—*Held*: the policy had not been cancelled, & the assessment was good.—*Re CITY MUTUAL INSURANCE CO., STEIFELMEYER'S CASE* (1893), 24 O. R. 100.—CAN.

**p. ——— By operation of law.]**—*Held*: a cancellation resulting from the action of the State was not a cancellation within the meaning of the clause providing for return of premiums if the policy was cancelled.—PICKES v. CHINA MUTUAL INSURANCE CO., SMITH v. CHINA MUTUAL INSURANCE CO. (1913), 12 E. L. R. 300; 47 S. C. R. 429; 10 D. L. R. 323.—CAN.

**q. ——— By transfer.]**—WILCOX v. BOWRING (1871), 5 Nfld. L. R. 403.—NFLD.

**r. Mutual insurance company—Not a "trading" company.]**—A co. incorporated by warrant under Mutual Fire Insurance Act is simply an association of individuals to assist one another in case of loss by fire & is not a "trading" co.—RICHARDSON v. URBAN MUTUAL FIRE INSURANCE CO. (1916), 34 W. L. R. 586; 10 W. W. R. 733; 26 Man. L. R. 372; 28 D. L. R. 162.—CAN.

## PART XI. SECT. 2.

**t. Necessity for registration—Companies Act, 1862 (c. 89), s. 4.]**—*Re D.* (1877), 11 L. L. T. 97.—IR.

**a. ———.]**—A mutual insurance club is an assocn. for the acquisition of gain so as to require registration



members were to contribute the deficiency *pro rata* according to the amounts for which they were insured. The managers were authorised to issue policies to members for periods less than a year, or for special risks either in time or voyage policies at special rates of premium, to which the reserve fund should in no way apply. The assocn. was not registered or incorporated, & persons became members by effecting a mutual policy. Its policies were signed only by the managers "per procuration of the several members of the Arthur Average Assocn. for insuring each other's ships." The managers issued special rate policies to a large amount to persons who had not taken mutual policies. In 1870 an order was made for winding up the association. H. & co., who were holders of special rate policies, but had not taken out any mutual policies, were found creditors to a large amount on their special rate policies. On an application by a contributory to vary the certificate by expunging their debt:—*Held*: (1) the assocn. came within the above sect., & ought to have been registered; it was therefore an illegal co., & an order for winding it up ought not to have been made, but that this objection could not be entertained on the present application; (2) the policies of H. & co. were void under 30 Vict. c. 23, s. 7, because they did not specify the names of the subscribers or underwriters; (3) those policies were also void as being *ultra vires*, for that the rules only authorised the managers to issue special rate policies to persons who were already members by having taken out policies of mutual insurance.—*Re ARTHUR AVERAGE ASSOCN. FOR BRITISH, FOREIGN & COLONIAL SHIPS, Ex p. HARGROVE & Co.* (1875), 10 Ch. App. 542; *sub nom. Re ARTHUR AVERAGE ASSOCN., Ex p. CORY & HAWKSLEY*, 44 L. J. Ch. 569; 32 L. T. 713; 23 W. R. 939; 2 Asp. M. L. C. 570, L. JJ.; *subsequent proceedings, sub nom. Re ARTHUR AVERAGE ASSOCN., DE WINTON & Co.'s CASE* (1876), 34 L. T. 942.

*Annotations*:—As to (1) *Consd. Re South Wales Atlantic S.S. Co.* (1876), 2 Ch. D. 763. *Distd. Smith v. Anderson* (1880), 15 Ch. D. 247. *Folld. Re Padstow Total Loss & Collision Assce. Assocn.* (1882), 45 L. T. 774. No association, therefore, of which the law could take cognisance has existed, & no winding [up] order could be made. I may add that in *Smith v. Anderson*, No. 3366, *ante*, I expressed an inclination of opinion to the contrary, but, after full argument, I feel that that opinion cannot be sustained (*BRETT, L.J.*). *Appld. I. R. Comrs. v. Cornish Mutual Assce.* (1924), 94 L. J. K. B. 237. *Refd. Re Haycock's Policy* (1876), 1 Ch. D. 611; *Sykes v. Beadon* (1879), 11 Ch. D. 170; *Wigfield v. Potter* (1881), 45 L. T. 612; *Re National Debenture & Assets Corpn.* (1891), 60 L. J. Ch. 533; *Brighton College v. Marriott*, [1925] 1 K. B. 312. As to (2) *Distd. Marine Mutual Insce. Assocn. v. Young* (1880), 43 L. T. 441.

**3368.** — — —.]—By the rules of a mutual marine insurance assocn., which was not registered under Co.'s Act, 1862 (c. 89), it was provided that all persons who effected an insurance with the assocn. should be members. No ship was to be insured for more than three-fourths of its value, the person insuring paid a deposit of 25s. per cent., on the amount of the insurance, & in case of the total loss of a vessel, the members were to pay the loser the amount for which he had insured it *ratably*, according to the amounts assured to them respectively. The assocn. consisted of more than twenty members. A vessel insured by R. was lost, & the amount of the loss was referred to arbn. R. assigned his claim to his bankers, who obtained judgment in R.'s name on the award, & not obtaining payment,

presented a petition to wind up the assocn., the petition stating that the assocn. consisted of more than seven members, but not stating that it consisted of more than twenty. The petition was served at the abandoned office of the assocn., which had ceased to carry on business, & the proper advertisements were issued. On May 28, 1880, a winding-up order was made, no one appearing to oppose. In Nov. 1881, another member of the assocn. heard, for the first time, of the winding-up order, & within a week applied for leave to appeal against it:—*Held*: although the business of the assocn. had not for its object the acquisition of gain by the assocn., it had for its object the acquisition of gain by the individual members; as it consisted of more than twenty members & was not registered, its formation was forbidden by Cos. Act, 1862 (c. 89), s. 4; the ct., therefore, could not recognise it as having any legal existence, & the order for winding it up must be discharged.—*Re PADSTOW TOTAL LOSS & COLLISION ASSURANCE ASSOCN.* (1882), 20 Ch. D. 137; 45 L. T. 774; 30 W. R. 326; *sub nom. Re PADSTOW TOTAL LOSS & COLLISION ASSURANCE ASSOCN., Ex p. BRYANT*, 51 L. J. Ch. 344, C. A.

*Annotations*:—*Folld. Jennings v. Hammond* (1882), 9 Q. B. D. 225; *Shaw v. Benson* (1883), 11 Q. B. D. 563. *Consd. Re Bowling & Welby's Contract*, [1895] 1 Ch. 663. *Appld. I. R. Comrs. v. Cornish Mutual Assce.* (1924), 94 L. J. K. B. 237. *Refd. Re Ilfracombe Permanent Mutual Benefit Bldg. Soc.*, [1901] 1 Ch. 102; *Marrs v. Thompson* (1902), 86 L. T. 759; *Brighton College v. Marriott*, [1925] 1 K. B. 312.

**3369.** — — — Founded before Act & reconstituted yearly.]—*MAY v. JACOBS* (1885), 1 T. L. R. 349, C. A.

**3370.** Effect of registration—Whether contract between assured & company.]—*MARINE MUTUAL INSURANCE ASSOCN., LTD. v. YOUNG*, No. 3375, *post*.

### SECT. 3.—REQUISITES OF POLICY.

*See Marine Insurance Act, 1906 (c. 41), s. 85.*

**3371.** Whether policy necessary.]—(1) Some shipowners joined in a club, & provided for the mutual insurance of their respective vessels:—*Held*: this was not an illegal association under 35 Geo. 3, c. 63; *Qu.*: whether it is necessary to have a policy in such cases.

(2) By the rules of a shipping insurance club, its affairs were to be managed by the members, assisted by the treasurer & secretary, & the "finance committee" were to sign all cheques & see that the funds were duly appropriated. A ship of a member having been lost at sea, he sued 7 of the members & the treasurer & secretary to obtain payment of the loss. There being no finance committee:—*Held*: on demurrer, these defts. had not improperly been made parties.

(3) By a rule of a shipping insurance club, a fine was imposed on non-payment of the premium for a month after it became due, & at the end of two months he was to be deprived of the benefit of insurance until the arrears were paid. A member insured his ship, which was lost at sea after the premium became due but before the expiration of the month. *Qu.*: whether, on subsequently paying the premium, the member was entitled to the sum insured.—*BROMLEY v. WILLIAMS* (1863), 32 Beav. 177; 1 New Rep. 413; 32 L. J. Ch. 716;

under Cos.' Act, 1899, if it consists of more than ten members.—*ROBERTS v. SNOW* (1906), 9 Nfld. L. R. 216.—*NFLD.*

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### PART XI. SECT. 3.

**3371 i.** Whether policy necessary.]—*MARINE & FREIGHT*

*ASSURANCE ASSOCN. v. MACKENZIE* 1043; 19



*Sect. 3.—Requisites of policy. Sect. 4.]*

8 L. T. 78; 27 J. P. 294; 9 Jur. N. S. 240; 11 W. R. 392; 1 Mar. L. C. 320; 55 E. R. 69.

*Annotations:—As to (1) Rejd. Gray v. Gibson (1866), L. R. 2 C. P. 120; Marine Mutual Insce. Asscn. v. Young (1880), 43 L. T. 441. As to (2) Foll. Wood v. McCarthy, [1893] 1 Q. B. 775.*

**3372. Whether stamp necessary.]—**(1) A claim of a member of a mutual ship insurance society was referred to arbitration, & an award made that the committee should assess a certain amount on the members according to the rules, & should pay the amount to claimant. The committee refused, & claimant filed a bill against the committee only, to have the sum awarded assessed & paid, or for an account & payment of what might be found due on his claim out of funds in the hands of the committee or by contribution of the members:—*Held*: pltf.'s proper remedy was in equity, & demurrer overruled.

(2) *Qu.*: whether 35 Geo. 3, c. 63, renders a stamped policy necessary to a mutual insurance between shipowners.—*TAYLOR v. DEAN (1856)*, 22 Beav. 429; 7 L. T. 45; 4 W. R. 665; 52 E. R. 1174.

*Annotation:—Generally, Mentd. Bromley v. Williams (1863), 8 L. T. 78.*

**3373. —.]—**S. agreed by writing to become a member of an assocn., each member of which on effecting an insurance on his own ship became bound to contribute to the loss of any other member. S. agreed to become a member in respect of an insurance for £300 on his own ship but no stamped policy was ever executed. He contributed to the losses of other members & his own ship having been injured he made a claim in respect of it but before anything had been paid the assocn. was ordered to be wound up:—*Held*: under 35 Geo. 3, c. 63, no agreement for insurance of ships can be valid unless duly stamped according to that Act; therefore there was no evidence of a binding mutual contract for insurance having been entered into & S. was not a contributory.—*Re LONDON MARINE INSURANCE ASSOCN., SMITH'S CASE (1869)*, 4 Ch. App. 611; 38 L. J. Ch. 681; 21 L. T. 97; 33 J. P. 643; 17 W. R. 941; 3 Mar. L. C. 280, L. JJ.

*Annotations:—Distd. Re Telgnmouth & General Mutual Shipping Asscn., Martin's Claim (1872), L. R. 14 Eq. 148; Barrow-in-Furness Mutual Ship Insce. v. Ashburner (1884), 52 L. T. 898. Foll. Re Premier Underwriting Asscn. (1912), 134 L. T. Jo. 7. Rejd. Re Albert Average Asscn., Blyth's Case (1872), L. R. 13 Eq. 529; Re Arthur Average Asscn. for British, Foreign & Colonial Ships, Ex p. Hargrove (1875), 10 Ch. App. 545, n.; Marine Mutual Insce. Asscn. v. Young (1880), 43 L. T. 441.*

**3374. —.]—***Re PREMIER UNDERWRITING ASSOCN., LTD. (1912)*, 134 L. T. Jo. 7.

**Stamps on marine policies.]—***See Part II., Sect. 3 (3), B., ante.*

**Stamps generally.]—***See Part XII., post; REVENUE.*

**3375. Form of execution—Common seal of association—Counter-signed by manager.]—**Pltfs. were a limited co., incorporated & duly registered under Co.'s Acts, for the mutual insurance of ships belonging to its members, & persons became members by effecting an insurance on their ships according to the rules & arts. of assocn. By rule 2 the members of the several classes therein specified severally & respectively agreed to insure each other's ships for a year from Feb. 20 in each year, & so on from year to year. By rule 4 the manager was to be entitled to levy contributions to form a fund for the payment of claims by means of drafts at two months' date from certain days named & at a certain rate therein fixed; & if the fund proved insufficient, the members were to

contribute the deficiency by additional calls *pro rata* on the premiums paid, to be drawn for in like manner. By rule 6 premiums were to be paid by acceptance & payment of the manager's drafts on members for their proportion of the annual estimated premium; members neglecting to accept or pay their contributions to forfeit all claims for losses or average under their policies, but to continue liable to contribute to all losses & averages occurring during the period for which the policies were originally granted, the manager being empowered to sue for the amount due from any defaulting member. By rule 21 any member not intending to renew his policy to give notice thereof in writing to the manager; if no such notice was given, then such policy to be renewed, except where the committee deemed it improper to renew it, when a similar notice was to be given to the parties concerned; but in either case, if the ship was at sea on expiration of the policy, the manager was to grant a new one until the ship arrived at its next port of destination. By the arts. of assocn., art. 39: every engagement or liability of the members for the purpose of being enforced was to be deemed an engagement or liability to the assocn. only, & all moneys payable thereunder were to be paid to the assocn. Art. 40, all claims were to be made & enforced against the assocn. only, but the assocn. was to be liable only to the extent of the funds which it would recover from the members liable for the same. The policies issued by pltfs. were sealed with the common seal of the assocn., authenticated by the signature of the manager, & the rules indorsed thereon were subject to the arts. of assocn. In Mar. 1878, defts. insured their ship *Athol* with defts. up to Feb. 20, 1879, the policy being duly sealed & signed. In Feb. 1879, defts. were indebted to pltfs. in the sum of £166 16s. 6d. for arrears of contributions in respect of which pltfs.' manager, under rule 6, had drawn on defts. for payment by drafts which defts. had dishonoured. Previous to Feb. 20, 1879, the ship *Athol* being then on her homeward voyage, defts. gave pltfs.' manager notice, under rule 21, that they required the policy on the ship to be renewed, but the application was refused by pltfs., as defts. were defaulting members under rule 6. During such voyage the ship sustained certain average losses amounting to £197 7s. 4d. In an action brought by pltfs. against defts. to recover the amount of their arrears of contributions, in which defts. counterclaimed to be entitled to a renewal of the policy, & to set-off the above-mentioned sum of £197 7s. 4d. against pltfs.' claim:—*Held*: (1) the policy was a valid policy within 30 & 31 Vict. c. 23, s. 7, & the affixing of the common seal of the assocn., authenticated by the signature of the manager, was a sufficient compliance with the statute; (2) the policy, coupled with the rules & arts. of assocn., disclosed a contract between pltfs. & defts., & not merely a contract between defts. & the members of the assocn. referred to in the policy; (3) defts. were not entitled under the circumstances either to a renewal of their policy, or to recover the sum counterclaimed to be set-off for average losses sustained by them.—*MARINE MUTUAL INSURANCE ASSOCN., LTD. v. YOUNG (1880)*, 43 L. T. 441; 4 Asp. M. L. C. 357.

*See, now, Marine Insurance Act, 1906 (c. 41), s. 24 (1).*

**3376. Sums respectively insured by each member.]—**A policy in the common form by an insurance club, where the members are not responsible for the solvency of each other, is valid, although the

sums which they respectively insure are not specified on the face of the policy.—*DOWELL v. MOON* (1815), 4 Camp. 166, N. P.

*Annotation*:—*Re* Arthur Average Asscn. for British, Foreign & Colonial Ships, *Ex p.* Hargrove (1875), 10 Ch. App. 545, n.

**3377. Names of underwriters.]**—*Re* ARTHUR AVERAGE ASSOCN. FOR BRITISH, FOREIGN & COLONIAL SHIPS, *Ex p.* HARGROVE & Co., No. 3367, *ante*.

**3378. Particulars of risk.]**—Pltf. had an equitable interest in a ship, & afterwards received a transfer of the legal interest from the registered owner, who was a member of defts.' society. The owner insured the ship with defts. in pltf.'s name by a policy incorporating the rules of the society, & providing among other things that every insurance effected should be valid & binding from noon on that day until noon of Jan. 1, then next following. By the rules persons became members only by signing the articles, & none but members could insure their ships. The rules also required certain notice upon sale of a ship or shares thereof. Pltf. had never signed the articles nor given notice of the transfer to him of the legal interest, but had paid contributions claimed from him as owner by the society. It was also provided by the rules that the directors should decide claims & disputes of members, & that aggrieved members might appeal for reconsideration of decisions, first to the directors, themselves, & then to the whole society; & also that no member should be allowed to bring or have any action, suit or proceeding or other remedy against the society for any claims or demands upon or in respect of the society or the members thereof, except as therein provided. Upon loss of the ship pltf. was refused his claim upon this policy by the directors twice, but made no appeal to the whole society:—*Held*: the policy incorporated the rules so as to be a sufficient compliance with 30 & 31 Vict. c. 23, s. 7; & defts. were estopped from disputing pltf.'s interest in the policy, & his right as member to claim upon it.—*EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY* (1876), 1 Q. B. D. 563; 34 L. T. 457; 3 Asp. M. L. C. 154, Ex. Ch.

*Annotation*:—*Mentd.* Trainor v. Phoenix Fire Assee. (1891), 65 L. T. 825.

**3377 i. Names of underwriters.]**—*Re* D. (1877), 11 I. L. T. 97.—*IR*.

**b. Cash premium system.]**—Pltf. in this case being insured upon the cash premium system, though defts. were a mutual insurance co.:—*Held*: the policy was not subject to the provisions of Mutual Insurance Acts.—*WHITE v. AGRICULTURAL MUTUAL ASSURANCE CO.* (1871), 22 C. P. 98.—*CAN*.

**c. —.]**—*LOWSON v. CANADA FARMERS' MUTUAL FIRE INSURANCE CO.* (1881), 6 A. R. 512.—*CAN*.

**d. Uniform Conditions Act, R. S. O., 1877, c. 162.]**—*Held*: above Act, excepting sect. 2, does not apply to mutual insurance cos.—*BALLAGH v. ROYAL MUTUAL FIRE INSURANCE CO.* (1880), 5 A. R. 87.—*CAN*.

#### PART XI. SECT. 4, SUB-SECT. 1.

**a. Breach of conditions—Insuring in other companies.]**—Three separate sums were insured, on a building, on the machinery, & on the stock in it; & a second insurance, without the consent of the co., was effected on the building & machinery:—*Held*: by the condition, & by the statute under which these cos. are incorporated, the policy was altogether avoided, & not merely as to the property so doubly insured.—*RAMSAY WOOLLEN CLOTH MANUFACTURING CO. v. MUTUAL FIRE CO. OF DISTRICT OF JOHNSTOWN* (1854),

11 U. C. R. 516.—*CAN*.

**f. —.]**—*MERRITT v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO.* (1859), 18 U. C. R. 529.—*CAN*.

**g. —.]**—*FAIR v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO.* (1876), 26 C. P. 398.—*CAN*.

**h. —.]**—*MCCREA v. WATERLOO COUNTY MUTUAL FIRE INSURANCE CO.* (1876), 26 C. P. 431; *affd.* (1877), 1 A. R. 218.—*CAN*.

**k. —.]**—The statutory requirement applicable to insurance in mutual insurance cos. that the consent of the directors to a double insurance must be signified by an endorsement on the policy or by other acknowledgment in writing is not satisfied by a mere knowledge by the insurers of other insurance.—*DUSTIN & HOCHELAGA MUTUAL FIRE INSURANCE CO.* (1881), 4 L. N. 295.—*CAN*.

**l. Account of loss—Must be in accordance with policy.]**—*Held*: the affidavit of loss, & the justice's certificate, set out in this case, were clearly not in compliance with the conditions indorsed on the policy, & pltf. could not recover.—*LANGEL v. PRESCOTT MUTUAL INSURANCE CO.* (1859), 17 U. C. R. 524.—*CAN*.

**m. Note—Other than premium note.]**—*Held*: a note, made by insured representing the portion of the deposit note payable to the treasurer for incidental expenses under C. S. U. C.,

#### SECT. 4.—CONSTRUCTION OF RULES AND ARTICLES OF ASSOCIATION.

##### SUB-SECT. 1.—IN GENERAL.

**3379. "Ship employed in coasting trade."]**—The rules of a mutual marine insurance assocn. provided that vessels crossing the North Sea to any port north of the Texel, the Atlantic, or Bay of Biscay, or to any port south of Brest should not, if the cargo consisted of iron, carry more than a certain percentage above the registered tonnage; that ships employed in the coasting trade & ports between the Texel & Brest should not carry more than a specific weight of cargo, & in all cases of loss while so laden, the owner should be subject to a stated percentage of deduction:—*Held*: a vessel which was lost on the coast of Norfolk whilst on a voyage from Sunderland to Bordeaux was not employed in the coasting trade & the words "whilst so laden" applied to both classes of ships mentioned in the above rule. Pltf. was therefore entitled to the sum insured, less the specified percentage of deduction.—*HARVEY v. BECKWITH* (1864), as reported in 4 New Rep. 258; 10 L. T. 632; 12 W. R. 896; 2 Mar. L. C. 63, L. J.J. *Annotations*:—*Mentd.* Pepper v. Green (1865), 2 Hem. & M. 478; Pepper v. Henzell, Woods v. Henzell, Reed v. Henzell (1865), 2 Hem. & M. 486; Wright v. Ward (1871), 24 L. T. 439.

**3380. Notice to directors of change of captain—Notice to be sent by post.]**—By a rule of a mutual assurance society, the insured was bound to give notice to the directors of any change of the captain of his vessel, & in case of default, the society was not to be liable for any subsequent loss. By another rule, notices to members sent by post were to be effectual, though not actually received:—*Held*: the directors of the society were members within the latter rule, & a notice of a change of captain sent to them by post was valid, though not actually received by them.—*BRANFORD v. HOWARD* (1866), 35 Beav. 613; 55 E. R. 1034.

**3381. Risks in proportion to premium—Premium not inserted—Limit of liability.]**—In a Lloyd's policy issued by a mutual marine insurance society, the amount of premium paid & the rate per cent. were left blank, but in place of the latter the words "twenty pounds per centum" were added in

c. 52, s. 22, was not a note given for a cash premium of insurance within 29 Vict. c. 38, s. 5 so as utterly to avoid the policy if the note should not be paid within 30 days after the same was made payable.—*ELLIS v. BEAVER & TORONTO MUTUAL INSURANCE CO.* (1870), 21 C. P. 81.—*CAN*.

**n. Negotiability of premium note.]**—*Held*: premium notes are not negotiable.—*GORE DISTRICT MUTUAL FIRE INSURANCE CO. v. SIMONS* (1856), 13 U. C. R. 555.—*CAN*.

**o. Assessment—Before insurance effected.]**—An insurer is not liable for assessment made before his insurance was effected or premium note given.—*GREEN v. BEAVER & TORONTO MUTUAL FIRE INSURANCE CO.* (1873), 34 U. C. R. 78.—*CAN*.

**p. —.]**—*Held*: an assessment for the purpose of paying promissory notes given by a mutual insurance co. must be confined to the premium notes or undertakings current at the time the loss occurred in respect of or to meet which the co.'s notes were given. New members cannot be assessed to pay notes given previously to their joining the co.—*VICTORIA MUTUAL FIRE INSURANCE CO. OF CANADA v. THOMSON* (1884), 9 A. R. 620.—*CAN*.

**q. — For losses.]**—Persons who become members of a mutual insurance co. & pay premiums under



**Sect. 4.—Construction of rules and articles of association: Sub-sects. 2 & 3. Sect. 5.]**

among the members, the amount of his loss.—*HUTCHINSON v. WRIGHT* (1858), 25 Beav. 444; 27 L. J. Ch. 834; 31 L. T. O. S. 375; 4 Jur. N. S. 749; 6 W. R. 475; 53 E. R. 706.

*Annotations:—As to (3) Reisd. Bromley v. Williams* (1863), 8 L. T. 78. *Generally. Mentd. Liverpool Borough Bank v. Turner* (1860), 1 John. & H. 159.

**3391. ———.]—Non-compliance with a rule which forms part of the contract of insurance prevents the insurer from recovering under the policy. One of the rules referred to in the policies of a mutual assurance assocn. for insuring the ships of members, provided that no member should have any claim for the loss of a ship subject to a mtgee., unless before the loss a guarantee by the mtgee. had been delivered to the manager. An insured ship was, to the knowledge of the assocn., subject to a mtgee., but no guarantee was delivered:—*Held*: (1) the insurer could not recover, though he had paid all contributions due from him; (2) a knowledge of the rules must be imputed to pltf. & the *onus* lay upon him to obtain the required guarantee from the mtgee.—*TURNBULL v. WOOLFE* (1862), 1 New Rep. 1; 7 L. T. 483; 27 J. P. 228; 9 Jur. N. S. 57; 11 W. R. 55; 1 Mar. L. C. 266, L. C.**

*Annotation:—As to (1) Consd. Alexander v. Campbell* (1872), 41 L. J. Ch. 478.

**3392. ———.]—One of the rules of a mutual insurance assocn., which was incorporated in their policies, was in these words: "No member, mtgee., or assignee, the whole or any part of whose share in a ship insured in the assocn. shall, at the time of entering or afterwards, be mortgaged or assigned to any person or persons, shall have any claim by virtue of this policy, nor shall any assignee of such policy have a claim for any loss or damage which may be sustained by such ship unless previous to the occurrence of such loss or damage such member, mtgee., or assignee shall have delivered to the manager an undertaking approved of by the mtgee. or assignee, whereby he shall covenant with the manager to pay & discharge all sums of money which are or may become due from such member in respect of such ship & her insurance, & in respect of the insurance underwritten on his behalf in this assocn." A member of the assocn. deposited a policy of insurance on his ship with a creditor to secure payment of his debt. The deposittee did not give the undertaking required by the rules, but he, in fact, paid & discharged all sums payable in respect of the ship & her insurance. The ship having been lost, the deposittee filed a bill against the assocn. to recover the money due on the policy:—*Held*: as the deposittee, who was an assignee within the rule, had not given the required undertaking, he was not entitled to recover the money due on the policy, & his bill must be dismissed with costs.—*ALEXANDER v. CAMPBELL* (1872), 27 L. T. 462; 1 Asp. M. L. C. 447, L. JJ.**

**3393. ———.]—Liability to contribute.]—Defts. by a proposal of insurance requested pltf., a mutual insurance assocn. registered under the Cos. Acts, to insure defts.' steamship & to enter defts. in the register of members of the assocn. The proposal was accepted, defts. were entered in the register of members, & a policy was issued by pltf. to defts. By rule 32 of the rules of the assocn. members were liable to claims for losses & also for special contributions for deferred claims; & by rule 35, a member was liable to contribute in respect of an insurance effected by him to all claims arising out of losses happening at & after**

noon on the day of the commencement of the insurance. By rule 41, a ship which was "mortgaged by a member shall not be or be considered as insured so far as his shares are concerned, & a ship insured which shall after an insurance thereon is effected be mortgaged by a member shall not continue to be or be considered as insured so far as his shares are concerned against losses which shall happen to the ship after the mtgee., unless & until the mtgee., or other persons to be approved by the directors, guarantees the payment of all contributions which are or may become due to the co. in respect of the insurance of the ship & the directors in their discretion accept such guarantee. In the event of a ship insured being mortgaged by a member after an insurance thereon is effected, such member shall give notice, in writing, of the mtgee. & the date thereof to the secretary, & shall be liable to contribute in respect of the insurance to all claims arising out of losses happening before noon of the day following that on which such notice shall be given." By rule 42, nothing in rules 35 & 41, amongst others, was to prejudice or affect the liability of the members for the special contributions mentioned in rule 32. At the date of the proposal the steamship was in fact mortgaged, but pltf. had no knowledge of this, & never received any notice thereof, nor had they any such guarantee as that mentioned in rule 41. An action was brought for calls made by pltf. on defts. under rule 42 for claims for losses & special contributions:—*Held*: (1) defts. were liable, inasmuch as by their proposal & its acceptance they became members of the assocn., & although, having failed to comply with rule 41, which assumed that where a ship was mortgaged at the time they joined the assocn., they would give notice thereof, their ship was not protected, that did not relieve them from liability as members for the special contributions & losses sued for.

(2) If a man induces a co. to be at risk during the whole of the year on an untrue statement, he is estopped from setting up the untruth of that statement (*FARWELL, L.J.*).—*NORTH-EASTERN 100A STEAMSHIP INSURANCE ASSOCN. v. RED S. STEAMSHIP CO., LTD.* (1906), 22 T. L. R. 692; 12 Com. Cas. 26, C. A.

**3394. ———.]—JONES v. BANGOR MUTUAL SHIPPING INSURANCE SOCIETY, LTD. No. 3407, post.**

**3395. ———.]—One-fifth of ship to be uninsured—Provisions in articles incorporated in policy.]—The pursuer insured his ship with the defenders, a mutual assurance assocn. The policy provided that the "provisions contained in the arts. of assocn. shall be deemed & considered part of this policy." Five years before the date of the policy the co., having full power under its arts. of assocn. to do so, resolved to alter (*inter alia*) one of its articles by substituting these words for others: "That it shall be a condition of this insurance that the assured shall keep one-fifth," of the value of such ship, "uninsured." This addition to the article was not confirmed by a special resolution passed in accordance with Cos. Act, 1862 (c. 89), ss. 50, 51; but it was registered, & printed with the articles on the back of each policy. The pursuer had also insured with another co., the result being that he had insured altogether for more than four-fifths:—*Held*: the irregularity in the procedure by which the article had been altered did not prevent it from being binding upon the pursuer, & the condition contained in such article having been broken, he was not entitled to recover upon the policy.—*MUIRHEAD v. FORTH & NORTH SEA STEAMBOAT MUTUAL INSURANCE***



ASSOCN., [1894] A. C. 72; 10 T. L. R. 82; 6 R. 59, H. L.

Annotation:—*Reid. Balmoral S.S. Co. v. Marten*, [1901] 2 K. B. 896.

### SUB-SECT. 3.—PROTECTION AND INDEMNITY ASSOCIATION.

**3396. "Improper navigation"—Negligence of crew—Open bilge-cock.**—An assocn. of steamship owners agreed by deed to indemnify each other, in respect of ships entered by them in the assocn., against, amongst other things, "loss or damage which, by reason of the improper navigation of any such steamship as aforesaid, may be caused to any goods, etc., on board such steamship." Pltfs.' steamship *Severn* was duly entered, & whilst on a voyage from Memel to Hull with a cargo of linseed & flax, having encountered heavy weather, & being short of coals, she put back to Fredericks-haven to coal, & to trim her cargo, which had shifted. Going into the harbour she took the ground, but was got off within an hour. The pumps were put on to try whether she had made any water, & for this purpose the bilge-cock was opened, but through the negligence of the crew this cock was not closed when the attempt to pump ceased. Whilst the *Severn* was moored at Frederickshaven quay, order were given to put on the donkey-engine pumps to fill the boilers, & for this purpose the sea-cock was opened. The sea-cock communicated with the box or tank in which was the bilge-cock; & when the boilers were filled, the sea-cock being through a like negligence left open, the water entered in large quantities by means of the open bilge-cock into the hold of the vessel, & damaged the linseed:—*Held*: this was a damage arising from "improper navigation," within the meaning of the deed.—*GOOD v. LONDON STEAM-SHIP OWNERS' ASSOCN.* (1871), L. R. 6 C. P. 563; 20 W. R. 33.

Annotations:—*Apprvd. Carmichael v. Liverpool Sailing Ship Owners' Mutual Indemnity Assocn.* (1887), 19 Q. B. D. 242. *Reid. Canada Shipping Co. v. British Shipowners' Mutual Protection Assocn.* (1889), 58 L. J. Q. B. 462. *Mentd. Hayn v. Culliford* (1878), 3 C. P. D. 410; *The Ferro*, [1893] P. 38.

**3397. ——— Open port hole.**—By the arts. of a mutual insurance assocn. the members agreed to indemnify each other against losses, damages, & expenses arising from or occasioned by any loss or damage of or to any goods or merchandise caused by "improper navigation of the ship carrying the goods," for which any such member might be liable. A cargo of wheat was shipped on board a vessel belonging to pltfs., who were members of the assocn. During the loading of the cargo an opening or port in the side of the vessel was, by the negligence of persons employed by pltfs., insufficiently secured, so that during the voyage water leaked in & damaged the wheat in the lower hold, & pltfs. became liable to pay & paid compensation to the owners of the cargo. The leak did not hinder or impede the navigation of the vessel in the course of her voyage:—*Held*: this was a damage arising from "improper navigation of the ship," within the arts. of assocn., for which pltfs. were entitled to recover.—*CARMICHAEL v. LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCN.* (1887), 19 Q. B. D. 242; 56 L. J. Q. B. 428; 57 L. T. 550; 35 W. R. 793; 3 T. L. R. 636; 6 Asp. M. L. C. 184, C. A.

Annotations:—*Expld. & Distd. Canada Shipping Co. v. British Shipowners' Mutual Protecting Assocn.* (1889), 23 Q. B. D. 342. *Mentd. The Cressington*, [1891] P. 152; *Dobell v. S.S. Rossmore Co.*, [1895] 2 Q. B. 408; *Blackburn v. Liverpool, Brazil & River Plate Steam Navigation Co.*, [1902] 1 K. B. 290.

**3398. ——— Damage to cargo—Tainted by previous cargo.**—By the rules of defts., a shipowners' mutual insurance assocn., pltfs. were entitled to protection in respect of "damage to goods on board when caused by the improper navigation" of their ship, but were not entitled to claim in respect of "damage caused by improper stowage." A cargo of wheat while in the hold of pltfs.' ship was damaged, owing to a taint communicated to the wheat through the ceiling & limber boards of the vessel having been saturated with a composition which had leaked from the previous cargo. The ceiling & limber boards had not been properly cleaned before the wheat was stowed:—*Held*: the damage was not caused by "improper navigation." *Qu.*: whether it was caused by "improper stowage."—*CANADA SHIPPING CO. v. BRITISH SHIP-OWNERS' MUTUAL PROTECTION ASSOCN.* (1889), 23 Q. B. D. 342; 58 L. J. Q. B. 462; 61 L. T. 312; 38 W. R. 87; 5 T. L. R. 700; 6 Asp. M. L. C. 422, C. A.

Annotations:—*Mentd. The Ferro* (1892), 1 R. 562; *Blackburn & Sohsten v. Liverpool, Brazil & River Plate Navigation Co.* (1901), 7 Com. Cas. 10.

**3399. Illness & costs & expenses of illness—Expenses of procuring new crew.**—Shipowners who were members of a protection & indemnity club were insured against "any claim or demand" which they should "become liable for & be required to pay" in respect of various risks, including "illness of any person," & "costs & charges . . . in respect of" illness:—*Held*: the club was not liable for expenses properly incurred by the shipowners in obtaining substitutes for a crew disabled by illness, or for other similar expenses consequent upon the illness of the crew.—*ROGERS & CO. v. BRITISH SHIPOWNERS' MUTUAL PROTECTION ASSOCN., LTD.* (1896), 12 T. L. R. 493; 1 Com. Cas. 414.

### SECT. 5.—POSITION OF PART OWNERS.

**3400. Insurance effected by part owner member—Liability of non-members for contributions.**—T., the manager & part owner of a ship, became a member of a mutual insurance assocn., & took out a policy with such assocn. in respect of the ship. The arts. of assocn. gave power to the committee, in order to provide funds for the business of the assocn., from time to time to direct sums to be paid by the members ratably. By the policy, which was made by the assocn. under their seal, the assocn. agreed with T., that the members thereof should according to the arts. of assocn. pay & make good losses & damages to the ship occasioned by the risks insured against, subject to a proviso that the assocn. should be liable only to the extent of so much of the funds as they were able to recover from the members liable for the same & which were applicable for the purpose of paying claims under the policy. Certain contributions to the funds of the assocn. having, in accordance with the arts., become payable by T., in respect of the ship, & T. being bkpt., the assocn. sued N., another part owner of the ship, for such contributions as an undisclosed principal of T.:—*Held*: the effect of the arts. of assocn., & the policy being that the liability for such contributions was imposed on members only, & N. not being a member of the assocn., he could not be sued for such contributions as an undisclosed principal of T.—*UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCN. v. NEVILL* (1887), 19 Q. B. D. 110; 56 L. J. Q. B.

*Sect. 5.—Position of part owners. Sect. 6.]*

522; 35 W. R. 746; 3 T. L. R. 658; 6 Asp. M. L. C. 226, n., C. A.

*Annotations:—*Consd. Ocean Iron Steamship Insce. Asscn. v. Leslie (1887), 22 Q. B. D. 722, n. *Distd.* Great Britain 100 A1. Steamship Insce. Asscn. v. Wyllie (1889), 22 Q. B. D. 710. *Consd.* Montgomerie v. United Kingdom Mutual Steamship Asscn., [1891] 1 Q. B. 370. *Distd.* British Marine Mutual Insce. v. Jenkins, [1900] 1 Q. B. 299. *Refd.* Tyser v. Shipowners' Syndicate (1895), 65 L. J. Q. B. 238.

**3401.** ———.]—The managing & part owner of a steamship became a member of a mutual insurance assocn., & took out a policy on behalf of himself & his co-owners in respect of the ship. By the arts. of assocn. every person was deemed to be a member "who in his own name, or in his name as agent, insures any ship in pursuance of the regulations of the co." & they also provided that the funds required for the payment of claims should "be raised by contributions from all the members." By the policy it was agreed between the assured & the co., "that without prejudice to the rights & remedies of the co. against the said person or persons effecting this insurance, as a member or members of the co., in respect of this insurance, the assured shall pay to the co., in lieu of premiums, all the sums & contributions which the co. are entitled to call upon the said person or persons effecting this insurance, as a member or members of the co., to pay to the co. in respect of this insurance according to the arts. of assocn. of the co., & that the provisions contained in the said arts. of assocn. shall be deemed & considered part of this policy, & shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance." Certain contributions having, in accordance with the arts. of assocn., become payable by the managing owner in respect of the ship, & the managing owner being bkpt., the assocn. sued the other owners to recover the contributions:—*Held:* under the terms of the policy, they were liable, although the policy was effected by the managing owner alone.—*OCEAN IRON STEAMSHIP INSURANCE ASSCN., LTD. v. LESLIE* (1887), 22 Q. B. D. 722, n.; 57 L. T. 722; 6 Asp. M. L. C. 226.

*Annotations:—*Apprvd. Great Britain 100 A1. Steamship Insce. Asscn. v. Wyllie (1889), 22 Q. B. D. 710. *Consd.* Montgomerie v. United Kingdom Mutual Steamship Asscn., [1891] 1 Q. B. 370; British Marine Mutual Insce. v. Jenkins, [1900] 1 Q. B. 299.

**3402.** ———.]—Pltfs. were a mutual marine assocn., being registered under Cos. Act, 1862 (c. 89), as a co. limited by guarantee. Defts. were some of the part owners of a steamship. H., to whom the other shares of the ship belonged, was the managing owner, having authority to insure the ship in such an assocn. as that of pltfs., & he insured it with them by a policy for £1,000. H. traded as H. & G. The policy stated that H. & G., "as well in their own names as & for in the names of all or every person & persons to whom the same may appertain, in part or in all, subject to the provisions hereinafter contained," insured the ship in the sum of £1,000 for a year, the charges of the insurance to be borne by members of the assocn. having ships entered in the assocn., in proportion to the sums assured therein, & that the assurers did thereby bind themselves to the assured for the true performance of the premises, the consideration due unto the assurers for the insurance being the contributions to be paid from time to time by the assured for losses & averages on other steamships mutually insured in the assocn., & other costs & charges of the

assocn. at the rates per cent. to be determined by the committee. It was mutually agreed between the assured & assurers that all the rules of the assocn., whether set out in the policy or indorsed thereon or otherwise, should be as binding on the assured & assurers as if they had been inserted in the policy & had formed part thereof. The rules were indorsed on the policy. The memorandum of assocn. of the assocn. stated its objects to be "the insurance of steamships belonging to members of the assocn., or in which members of the assocn. are interested, or have a share or shares." The arts. of assocn. provided that "every person shall be deemed to have agreed to become a member of the assocn. who insures any ship, or share or shares in a ship, in pursuance of the regulations herein contained." The first rule was, "the members of this club shall mutually insure each other's steamships, or shares therein, in such manner & against such loss & damage as are hereinafter mentioned." H. having become bkpt., an action was brought against defts., the other co-owners of the ship, to recover contributions according to the rules to losses in respect of other ships insured with the assocn. during the currency of the policy:—*Held:* defts. were liable, for whether they had or had not become members of the assocn., they had by the policy expressly contracted with the assocn. that they would be liable for contributions to losses in respect of other ships insured with the assocn. in accordance with the rules, just as if they had been members, & that such a contract was within the authority of the managing owner, & within the powers of the assocn.—*GREAT BRITAIN 100 A1 STEAMSHIP INSURANCE ASSCN. v. WYLLIE* (1889), 22 Q. B. D. 710; 58 L. J. Q. B. 614; 60 L. T. 916; 37 W. R. 407; 5 T. L. R. 285; 6 Asp. M. L. C. 398, C. A.

*Annotations:—*Consd. Montgomerie v. United Kingdom Mutual Steamship Asscn., [1891] 1 Q. B. 370; British Marine Mutual Insce. v. Jenkins, [1900] 1 Q. B. 299. *Refd.* Tyser v. Shipowners' Syndicate (Re-assured) (1895), 73 L. T. 605.

**3403.** ———.]—Pltfs., a mutual insurance assocn., sued defts. for contributions or premiums payable in respect of an insurance of defts.' ship in pltfs.' club. By the policy, which was in the form of a Lloyd's policy, & subject to pltfs.' memorandum & arts. of assocn. & rules, defts.' manager insured the ship in his own name, & for, & in the names of, all persons to whom the same might appertain. By the memorandum one of the objects of the assocn. was the mutual insurance "of ships which the members may be authorised to insure in their own names." The arts. defined a member as any person who, on behalf of himself, or of any other person, insures any ship in the assocn., & empowered a committee of the assocn. to assess the members ratably in order to provide a fund to meet losses, & stipulated that the assocn. should not be liable for losses, except to the extent of the fund which it could recover from members or persons liable. The rules provided for payment of premiums, for which the ships were to be assessed. Defts. authorised the manager of their ship to enter her in the club, which he did, & he so became a member of the club, within the meaning of pltfs.' memorandum & arts. of assocn., & personally liable to pay the contributions or premiums, which, under the arts. of assocn. & the rules, might be levied by the committee of the club. He became insolvent, & unable to pay, & pltfs. sued defts., as being the persons on whose behalf, & for whose benefit, the insurance was effected:—*Held:* defts., being owners of an insurable interest, were the persons



for whom the insurance was effected, & there was nothing in the memorandum & arts. of assocn., or the rules, to exclude their liability to pay the premiums, & pltf's. were entitled to recover.—*BRITISH MARINE MUTUAL INSURANCE CO. v. JENKINS*, [1900] 1 Q. B. 299; 69 L. J. Q. B. 177; 82 L. T. 297; 9 Asp. M. L. C. 26; 5 Com. Cas. 143.

**3404. — Right of non-member to recover a loss.]**—By a policy of marine insurance in the form of a deed-poll, defts. a mutual insurance assocn., covenanted to pay losses upon a steamship with a firm described in the deed as "a member." Under the policy members having ships entered were to make good losses on the ship, according to the provisions of the arts. of assocn. & the rules. One rule was an arbn. clause, by which the sum to be paid by the assocn. upon any claim was to be settled by the committee; & if the member agreed to accept the sum so settled, he was to be entitled to be paid in the mode of payment customary to the assocn.; & in case of difference the matter was to be decided by arbitrators, to be appointed by the committee & the member, the obtaining of a decision from whom was to be a condition precedent to the right of the member to maintain an action on the policy. The memorandum of assocn. set out that the assocn. was established for the "insurance of ships of members, & of ships which the members may be authorised to assure in their own names." It was provided by the arts. of assocn. that "every person who, on behalf of himself or any other person, insures for the protection of any ship . . . shall, as from the date of the commencement of such insurance or protection be deemed to be a member of the assocn."; & further, that "all claims in respect of insurance or protection shall be made & enforced against the assocn. itself, & not against any member thereof; but the assocn. shall not be liable to any member or other person for the amount of any loss, claim, or demand, except to the extent to which the assocn. is able to recover from the members or persons liable for the same." Pltfs. were part owners of the ship insured in question, & brought, in their own names, an action on the policy against defts. to recover a loss on the ship:—*Held*: this action could not be maintained, since, under the policy, defts. were expressly excluded from liability to any other person than the firm therein described as "a member."—*MONTGOMERIE v. UNITED KINGDOM MUTUAL STEAMSHIP ASSOCN.*, [1891] 1 Q. B. 370; 60 L. J. Q. B. 429; 64 L. T. 323; 39 W. R. 351; 7 T. L. R. 203; 7 Asp. M. L. C. 19.

*Annotation*:—*Reid. Miller Gibb v. Smith & Tyrer*, [1917] 2 K. B. 141.

## PART XI. SECT. 6.

**t. Policy invalidly executed.]**—Under 6 Will. 4, c. 18, s. 10, a policy signed by the secretary, but not by the president, is invalid. The co. can be compelled, however, upon the defect being noticed, to execute a valid policy of the proper date; & their bye-law estops them from objecting that the policy was not in fact executed before the loss.—*PERRY & PERRY v. NEWCASTLE DISTRICT MUTUAL FIRE INSURANCE CO.* (1852), 8 U. C. R. 363.—CAN.

**a. Default in payment of assessment—Subsequent payments accepted—Waiver of forfeiture.]**—*LYONS v. GLOBE MUTUAL FIRE INSURANCE CO.* (1877), 27 C. P. 567.—CAN.

**b. — — — — —.]**—*SMITH v. MUTUAL INSURANCE CO. OF CLINTON* (1877), 27 C. P. 441.—CAN.

**c. — — — — —.]**—*LAW v. HAND-IN-HAND MUTUAL INSURANCE CO.* (1878), 29 C. P. 1.—CAN.

**d. — — — — — Whether waiver of condition.]**—Where a mutual insurance co. have without objection received payment of assessments after the proper date for their payment, they are not thereby debarred from insisting on a subsequent occasion upon the strict observance of the conditions of the co. as to payment when they give notice that they intend so to insist, & there is no conduct on their part tending to mislead the insured.—*REDMOND v. CANADIAN MUTUAL AID ASSOCN.* (1891), 18 A. R. 335.—CAN.

**e. Further insurance—Constructive notice to company.]**—Defts. inspector notified pltf. that defts. intended reducing his insurance with them by \$1,000, to which pltf. assented,

## SECT. 6.—ESTOPPEL.

Estoppel by conduct generally, *see* ESTOPPEL, Vol. XXI., pp. 328 *et seq.*

**3405. Unstamped policy—Admission of liability by raising money from members.]**—A. insured a ship in a mutual marine insurance association in 1863, & the policy, which was not stamped, was annually renewed up to the year ending Mar. 1868. In Feb. 1868, the ship, with A. on board, was lost at sea. The loss of the ship was reported to the assocn., & it appeared from entries in the minute books that the money due upon the policy was raised by order of the committee, but retained by the secretary until a personal representative to A. had been appointed. The co. was ordered to be wound up in Jan. 1870, & A.'s widow obtained letters of administration to him in Dec. 1871. Upon a claim by the widow under the winding up for the amount secured by the policy:—*Held*: there was a sufficient admission of liability in the books of the co. to enable the widow to recover as a creditor for the amount secured by the policy, although, from the absence of a stamp, the policy itself, upon which the claim arose, could not be given in evidence.—*Re TEIGNMOUTH & GENERAL MUTUAL SHIPPING ASSOCN., MARTIN'S CLAIM* (1872), L. R. 14 Eq. 148; 41 L. J. Ch. 679; 26 L. T. 684; 1 Asp. M. L. C. 325.

**3406. — Payment by member of calls.]**—Where a member of a mutual insurance co., afterwards converted into a limited co., has vessels on its books as insured, & pays calls, & otherwise acts as if he were a member of the co., he is, in any action brought against him by the limited co. for calls on losses, estopped from denying his liability, & from setting up either any irregularity in the transfer from the one co. to the other, or that the losses were paid without any stamped policies being entered into in contravention of 30 Vict. c. 23, s. 7.—*BARROW MUTUAL SHIP INSURANCE CO., LTD. v. ASHBURNER* (1885), 54 L. J. Q. B. 377; 54 L. T. 58; 5 Asp. M. L. C. 527, C. A.

**3407. Rule against double insurance—Policy issued with knowledge of other insurance.]**—By one of the rules of a mutual marine insurance society, it was provided that vessels of a certain class should not be insured for more than three-fourths of their value, & that "if any member insure or attempt to insure elsewhere any ship share or shares in any ship already insured in this society, he shall be liable to immediate expulsion & to forfeiture of any claim or demand he may have against the society." By another rule it was provided as follows: "If it comes to the

informing them that he would replace the amount in some other co. The insurance was subsequently reduced & the unearned premium returned by the local agent, S., with whom pltf. effected an insurance for the \$1,000 in the Q. Co., of which co. S. was also agent:—*Held*: under these circumstances defts. could not set up that this was a further insurance without notice to them.—*PARSONS v. VICTORIA MUTUAL FIRE INSURANCE CO.* (1878), 29 C. P. 22.—CAN.

**f. Innocent misstatement by applicant—Knowledge of agent.]**—*GRAHAM v. ONTARIO MUTUAL INSURANCE CO.* (1887), 14 O. R. 358.—CAN.

**g. Omission by insurance society.]**—The rules of a mutual marine insurance club provided that a certificate should issue to insured, as evidence of the contract, & security should be given for the vessel's proportion of losses.



**Sect. 6.—Estoppel. Parts XII & XIII.]**

notice of any member that any vessel or share of a vessel insured by the society is mortgaged, he shall immediately give notice in writing of the name & address of the mtgee. The board of directors may then require the mtgee. to give such security as they deem necessary for the payment to them of all sums which are or may become due on account of such insurance. If such notice is not given, or if mtgee. refuse to give such security as the society requires, the member in whose name the insurance is registered shall during the existence of such mortgage forfeit all claims upon the society in respect of such vessel or share to the extent of such mtge. thereon." P. on behalf of the owner of the ship *Bolina* insured her in defts.' society for £600. P. was entered in the society's books as the policy holder, & the policy was issued to him. The *Bolina* was at the time when the insurance was effected insured in another society for £300, of which insurance defts. had knowledge & the sum of £300 together with the

£600 above mentioned amounted to more than three-fourths, but less than the whole amount at which the directors of deft. society valued her. During the subsistence of the policy P. became aware that the *Bolina* had been mortgaged by the owner for £300 but no notice of mtge. was ever given to the society. In an action by the representative of the owner:—*Held*: the society after issuing the policy of insurance on the *Bolina*, with knowledge that she was insured elsewhere, were estopped from relying on the rule as to double insurance; but as P., who was a member of the society, had not given notice of the mtge. of which he had knowledge, the amount of that mtge. must be deducted from the sum payable under the policy.—*JONES v. BANGOR MUTUAL SHIPPING INSURANCE SOCIETY, LTD.* (1889), 61 L. T. 727; 6 Asp. M. L. C. 450, D. C.

**3408. Rule against mortgage of ship—Ship mortgaged when insured.]**—*NORTH-EASTERN 100A STEAMSHIP INSURANCE ASSOCN. v. RED S. STEAMSHIP CO., LTD.*, No. 3393, *ante*.

## Part XII.—Stamp Duties.

See Stamp Act, 1891 (c. 39), ss. 91, 98–100; & generally, REVENUE.

Stamps on marine insurance, see Part II., Sect. 3, sub-sect. 3, B., *ante*.

**3409. Agreement by several having common interest—Agreement by underwriters to refer.]**—The several underwriters on the same policy have such a community of interest in the subject insured, that if they all agree to refer the demand of the assured on that policy, one stamp for the agreement to refer, & one stamp for the award, are sufficient.—*GOODSON v. FORBES, GOODSON v.* (1815), 6 Taunt. 171; 1 Marsh. 525; 128 E. R. 999.

*Annotation*:—*Refd.* *Ramsbottom v. Davis* (1839), 7 Dowl. 173.

**3410. — Power of attorney by members of mutual insurance club.]**—A deed, in which several persons combine to effect a common purpose, requires only a single stamp. Therefore, a power of attorney, whereby the several members of a mutual insurance club authorised the subscription of policies in their respective names, requires only one stamp; there being a community of purpose though, from each insurer being excluded from the policy upon his own ship, not an entire community of interest.—*ALLEN v. MORRISON* (1828), 8 B. & C. 565; 3 Man. & Ry. K. B. 70; 108 E. R. 1152; *sub nom.* *ALLAN v. HARRISON*, 7 L. J. O. S. K. B. 106.

*Annotation*:—*Refd.* *Lovelock v. Franklyn* (1847), 8 L. T. O. S. 444.

**3411. Assignment of policy — On goods.]**—Where two parties were interested in a sum invested in the funds, one having a life interest, & the other a reversion, & a deed was executed between them, by which in consideration of the person entitled for life consenting to a sale of part of the stock for the benefit of the reversioner, the

latter covenanted to pay an annuity to the person entitled for life:—*Held*: such deed was not a conveyance upon the sale of an annuity, so as to render it liable to the *ad valorem* duty, under Stamp Act, 1815 (c. 184), sched. part 1. An assignment of a policy of insurance of goods is not an assignment of property within the above Act, so as to require an *ad valorem* duty.—*BLANDY v. HERBERT* (1829), 9 B. & C. 396; 7 L. J. O. S. K. B. 223; 109 E. R. 147.

*Annotations*:—*Expld.* *Caldwell v. Dawson* (1850), 5 Exch. 1. *Refd.* *Mestayer v. Biggs* (1834), 1 Cr. M. & R. 110; *Potter v. I. R. Comrs.* (1854), 10 Exch. 147.

**3412. — By way of mortgage.]**—An assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mtge. within Stamp Act, 1815 (c. 184), sched. part 1, & therefore requires an *ad valorem* stamp.—*CALDWELL v. DAWSON* (1850), 5 Exch. 1; 14 Jur. 316; 155 E. R. 1; *sub nom.* *COLWELL v. DAWSON*, 14 L. T. O. S. 468.

*Annotation*:—*Refd.* *Potter v. I. R. Comrs.* (1854), 10 Exch. 147.

**3413. Policy on cattle.]**—A policy of insurance on the lives of cattle is an insurance on lives within Stamp Act, 1815 (c. 184), & is liable to duty. But such an instrument is only liable to a £5 penalty for want of a stamp, under 10 Ann, c. 26, & not to the penalty of £500 under 35 Geo. 3, c. 63, s. 17, which applies to marine insurance only.—*A.-G. v. CLEOBURY* (1849), 4 Exch. 65; 18 L. J. Ex. 395; 13 L. T. O. S. 385; 13 J. P. 537; 154 E. R. 1127.

**3414. Policy guaranteeing payment of fixed sum —Proviso for surrender value.]**—In order that a document may be a promissory note within Stamp Act, 1870 (c. 97), s. 49, it must substantially contain a promise to pay a definite sum of money & nothing more. A document containing a promise to pay money as part of a contract containing

Where neither rule was conformed to by the assured:—*Held*: the want of a certificate was the default of the club, & could not invalidate the contract previously subsisting. The security could only be lawfully demanded when the vessel was entered for insurance; that not having been done, any de-

mand for it after was unauthorised by the rules of the club.—*TAYLOR v. MADDOCK* (1893), 5 Nfld. L. R. 510.—*NFLD.*

### PART XII.

**h. Document renewing policy.]—A**

document renewing a policy of insurance is not a fresh policy, but merely a receipt, & as such requires a penny stamp.—*KENNEDY v. MACMAHON* (1889), 3 Q. L. J. 119.—*AUS.*

**k. Assessment of policies in settlement—Surrender value at date of deed.]—**

other stipulations would not be a promissory note within the Act.

By an instrument, described as a policy of insurance, after reciting that E. was desirous of being insured with the applt. corpn., & that there had been paid to the corpn. the sum of £9 17s. 4d., being the agreed premium for such assurance, it was witnessed that the corpn. did thereby guarantee to the assured payment of the sum of £100 on May 18, 1907; provided that, if the assured should be desirous at any time of surrendering the policy, the corpn. would allow to him the surrender value thereof as on May 18 last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corpn. for the time being in force with reference to surrenders:—*Held*: this instrument was liable to stamp duty as an agreement, & not as a promissory note within the above sect.—MORTGAGE INSURANCE CORPN. v. INLAND REVENUE COMRS. (1888), 21 Q. B. D. 352; 57 L. J. Q. B. 630; 36 W. R. 833; 4 T. L. R. 710, C. A.

*Annotations*:—*Reid*. Smith v. Dean (1900), 69 L. J. Q. B. 331; Hodgkins v. Simpson (1908), 25 T. L. R. 53.

**3415.** — On attaining fixed age—Or lesser sum if dying sooner.]—An instrument whereby it is contracted that, in consideration of the payment by a person of a weekly premium of 6d., a sum certain is to be paid to him on his attaining the age of sixty-five, or, in the event of his dying under that age, a smaller sum is to be paid to his exors., is a policy of insurance upon a contingency

depending upon a life within Stamp Act, 1891 (c. 39), s. 98. *Semble*: even if the portion of the said contract relating to the payment of money to the assured on his attaining the age of sixty-five stood alone, it would be a policy of insurance upon a contingency depending upon a life within the said sect.—PRUDENTIAL INSURANCE CO. v. INLAND REVENUE COMRS., [1904] 2 K. B. 658; 73 L. J. K. B. 734; 91 L. T. 520; 53 W. R. 108; 20 T. L. R. 621; 48 Sol. Jo. 605.

*Annotations*:—*Apprvd.* Joseph v. Law Integrity Insee., [1912] 2 Ch. 581. *Consd.* Gould v. Curtis, [1913] 3 K. B. 84.

**3416.** Employers' liability policy—Whether policy of insurance against accident—Stamp Act, 1891 (c. 39), s. 98.]—An insurance co. by a policy granted to employers of labour agreed to pay, for & on behalf of the employers, such sums as they should become liable to pay under Employers' Liability Act, 1880 (c. 42), Workmen's Compensation Act, 1897 (c. 37), or by the common law, in respect of personal injury to any workmen in their employ:—*Held*: this instrument was not "a policy of insurance against accident" within the above sect., & Sched. I. of the Act, & therefore was not chargeable with the duty imposed by the Act in respect of such policies.—LANCASHIRE INSURANCE CO. v. INLAND REVENUE COMRS., VULCAN BOILER & GENERAL INSURANCE CO. v. INLAND REVENUE COMRS., [1899] 1 Q. B. 353; 68 L. J. Q. B. 143; 79 L. T. 731; 63 J. P. 21; 47 W. R. 396; 15 T. L. R. 119; 43 Sol. Jo. 127; 1 W. C. C. 38.

## Part XIII.—Effect of Bankruptcy.

**3417.** Insolvency of underwriter—Payment by broker—Right to recover.]—If an insurance broker, when a loss happens upon a policy which he has effected pays the assured the full amount of the money subscribed, he cannot recover back any part of it, upon the ground that before the loss happened one of the underwriters upon the policy had become insolvent, & that he was not aware of this fact when he paid the money.—EDGAR v. BUMSTEAD (1808), 1 Camp. 411, N. P.

*Annotations*:—*Distd.* Benson v. Maitland (1820), Gow, 205. *Reid.* Universo Insee. Co. of Milan v. Merchants Marine Insee., [1897] 2 Q. B. 93.

**3418.** — — — — — Laches.]—JAMESON v. SWAINSTONE (1809), 2 Camp. 546, n., N. P.

**3419.** Obligation to refund premium advanced by creditor.]—A. being indebted to B., assigned to him a policy of assurance on his life, & covenanted to pay the annual premiums, & in case he did not, & A. should pay them, he would repay him the amount with interest, on demand. B. afterwards became bkpt., & obtained his certificate. A premium accruing due after the bkpcy., & being unpaid by B., & A. having paid it, & not being repaid:—*Held*: B. was not discharged, by 12 & 13 Vict. c. 106, ss. 178, 200, from liability

for the breach of the first of these covenants, but he was discharged *quoad* the breach of the second covenant.—YOUNG v. WINTER (1855), 16 C. B. 401; 3 C. L. R. 1268; 24 L. J. C. P. 214; 25 L. T. O. S. 163; 1 Jur. N. S. 960; 139 E. R. 815.

*Annotations*:—*Consd.* Browne v. Price (1858), 4 C. B. N. S. 598. *Reid.* Maples v. Pepper (1856), 18 C. B. 177; Boyd v. Robins (1858), 4 C. B. N. S. 749; Warburg v. Tucker (1858), E. R. & E. 914; Betteley v. Stainsby (1862), 9 Jur. N. S. 440; Betteley v. Stainsby (1867), L. R. 2 C. P. 568. *Mentd.* Re Strahan, *Ex p.* Barwis (1855), 6 De G. M. & G. 762; Parker v. Ince (1859), 4 H. & N. 53.

**3420.** Right of bankrupt to maintain policies.]—A bkpt., after his bkpcy., kept up the premiums of certain policies of insurance which he had mortgaged previous to his bkpcy., & the premiums on which he had covenanted to keep up, & in which the assignees had disclaimed any interest, fulfilling also the condition on which he had obtained his discharge:—*Held*: his representatives were entitled to the residue of the moneys payable under the policies after payment of the mtge. debt due on them.—Re LEARMOUTH (1866), 14 W. R. 628.

**3421.** Necessity for intimation of trustee's title—Priority of notice.]—Bkpt. prior to the bkpcy. had borrowed money from his wife, & had deposited

Re TWOPENNY (1899), 24 V. L. R. 596.—AUS.

1. Insurance business transacted outside Victoria.]—BRITISH HILL ASSOCIATED SMELTERS PROPRIETARY, LTD. v. COLLECTOR OF IMPORTS FOR VICTORIA (1918), 25 C. L. R. 61.—AUS.

m. Policy guaranteeing payment of allowance for illness & accident & lump sum on death by accident—Chargeable as accident policy only.]—GENERAL ACCIDENT ASSURANCE CORPN LTD. v. INLAND REVENUE COMRS (1906), 8

F. (Ct. of Sess.) 477; 43 Sc. L. R. 368; 13 S. L. T. 903.—SCOT.

### PART XIII.

n. Insolvency of underwriter.]—CHINA MUTUAL INSURANCE CO. v. PICKLES (1910), 9 E. L. R. 269.—CAN.

o. Insolvency of insurance broker—Liability on guarantee to underwriters.]—The insurance broker continues still to be liable as guarantee for payment of the premiums to the

underwriters, though the unlifted premiums are not part of his estate when he becomes bkpt.—SMITH v. RICHMOND & FREEBAIN'S TRUSTEE (1812), 16 Fac. Coll. 557.—SCOT.

3420 i. Right of bankrupt to maintain policies.]—O'MEARA v. ROYAL INSURANCE CO. (1881), 5 Q. S. C. R. 214.—AUS.

p. Rights of creditors — Where policy declared by husband in wife's favour.]—Where insured, under a

with her a life policy as security for the loan. The trustee in the bkpcy. had given notice of the bkpcy. to the insurance co. before the wife gave notice of her claim :—*Held* : the fact of the trustee being the first to give notice to the insurance co. did not affect the title of bkpt.'s wife as an incumbrancer for value prior to the bkpcy.—*Re WALLIS, Ex p. JENKS*, [1902] 1 K. B. 719 ; 71 L. J. K. B. 465 ; 18 T. L. R. 414 ; 9 Mans. 136 ; *sub nom. Re WALLIS, Ex p. THE TRUSTEE v. WALLIS*, 86 L. T. 237 ; 50 W. R. 430 ; 46 Sol. Jo. 340.

*Annotation* :—*Reid. Re Anderson*, [1911] 1 K. B. 896.

**Rights of joint creditors.**—*See* BANKRUPTCY, Vol. IV., p. 429, No. 3870.

policy of life insurance, declares same to be for the benefit of his wife, the trust thereby created is not invalidated by the subsequent insolvency of the husband, & creditors of the insured have no rights which would interfere with the rights of such wife even though

the endowment policy matures during the life of the insured. *Semble* : such a declaration is valid even though the insured be insolvent at the time of making it.—*BANK OF BRITISH NORTH AMERICA v. EDGECOMBE* (1919), 46 N. B. R. 105.—CAN.

**Proof for insurance premiums.**—*See* BANKRUPTCY, Vol. IV., pp. 268, 301, Nos. 2520, 2820.

**Right of creditors to underwriters deposit at Lloyd's.**—*See* BANKRUPTCY, Vol. V., p. 649, No. 5806.

**Property available for distribution amongst creditors—Property of bankrupt.**—*See* BANKRUPTCY, Vol. V., pp. 673, 674, Nos. 5959–5961.

**Policy taken out after adjudication.**—*See* BANKRUPTCY, Vol. V., p. 733, Nos. 6351, 6352.

**Property in reputed ownership of bankrupt.**—*See* BANKRUPTCY, Vol. V., pp. 748, 785, 800, Nos. 6447, 6727–6735, 6836, 6837.

**Notice of transfer.**—*See* BANKRUPTCY, Vol. V., p. 770, Nos. 6615–6629.

**q. Assignment for benefit of creditors—Right of assignee against insurer—Payment of claim.**—*NORTH AMERICAN ACCIDENT INSURANCE CO. v. NEWTON* (1919), 57 S. C. R. 577 ; 45 D. L. R. 247 ; [1919] 1 W. W. R. 317.—CAN.

## INSURRECTION.

*See* CRIMINAL LAW AND PROCEDURE.

## INTERESSE TERMINI

*See* LANDLORD AND TENANT.

## INTEREST.

*See* AGENCY ; BANKERS AND BANKING ; BANKRUPTCY AND INSOLVENCY ; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS ; BILLS OF SALE ; COMPANIES ; COMPULSORY PURCHASE OF LAND AND COMPENSATION ; CONFLICT OF LAWS ; CONTRACT ; EXECUTORS AND ADMINISTRATORS ; JUDGMENTS AND ORDERS ; MONEY AND MONEY-LENDING ; REAL PROPERTY AND CHATTELS REAL ; SETTLEMENTS ; WILLS.

## INTEREST SUIT.

*See* EXECUTORS AND ADMINISTRATORS.



## INTERIM ORDERS.

*See* BANKRUPTCY AND INSOLVENCY ; COMPANIES ; CONSTITUTIONAL LAW ; COPYRIGHT AND LITERARY PROPERTY ; EASEMENTS AND PROFITS À PRENDRE ; EXECUTORS AND ADMINISTRATORS ; HUSBAND AND WIFE ; INJUNCTION.

## INTERLINEATION.

*See* DEEDS AND OTHER INSTRUMENTS ; WILLS.

## INTERLOCUTORY ORDERS.

*See* COUNTY COURTS ; HUSBAND AND WIFE ; INJUNCTION ; JUDGMENTS AND ORDERS ; PRACTICE AND PROCEDURE.

## INTERMEDDLING.

*See* EXECUTORS AND ADMINISTRATORS.

## INTERMENT.

*See* BURIAL AND CREMATION.

## INTERNATIONAL LAW.

*See* CONFLICT OF LAWS ; COPYRIGHT AND LITERARY PROPERTY ; EXTRADITION AND FUGITIVE OFFENDERS ; HUSBAND AND WIFE ; PRIZE LAW AND JURISDICTION ; SHIPPING AND NAVIGATION.

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<i>Damages</i> . . . . .	„ DAMAGES.	<i>Receiver</i> . . . . .	„ RECEIVERS.
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<i>Landlord's Claim on Bankruptcy</i> . . . . .	„ BANKRUPTCY ; DIS- TRESS ; EXECUTION		

## Part I.—Nature and Purpose.

**1. Nature—Whether separate action.]—**Interpleader is not an action either in the strict or in any conventional sense. . . . Interpleader is treated by R. S. C., Ord. 1, r. 2, as a proceeding in an action & not as an action itself (LORD SELBORNE, C.).—*HAMLIN v. BETTELEY* (1880), 6 Q. B. D. 63; 50 L. J. Q. B. 1; 43 L. T. 790; 29 W. R. 275, C. A.

*Annotations:—*Consd. *Hartmont v. Foster* (1881), 8 Q. B. D. 111. *James v. Ricknell* (1887), 20 Q. B. D. 164. *Reid v. Westminster Assmt. Com., Ex p. London & Provincial Victuallers, R. v. Islington Assmt. Com., Ex p. Agricultural Hall Co.*, [1917] 2 K. B. 215. *Credit Co. v. Pott* (1880), 6 Q. B. D. 295; *Re Ex p. National Mercantile Bank* (1880), 15 Ch. D. 42; *Re Rogers, Ex p. Challinor* (1880), 16 Ch. D. 260; *Hamilton v. Chaine* (1881), 7 Q. B. D. 1.

**2. ———.]—**The latter [interpleader proceedings] are never spoken of as actions (*per cur.*).—*COLLIS v. LEWIS* (1887), 20 Q. B. D. 202; 57 L. J. Q. B. 167; 57 L. T. 716; 36 W. R. 472, D. C.

**3. ———.]—**Proceedings in interpleader are substantially a second action, & nothing but very strong authority would induce me to hold that pltf. as a solr. has any right to embark in them without express instructions from his client. . . . The fact that proceedings in interpleader are a second litigation is not disposed of by suggesting that for some technical purpose they are regarded as part of the original action. . . . Interpleader at the instance of the sheriff is not a natural consequence of a judgment in favour of pltf. in an action. It is another proceeding & it rests with pltf. to say whether he will or will not become a party to the new issue (WILLS, J.).—*JAMES v. RICKNELL* (1887), 20 Q. B. D. 164; 57 L. J. Q. B. 113; 58 L. T. 278; 36 W. R. 280; 4 T. L. R. 169, D. C.

*Annotation:—*Mentd. *Bagley v. Maple* (1911), 27 T. L. R.

**4. Purpose — To prevent multiplicity of actions.]—***MORGAN v. MARSACK*, No. 51, *post*.

**5. ———.]—**The right of pltf. in interpleader is to be protected not merely from double liability, but from double vexation; & he is not therefore bound to show the existence of an apparent title in each of defts. who are claimants of the property in dispute.

The stakeholder is entitled to relief by suit of interpleader, & is not bound to accept an indemnity from either of the claimants, although the claimant offering such indemnity shows an apparent title to the property in dispute.

Deft. in interpleader cannot generally be ordered to interplead, by bringing or defending a suit in respect of the property in question, until he has put in his answer, or the bill is taken *pro confesso* against him; but where deft. seeks, as an indulgence, time to answer beyond that which the general rule allows he must satisfy the ct. that the case cannot with justice be put in a course for determination without further delay; & in this case, the further time was granted only upon deft. forthwith proceeding to try his legal right by defending the action which had been brought by the other deft. against the stakeholder.

Pltf. in interpleader undertakes by his suit to use all proper diligence to get in the answer of, or take the bill *pro confesso* against, each of defts.; & if any delay should occur in such proceedings any deft. may apply as against pltf. for a dissolution of the injunction, or for the delivery up of the subject of interpleader, as the case may be.—*EAST & WEST INDIA DOCK CO. v. LITLEDALE* (1848), 7 Hare, 57; 12 L. T. O. S. 26; 68 E. R. 23.

*Annotations:—*Reid. *G. S. & W. Ry. v. Corry* (1867), 15 W. R. 650. Mentd. *Manby v. Robinson* (1869), 17 W. R. 479; *Credits Gerundense v. Van Weede* (1884), 12 Q. B. D. 171.

**6. ———.]—**The ct. will not refuse an interpleader only because the evidence against defts. in claimant's case is different from what it is in pltf.'s case, so long as defts. have not established any new relation between themselves & pltf.

Pltf. occupied a farm, of which defts. were landlords. Defts. sometimes treated pltf. & sometimes his father, the claimant, their original lessee, as tenant, & gave each notice to quit. On pltf. quitting, the tenant-right was valued, as between him & defts. at £185 2s. 2d.

Pltf. having sued defts. for that sum, & two other sums due to him, defts. were willing to pay the two other sums to pltf. but asked that pltf. & claimant should interplead as to the £185 2s. 2d., that amount of the valuation, however, not to bind claimant:—*Held*: an order as prayed might be made, if not under Interpleader Act, 1831 (c. 58), under C. L. P. Act, 1860 (c. 126).

Defts. in 1853 let a farm to claimant, who put pltf., his son, in to manage it, & after the first rent day all rent was paid by the son & receipts for it were taken in his name. Defts. gave notice to quit at Lady Day both to pltf. as tenant, & to the father as tenant. Pltf. gave up possession at Lady Day in 1863, & the tenant-right was valued by persons appointed by pltf., & defts. The father then claimed the tenant right. The son alleged that he paid his father for it, & that having been treated as tenant by defts. throughout he was entitled to the tenant-right:—*Held*: it was a proper case for an interpleader, & the ct. in its discretion had power to order that if claimant, on interpleading should be found entitled to the tenant-right, & should be dissatisfied with the valuation, he should apply to the ct. for relief; the fact that pltf. & claimant might have different classes of evidence, as against defts., was no reason why an interpleader should not be ordered, no new relations between the parties having been established.—*EVANS v. WRIGHT* (1865), 5 New Rep. 331; 12 L. T. 77; 13 W. R. 468.

**7. ——— To prevent circuity of actions.]—***THOMPSON v. WRIGHT*, No. 205, *post*.

**8. ——— To determine ownership of property.]—**A life insurance co. received notice of an assignment by an insurer of a policy, which the co. had granted, & the insurer afterwards became insolvent. Soon after the death of the person whose life was insured the assignee for value applied for payment

### PART I.

**1 i. Nature — Whether separate action.]—**The words "action at law," include an interpleader proceeding.—*CANADA PERMANENT BUILDING SOCIETY v. FOREST* (1874), 6 P. R. 254.—CAN.

**1 ii. ———.]—**An interpleader

issue is within the term "action."—*DOUGLAS v. BURNHAM* (1888), 5 Man. L. R. 261.—CAN.

**1 iii. ———.]—**An interpleader proceeding is not an action.—*HOGABOOM v. GILLIES* (1895), 16 P. R. 402.—CAN.

**1 iv. ———.]—**An interpleader issue ordered in an action is technically a "proceeding" in that action.—*CATTANACH v. GUSA*, [1925] 1 D. L. R. 48; [1924] 3 W. W. R. 832.—CAN.

**a. ——— Not an interlocutory order.]—**An interpleader issue to try the



of the sum due upon the policy, & the co. inquired of the provisional assignee of the insolvent whether he would consent to payment being made to the assignee for value. The provisional assignee said he could not give such consent but that it must be sought for from the Ct. of Insolvent Debtors. The insolvent himself gave notice to the co. not to pay over the policy moneys to his assignee for value on the ground that the debt for which it was assigned as a security was satisfied. In the meantime an action was brought upon the policy by the assignee for value, in the name of the insolvent, against the co.:—*Held*: it was not a case in which the co. were entitled to file their bill of interpleader against pltf. in the action, the insolvent & his provisional assignee, the insolvent having no title & the title of his provisional assignee being subordinate to that of the assignee for value.

Now the foundation of the right to file a bill of interpleader is that there is a conflict between two or more persons claiming the same debt or obligation. Where such a state of things exists, & when that double claim has not been occasioned by the conduct of the person who is liable to discharge the debt or obligation he may obtain the assistance of the ct. & upon bringing into ct. the amount of the debt in dispute, the ct. will relieve him & put the conflicting claimants to litigate their rights between one another (LORD

CRANWORTH).—*DESBOROUGH v. HARRIS* (1855), 5 De G. M. & G. 439; 3 Eq. Rep. 1058; 26 L. T. O. S. 1; 1 Jur. N. S. 986; 4 W. R. 2; 43 E. R. 940, L. C.

*Annotations*:—*Reid. G. S. & W. Ry. v. Corry* (1867), 15 W. R. 650. *Mentd. Crossley v. City of Glasgow Life Assce. Soc.* (1876), 46 L. J. Ch. 65; *Matthew v. Northern Assce.* (1878), 9 Ch. D. 80.

9. ———.]—In interpleader proceedings an order was made transferring the proceedings to the county ct. claimants to be at liberty to pay a sum of money to the sheriff for the release of the goods seized, “to abide the order of the county ct.” The execution creditor abandoned his claim, & claimants had judgment, but the judge refused as unnecessary an order as to the money in the hands of the sheriff. The sheriff refused to pay & claimants brought an action against him for money had & received:—*Held*: the sheriff was not bound to pay over without an order of the county ct.

The object of an interpleader order is to try the title to the goods at the time of seizure (BOWEN, L.J.).

If the judge before whom the case comes is clear as to the ownership of his goods he may make an order at once (LORD ESHER, M.R.).—*DISCOUNT BANKING CO. OF ENGLAND & WALES v. LAMBARDE*, [1893] 2 Q. B. 329; 63 L. J. Q. B. 21; 69 L. T. 223; 58 J. P. 39; 42 W. R. 50; 9 T. L. R. 611; 4 R. 539, C. A.

## Part II.—Interpleader in the High Court.

### SECT. 1.—JURISDICTION.

*See* C. L. P. Act, 1860 (c. 126), s. 17; R. S. C., Ord. 57.

10. Source of jurisdiction—R. S. C., Ord. 57.]—An appeal lies, without leave, under Jud. Act, 1873 (c. 66), s. 19, from the judgment of a judge upon the interpleader issue with respect to the findings on the facts or a ruling on a point of law; although an appeal will not lie, without leave, from the final determination of the interpleader proceedings under R. S. C., Ord. 57, r. 13.

The intention of the framers of R. S. C., Ord. 57, was to put into it all that was contained relating to interpleader in C. L. P. Act, 1860 (c. 126), & such of the Chancery Orders as could be worked into it (LINDLEY, L.J.).—*DAWSON v. FOX* (1885), 14 Q. B. D. 377; 33 W. R. 514; *sub nom.* *FOX v. SMITH*, 54 L. J. Q. B. 299, C. A.

*Annotations*:—*Consd. Webb v. Shaw* (1886), 16 Q. B. D. 658; *McNair v. Audenshaw Paint & Colour Co.*, [1891] 2 Q. B. 502. *Reid. Field v. Rivington* (1889), 5 T. L. R. 642; *Re Tarn* (No. 1) (1893), 37 Sol. Jo. 372; *Cox v. Bowen*, [1911] 2 K. B. 611. *Mentd. Lyon v. Morris* (1887), 19 Q. B. D. 139.

11. ———.]—*WEBB v. SHAW*, No. 444, *post*.

12. ———.]—*READING v. LONDON SCHOOL BOARD*, No. 75, *post*.

13. ———.]—Where wharfingers, with whom goods were stored, had written a letter to a bank, stating that they held the goods to the bank's order, on the faith of which statement the bank advanced money on the goods, & subsequently that bank & another bank claimed the goods adversely to one another:—*Held*: on an application by the wharfingers for relief by way of interpleader, assuming the before-mentioned letter to constitute an estoppel, nevertheless an interpleader order might be made restraining claimants from proceeding against the wharfingers in respect of their claims except in respect of any claim which the first-mentioned bank might have upon the letter, & directing the trial of an issue between the two banks on the question to which of them the goods belonged.

The law as to interpleader now depends upon the provisions of R. S. C., Ord. 57 (A. L. SMITH, L.J.).

Except as mentioned in rule 2, I cannot find any limitation on the power of a judge to grant relief by way of interpleader, except of

title to property taken under execution on a final judgment in the suit in which it is issued is not an interlocutory order.—*WHITING v. HOVEY* (1885), 12 A. R. 119.—CAN.

b. ———.]—*JACK v. BURNE* (1868), 16 W. R. 367.—IR.

c. Purpose—Protection of sheriff.]—*JOHNSON v. McDONALD* (1863), 23 U. C. R. 183.—CAN.

### PART II. SECT. 1.

d. Source of jurisdiction—Statute.]—A common law judge has no power, unless by statute, to direct a feigned issue to be tried by a jury.—

*MCLAUGHLIN v. MCLAUGHLIN* (1865), 15 C. P. 182.—CAN.

e. ———.]—*MCKENZIE v. AETNA INSURANCE CO.* (1881), 14 N. S. R. (2 R. & G.) 326; 2 C. L. T. 94.—CAN.

f. Submission to jurisdiction—Employment of solicitor to support claim.]—On application to rescind or vary an interpleader order:—*Held*: claimant, a resident of the United States, having placed the goods here, would have been personally liable to the jurisdiction of this ct. in any question concerning them, even if he had not employed an attorney & made

an affidavit to support his claim.—*BUFFALO & LAKE HURON RY. CO. v. HEMINGWAY* (1863), 22 U. C. R. 562.—CAN.

g. ——— By accepting order & defending issue.]—*HALDAN v. BEATTY* (1878), 43 U. C. R. 614.—CAN.

h. ——— By foreign claimants—Extraordinary remedy not applicable.]—A summary application for an interpleader order in respect of certain moneys deposited with debts & claimed by pltf. by this action brought in Ontario, & also by an English corp., by an action brought in England, was dismissed:—*Held*: the mere fact that

*Sect. 1.—Jurisdiction. Sect. 2: Sub-sects. 1 & 2. Sect. 3: Sub-sect. 1, A.]*

course that he must be satisfied that in the circumstances of the case it is just & proper that relief should be granted. The learned judge has exercised his discretion as to the justice & propriety of granting the relief asked for in the circumstances of this case (A. L. SMITH, L.J.).

Assuming for the purposes of this appeal that there was such an estoppel, does that limit the jurisdiction to grant relief by way of interpleader given by the rule. In my opinion it does not (A. L. SMITH, L.J.).—*Ex p. MERSEY DOCKS & HARBOUR BOARD*, [1899] 1 Q. B. 546; 68 L. J. Q. B. 540; 80 L. T. 143; 47 W. R. 306; 15 T. L. R. 199.

*Annotation:—Consd. Sun Insee. Office v. Galinsky*, [1914] 2 K. B. 545.

**Common Law Procedure Act, 1860 (c. 126), s. 17.]**—A summary decision under R. S. C., Ord. 57, r. 8, by a judge at chambers, on an interpleader summons, is final & conclusive, & no appeal lies from such decision, & there is no power to give leave to appeal.

C. L. P. Act, 1860 (c. 126), s. 17, is still in force, but, with that exception, the provisions as to interpleader are now contained in the Rules of 1883, Order 57 (DAY, J.).—*LYON v. MORRIS* (1887), 19 Q. B. D. 139; 56 L. J. Q. B. 378; 56 L. T. 915, D. C.; *affd.*, 19 Q. B. D. 146, C. A.

*Annotations:—Reid. Field v. Rivington* (1889), 5 T. L. R. 642; *Re Tarn*, [1893] 2 Ch. 280; *Van Laun v. Baring*, [1903] 2 K. B. 277. *Mentd. Bourne v. Wall* (1891), 39 W. R. 510; *Peace v. Brookes*, [1895] 2 Q. B. 451.

**15. Exercise of jurisdiction—Discretionary.]**—Where an order for an interpleader issue is made there is no jurisdiction to impose on a claimant without his consent a condition limiting his defence to such grounds as could have been raised by the original debt.

M. & Co. were sued by G., as acceptors on a bill of exchange. M. & Co. had handed the bill to L. & Co. for full value received. L. & Co. had really obtained the bill for one H. in consideration of the value of a cargo sent by G. to England from Russia, which H. instructed L. & Co. to sell on commission. H. obtained possession of the cargo on handing over the bill to G.'s agents in England. The bill was then forwarded to G. in Russia, & being duly presented, was dishonoured, whereupon H. sued M. & Co., as acceptors. L. & Co. meantime give M. & Co. notice not to pay the bill, on the ground that they, L. & Co., had parted with the bill through the fraud of H., & that, the cargo being deteriorated, they had not received full value for the bill, & claimed to be recouped for their loss on its sale from the moneys handed to M. & Co. for the bill. M. & Co. apply for an inter-

pleader issue to be ordered, which the master granted, & on which he substituted L. & Co., as defts., in lieu of M. & Co. On appeal to the judge at chambers the order for interpleader was affirmed, but a condition imposed limiting L. & Co., as defts., to such defences only as M. & Co. could have raised:—*Held*: M. & Co., being "persons seeking relief who were under liability for a debt in which they were, or expected to be, sued by two or more parties making adverse claims" within the terms of R. S. C., Ord. 57, r. 1 (a), there was jurisdiction for the ct. or judge to exercise their discretion in ordering an interpleader issue, & such discretion had been rightly exercised; but there was no jurisdiction under R. S. C., Ord. 57, r. 7, to limit the defences of claimant, who is substituted as debt. to such defences as the original debt. could raise, since the words of R. S. C., Ord. 57, r. 7, empowering the ct. or judge to substitute any claimant as debt. "in lieu of" appct., the original debt., did not mean that such claimant should stand "in the actual place of," but instead of, such debt.

The guiding words of the rule are relief "may be granted" under such circumstances. A discretion is given to the judge to refuse or to grant the relief so applied for (*HUDDLESTON, B.*).—*GERHARD v. MONTAGU & Co.* (1889), 61 L. T. 564; 38 W. R. 76; 6 T. L. R. 19, D. C.

**16. ———.]—Ex p. MERSEY DOCKS & HARBOUR BOARD**, No. 13, *ante*.

## SECT. 2.—PERSONS TO WHOM RELIEF MAY BE GRANTED.

### SUB-SECT. 1.—STAKEHOLDER.

**17. Who is a stakeholder—Ship's captain—Claims against ship.]**—Where a suit has been instituted in the Ct. of Admlty. by arrest of a ship, on behalf of a person claiming to be the owner of goods, on the ground of breach of duty on the part of the master in not delivering the goods to him; & a like proceeding has been instituted in the same ct. by another claimant in respect of the same goods. *Semble*: a bill of interpleader by the captain of the ship will not lie, on the grounds that the proceedings are not against him but against the ship; & that the Ct. of Admlty. has jurisdiction to decide the whole question.

Hitherto the proceedings appear to have been proceedings against the ship . . . the real defts. are of course the owners of the ship, but the proceedings are said to be against the ship; . . . that being so, a bill of interpleader by the master

an action was possible here because a branch office of the bank was in Toronto, was not enough to attract to this forum the extraordinary or special remedy by way of interpleader, as against the English corps.—*HARRIS v. BANK OF BRITISH NORTH AMERICA* (1900), 20 L. T. 38; 19 P. R. 51.—CAN.

**k. ——— Although claimants resident outside jurisdiction.]**—Although both claimants were out of the province, & the co.'s head office was also outside of the province:—*Held*: there was jurisdiction to make an interpleader order, claimants themselves having brought the co. into the jurisdiction, & the documents being within the jurisdiction.—*Re UNDERFORD STOKER Co. OF AMERICA* (1901), 21 C. L. T. 146; 1 O. L. R. 42.—CAN.

**l. ——— By appearance & plea of defence.]—ARNOTT v. STEWART**

(1843), 5 Dunl. (Ct. of Sess.) 715; 15 Sc. Jur. 328.—SCOT.

**m. Extent of jurisdiction—Judge in chambers—Validity of landlord's claim.]**—The validity of a landlord's claim cannot be decided in chambers, & an interpleader order will therefore be refused.—*CRAIG v. CRAIG* (1877), 7 P. R. 209.—CAN.

**n. ——— Local master—Parties consenting to summary disposition in chambers.]**—A local master has jurisdiction, upon an interpleader application, to entertain & dispose of the question of the right of a debtor to an exemption claimed, although the title to land might come in question, the parties having consented to the summary disposition of the matter in chambers.—*Re HETHERINGTON* (1910), 14 W. L. R. 529; 3 Sask. L. R. 232.—CAN.

**o. ———.]**—Where proceedings in interpleader have begun under a judge's order, all subsequent applications must be made to the same judge.—*COMMERCIAL BANK v. CLARKE* (1855), 1 P. R. 276.—CAN.

**p. Goods outside jurisdiction.]**—The ct. has no jurisdiction under the Act relating to interpleader by carriers, when the goods are not within the jurisdiction.—*Re BRUNSWICK BALKE Co. & MARTIN* (1885), 3 Man. L. R. 328.—CAN.

**q. Land.]—MUNSIE v. MCKINLEY** (1864), 15 C. P. 50.—CAN.

### PART II. SECT. 2, SUB-SECT. 1.

**r. Who is a stakeholder—Solicitor retained to collect debt—When authorised to interplead.]**—Solr. retained to collect a debt is not entitled to interplead without a further retainer for that

of the ship would not be a bill to relieve himself, but a bill to relieve the owners of the ship, at his suggestion (PAGE WOOD, V.-C.).—*SABLICICH v. RUSSELL* (1866), L. R. 2 Eq. 441; 14 W. R. 913.

18. — **Debtor—Uncertainty to whom debt due.**—An assurance co. is not a trustee but a debtor, & is not justified in paying policy moneys into ct. under Trustee Relief Act, nor is it discharged by such payment. Therefore where M. had become entitled, by assignment, of which the statutory notice had been given to the co., to certain policy moneys, & the co. had paid the moneys into ct., not being satisfied as to M.'s title thereto, the fund being also claimed by the exors. of the assured, the co. was held not to be discharged by such payment, & was ordered to pay to M. the amount of the policy with interest, & the costs of the action.

An ordinary debtor can be described as a stakeholder only in the limited sense that he can bring an action of interpleader when his creditor has so dealt with the debt that he cannot find out whose debt it is.

A debtor, who, not being satisfied as to the title of his creditor, compels him to bring an action to prove it, is liable to pay the costs.—*MATTHEW v. NORTHERN ASSURANCE CO.* (1878), 9 Ch. D. 80; 47 L. J. Ch. 562; 38 L. T. 468; 27 W. R. 51.

19. **Entitled to relief.**—*EAST & WEST INDIA DOCK CO. v. LITTLEDALE*, No. 5, *ante*.

20. — **Indemnity from one claimant—Showing apparent title—Necessity to accept.**—*EAST & WEST INDIA DOCK CO. v. LITTLEDALE*, No. 5, *ante*.

#### SUB-SECT. 2.—SHERIFFS OR OTHER OFFICERS.

See R. S. C., Ord. 57, r. 1 (b).

21. **Sheriff—Relief discretionary.**—*BISHOP v. HINXMAN*, No. 125, *post*.

22. **“Other officers”—Lord of manor.**—*IBBOTSON v. CHANDLER* (1841), 9 Dowl. 250; H. & W. 83.

23. — **Receiver appointed by court.**—Resps. recovered judgment for a sum of money against a foreign co. carrying on business in France. Goods belonging to the co. being, at the date of the judgment, in the possession of a firm in England who had a lien upon them; resps. obtained in chambers, *ex p.*, an order appointing a receiver of the co.'s interest in the goods, & directing that any money received by him should be paid to resps. in satisfaction of their debt. Shortly after the receivership order was made the co. was adjudicated by a French ct. to be in judicial liquidation, & applts. were appointed liquidators. Subsequently, applts. having claimed to be entitled to the goods, under orders made by the Q. B. Div., the goods were sold; the lien was paid off; the balance in the hands of the receiver was paid into ct., & an issue was directed to try whether applts. or resps. were entitled to such balance:—*Held*: assuming that by the law of France applts. became entitled to the goods at the

date of the liquidation, yet the receivership order had the effect of entitling resps. to the goods, or the proceeds of them, as & from the date upon which it was made, subject only to the discharge of the lien which was a legal impediment to execution, & therefore, resps. were entitled to the balance paid into ct.—*LEVASSEUR v. MASON & BARRY*, [1891] 2 Q. B. 73; 60 L. J. Q. B. 659; 64 L. T. 761; 39 W. R. 596; 7 T. L. R. 436, C. A. *Annotations*:—*Mentd.* *Re Potts, Ex p. Taylor*, [1893] 1 Q. B. 648; *Re Anglesey, De Galve v. Gardner*, [1903] 2 Ch. 727; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Singer v. Fry* (1915), 84 L. J. K. B. 2025; *Re Pearce, Ex p. Official Receiver, The Trustee*, [1919] 1 K. B. 354.

#### SECT. 3.—WHEN RELIEF GRANTED.

##### SUB-SECT. 1.—IN GENERAL.

##### A. Equitable Rights.

NOTE.—Cases before C. L. P. Act, 1860 (c. 126), are omitted as obsolete.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 40; R. S. C., Ord. 57.

24. **Whether court will grant relief.**—An equitable claim is not the subject of an interpleader summons.—*HURST v. SHELDON* (1863), 13 C. B. N. S. 750; 143 E. R. 296.

*Annotation*:—*Reid.* *Evans v. Wright* (1865), 13 W. R. 468.

25. —.]—*EVANS v. WRIGHT*, No. 6, *ante*.

26. —.]—In an action for freight brought by the mtgee. of a ship against charterers under the mtgors. after the mtge., the charterers interpleaded & paid the freight into ct.; & an interpleader issue was directed between pltf. & the assignee in bkpcy. of the mtgors. On this issue a special case was stated, concluding with the question whether pltf. was entitled as against deft. to the sum in ct.:—*Held*: the ct. would in this special case consider the equitable rights of the parties; & as pltf. was equitably entitled to the freight as against the owners, & deft., as assignee in bkpcy. of the owners, could only take that to which the owners were equitably as well as legally entitled, pltf. was entitled to recover.

It would be a very narrow view of the Interpleader Acts to hold that it was not intended to confer upon the ct. a jurisdiction to determine equitable rights (*CHANNEL, B.*).—*RUSDEN v. POPE* (1868), L. R. 3 Exch. 269; 37 L. J. Ex. 137; 18 L. T. 651; 16 W. R. 1122; 3 Mar. L. C. 91.

*Annotations*:—*Folld.* *Duncan v. Cashin* (1875), L. R. 10 C. P. 554; *Engelback v. Nixon* (1875), L. R. 10 C. P. 645. *Reid.* *Jennings v. Mather*, [1901] 1 K. B. 108. *Mentd.* *Wilson v. Wilson* (1872), L. R. 14 Eq. 32; *Anderson v. Butler's Wharf Co.* (1879), 48 L. J. Ch. 824; *The Benwell Tower* (1895), 72 L. T. 664.

27. —.]—In the ordinary course of business between P. & co. & deft., P. & co. bought, on Sept. 14, 1869, a cargo of maize afloat from H. & re-sold it to deft. on the same day. On Oct. 4 they paid H. a deposit of £883 15s. & drew a bill on deft. for that amount. The bill having been

purpose, but being so retained he has the ordinary rights of solrs. as in other contested cases.—*HACKETT v. BIBLE* (1888), 12 P. R. 482.—CAN.

t. **Entitled to relief—Insurance company—Policy money attached—Conflicting attaching orders.**—*VICTORIA MUTUAL FIRE INSURANCE CO. v. BETHUNE* (1877), 1 A. R. 398.—CAN.

#### PART II. SECT. 2, SUB-SECT. 2.

*Sheriff—Proceeds of sale claimed*  
.]—A sheriff has a right

to interpleader where the proceeds of the sale of goods under execution are claimed by the official assignee in insolvency of the judgment debtor.—*BRAND v. BICKLE* (1868), 4 P. R. 191.—CAN.

#### PART II. SECT. 3, SUB-SECT.

24 i. **Whether court will grant relief.**—The ct. has power in interpleader proceedings to determine all equitable claims.—*ANDERSON v. CARTER* (1894), 20 V. L. R. 246.—AUS.

the judge may determine claimant's right to an equitable interest.—*MCINTOSH v. MCINTOSH* (1871), 18 Gr. 58.—CAN.

24 iii. —.]—*McKENZIE v. AETNA INSURANCE CO.* (1879), R. E. D. 346.—CAN.

24 iv. —.]—An equitable title is sufficient on which to base a claim in interpleader.—*BEAVER LUMBER CO. v. DOLSEN* (1916), 31 W. L. R. 819; 8 Sask. L. R. 231.—CAN.



*Sect. 3.—When relief granted: Sub-sect. 1, A., B.,* | goods of the execution creditor, the same  
upon an interpleader issue in a

duly accepted, was discounted by plffs. As between deft. & P. & co. this bill was drawn & accepted on the terms that the proceeds of the cargo should be applied to take it up when due. Deft. on the cargo arriving, sold it through P. & co. to C. who closed the sale at their request by paying H. what remained due to him, & taking up directly from him the shipping documents, which had been retained by him. After making this payment a balance of £415 10s. remained in C.'s hands. On Dec. 2, P. & co. suspended payment & executed an inspectorship deed, to which plffs. assented, & under which they proved. On Dec. 20, deft. executed a composition deed, to which plffs. assented, reserving their rights in respect of the above-mentioned balance. Had P. & co. not suspended payment they would have been entitled according to the custom of dealing applicable to the sale of the cargo, & it would have been their duty to have specifically applied the balance to taking up the bill.

Deft. having commenced an action against C. to recover this balance, an interpleader issue was directed between plffs. who also claimed it, & deft. P. & co. & their trustees under the inspectorship deed were made formal parties to the issue & proceedings, but neither they nor their trustees claimed any interest for themselves in the fund in dispute. On a case stated by judge's order in the course of the interpleader proceedings:—*Held*: plffs. were entitled to have the sum in C.'s hands applied *pro tanto* to discharging the bill which they had discounted.

The case has been presented to us sitting as a ct. of equity & we are asked to say that in equity plffs. have a right to the money in dispute (CLEASBY, B.).—*BANK OF IRELAND v. PERRY* (1871), L. R. 7 Exch. 14; 41 L. J. Ex. 9; 25 L. T. 845; 20 W. R. 300.

*Annotations*:—*Folld.* Engelback v. Nixon (1875), L. R. 10 C. P. 645. *Refd.* Duncan v. Cashin (1875), L. R. 10 C. P. 554. *Mentd.* Ebsworth v. Alliance Marine Insce. (1873), L. R. 8 C. P. 596.

28. —.]—The savings of a married woman's separate estate, like the income itself, become her separate estate in equity. Furniture was settled upon a married woman to her separate use, & with money, also her separate property, she from time to time renewed such as wore out. The whole was seized by the sheriff for a debt of her husband:—*Held*: as a ct. of equity would in the circumstances have restrained the sheriff from selling the accretions as well as the original furniture, a ct. of law, upon an interpleader summons, must take notice of the equitable claim of the wife's trustee, & direct the sheriff to withdraw.—*DUNCAN v. CASHIN* (1875), L. R. 10 C. P. 554; 44 L. J. C. P. 225; 32 L. T. 497; 23 W. R. 561.

*Annotations*:—*Consd.* Engelback v. Nixon (1875), L. R. 10 C. P. 645. *Refd.* Jennings v. Mather, [1901] 1 K. B. 108. *Mentd.* Norman v. Villars (1877), 36 L. T. 663.

29. —.]—In 1870 E. was adjudicated bkpt., & was allowed by the trustees to carry on his business for the benefit of his creditors. In 1875, a creditor, whose debt had been contracted whilst, & who was ignorant of the circumstances in which E. was so trading, obtained a judgment against him, under which the sheriff seized in execution furniture which E. had acquired by means of the profits of such trading. Upon an interpleader issue, in which the trustee was pltf. & the execution creditor deft.:—*Held*: as a ct. of equity would, in the circumstances, decree the goods to be the

law.

Upon trial of an interpleader issue the ct. will take notice of equitable rights.—*ENGELBACK v. NIXON* (1875), L. R. 10 C. P. 645; 44 L. J. C. P. 396; *sub nom.* ENGLEBACK v. NIXON, 32 L. T. 831.

*Annotations*:—*Mentd.* Wadling v. Oliphant (1875), 1 Q. B. D. 145; *Re* Gorton, Dowse v. Gorton (1889), 60 L. T. 305.

30. —.]—Debentures were issued by a limited co. in the form of bonds by which the co. covenanted to pay to bearer the principal & interest, each debenture containing a clause that the repayment was secured by an indenture of mtge. made between the co. & certain persons as trustees for the debenture holders. The mtge. deed was not identified in the debentures by its date or by any further particulars of its contents; & the debentures themselves did not affect to pass any of the co.'s property to the holder. The deed itself, which was of even date with the debentures was an ordinary deed of mtge., purporting to convey all the land, plant, machinery, fixtures, etc., of the co. to the mtgees.; it contained no trust for the benefit of the debenture holders. It was not registered as a bill of sale. Goods & chattels of the co. having been seized in execution under a judgment obtained by pltf. a claim was made to them by a holder of the debentures:—*Held*: the mtge. deed being void for want of registration under Bills of Sale Acts, the debentures created no charge enforceable by the holder against a *bonâ fide* execution creditor.—*JENKINSON v. BRANDLEY MINING CO.* (1887), 19 Q. B. D. 568; 35 W. R. 834; 3 T. L. R. 832.

*Annotations*:—*Mentd.* Topham v. Greenside Glazed Fire-Brick Co. (1887), 37 Ch. D. 281; *Read v. Joannon* (1890), 25 Q. B. D. 300; *Re* Standard Manufacturing Co., [1891] 1 Ch. 627.

31. —.]—A mtgor. of a house with the trade fixtures subsequently granted to claimant a bill of sale of the chattels, including the trade fixtures, upon the premises. The trade fixtures & other chattels were taken in execution under a judgment against the mtgor. In an interpleader issue between claimant & execution creditor:—*Held*: claimant having become possessed of the equity of redemption in the goods under the bill of sale was entitled to them as against execution creditor.—*USHER v. MARTIN* (1889), 24 Q. B. D. 272; 59 L. J. Q. B. 11; 61 L. T. 778.

*Annotation*:—*Refd.* Jennings v. Mather, [1901] 1 K. B. 108.

32. —.]—(1) The assignee under a deed of assignment for the benefit of creditors incurred debts in the course of carrying on the business. Judgment having been obtained against him, the execution creditor seized some of the assets of the business. The assignee having meanwhile become bkpt., these assets were claimed by the trustee in bkpcy. In an interpleader issue:—*Held*: although the assets were property held on trust by the bkpt. & so by Bkpcy. Act, 1883 (c. 52), s. 44, were not divisible among his creditors, yet he had a right of indemnity over them in the nature of a lien which passed to his trustee in bkpcy., & therefore the trustee in bkpcy. was entitled to succeed as against the execution creditor.

(2) It is no novel doctrine that the ct. is bound in interpleader cases to recognise equitable rights (KENNEDY, J.).—*JENNINGS v. MATHER*, [1901] 1 K. B. 108; 70 L. J. Q. B. 53; 83 L. T. 506; 49 W. R. 495; 8 Mans. 14, D. C.; *affd.*, [1902] 1 K. B. 1, C. A.

*Annotation*:—*Generally, Mentd.* *Re* Jones, *Ex p.* Official Receiver (1910), 55 Sol. Jo. 30.

*B. Claims Differing in Extent.*

NOTE.—Cases before C. L. P. Act, 1860 (c. 126), are omitted as obsolete.

See, now, R. S. C., Ord. 57.

33. No bar to relief—Deduction of applicant's charges—Admitted by one claimant & not by the other.]—BEST v. HAYES, No. 36, *post*.

34. — Claims for goods—On claimant also claiming damages.]—ATTENBOROUGH v. ST. KATHARINE'S DOCK CO., No. 40, *post*.

*C. Claims Not having a Common Origin.*

NOTE.—Cases before C. L. P. Act, 1860 (c. 126), are omitted as obsolete.

See, now, R. S. C., Ord. 57, r. 3.

35. No bar to relief.]—MEYNELL v. ANGELL, No. 37, *post*.

36. —.]—Deft. was entrusted by pltf. with furniture, etc., to sell for him by auction, & deft. having sold, & between £300 & £400 of the proceeds being still in his hands, deft. received a notice from G. that she claimed the goods. An action having been brought by pltf. against deft., to recover the balance in his hands, deft. sought to deduct his charges for commission, etc., & asked for an interpleader order between pltf. & G. as to the residue. G. being willing to allow deft. his charges, & to take the issue:—*Held*: an order as prayed might be made, if not under Interpleader Act, 1831 (c. 58), under C. L. P. Act, 1860 (c. 126), s. 12.—BEST v. HAYES (1863), 1 H. & C. 718; 32 L. J. Ex. 129; 11 W. R. 71; 158 E. R. 1073.

Annotations:—*Apld.* Tanner v. European Bank (1866), L. R. 1 Exch. 261. *Foll.* Attenborough v. St. Katharine's Dock Co. (1878), 3 C. P. D. 450. *Apprvd.* Robinson v. Jenkins (1890), 24 Q. B. D. 275. *Refd.* Evans v. Wright (1865), 13 W. R. 468; *Ex p.* Mersey Docks & Harbour Board, [1899] 1 Q. B. 546.

*D. Personal Obligation to One Claimant.*

(a) Since Common Law Procedure Act, 1860.

See, now, R. S. C., Ord. 57, r. 3.

37. No bar to relief—Agency.]—Pltf. having contracted in his own name with deft. to do certain work completed it, & was paid part of the price, when deft. received notice from C. that pltf. was C.'s agent in making the contract, & that further payment to pltf. would be at deft.'s peril. Pltf. having brought this action for the balance, admitted to be due to some one:—*Held*: under C. L. P. Act, 1860 (c. 126), s. 12, an interpleader might be granted in favour of deft.

I prefer deciding the case on the broad ground that C. L. P. Act, 1860 (c. 126), s. 12, enables the ct. to give relief whenever it appears that in the particular case the relief will be complete & just, even though the claims had not a common origin. . . . It might have been the case that deft. was estopped as to one of claimants or some other reason might have existed showing that it would have prejudiced the fair rights of either of claimants if Angell was relieved & claimants put to interplead. But such were not the facts here. If such had been the facts my judgment would have been different (BLACKBURN, J.).—MEYNELL v. ANGELL

(1862), 1 New Rep. 126; 32 L. J. Q. B. 14; 8 Jur. N. S. 1211; 11 W. R. 122.

Annotations:—*Consd.* Best v. Hayes (1863), 1 H. & C. 718; *Attenborough v. St. Katharine's Dock Co.* (1878), 3 C. P. D. 450.

38. — Bailment.]—BEST v. HAYES, No. 36, *ante*.

39. —.]—A. sued defts., to whom he had entrusted a policy for certain specified purposes, & declared in trover & detinue, & specially on the contract. B., who had pledged the policy with A., then brought an action against the same defts. for the recovery of the policy. An interpleader order was made directing that the proceedings in the first action should be stayed till further order, that A. should be at liberty to defend the second action, indemnifying defts., & that B. should give defts. security for costs:—*Held*: the order was rightly made.—TANNER v. EUROPEAN BANK (1866), L. R. 1 Exch. 261; 4 H. & C. 398; 35 L. J. Ex. 151; 12 Jur. N. S. 414; 14 W. R. 675; *sub nom.* Re TANNER v. EUROPEAN BANK, BOWEN v. EUROPEAN BANK, 14 L. T. 414.

Annotations:—*Foll.* Attenborough v. St. Katharine's Dock Co. (1878), 3 C. P. D. 450. *Apprvd.* Robinson v. Jenkins (1890), 24 Q. B. D. 275. *Refd.* *Ex p.* Mersey Docks & Harbour Board, [1899] 1 Q. B. 546; Sun Insee. Office v. Galinsky (1913), 110 L. T. 358.

40. —.]—(1) S. was the agent of L., a wine merchant in Spain, & was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, & sent the bills of lading to S., the bills of lading were handed by S., to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with defts., a dock co., who issued warrants for the same; some of the wine therein mentioned was made deliverable to the order of one of the three persons, & the rest to the order of another of them. The warrants were then pledged with pltf. to secure advances. L., afterwards served notice upon defts. not to part with the wine; thereupon defts. refused to give up the wine when it was demanded of them by pltf., who commenced actions claiming damages in addition to the value of the wines:—*Held*: defts. were entitled to an interpleader order under Interpleader Act, 1831 (c. 58), s. 1, & C. L. P. Act, 1860 (c. 126), s. 12, for the right to the wine might be determined as between pltf. & L., & the actions might be stayed as to that, & might be continued as to the claims for damages, & by issuing the dock-warrants defts. had not debarred themselves from obtaining relief under those statutes.

I do not think that the statutes apply merely where the opposing claims are co-extensive; I think that they bear a wider construction (BRETT, L.J.).

I cannot think that in this case there was any estoppel, but I confess that in my view, although a deft. in possession of goods may be technically estopped from denying pltf.'s claim to them, yet if a *bond fide* claim is made to them by a third person, a judge ought to disregard the technical

to interplead the second time.—GAYNOR v. SALT (1864), 24 U. C. R. 180.—CAN.

PART II. SECT. 3, SUB-SECT. 1.—D. (a).

38 i. No bar to relief—Bailment.]—BOMBAY, BARODA & CENTRAL INDIA RY. Co. v. SASSOON (1893), 1 L. R. 18 Bom. 231.—IND.

d. Bar to relief—Bailment.]—Where goods delivered to a common

PART II. SECT. 3, SUB-SECT. 1.—B.

b. No bar to relief.]—PEACOCK v.

interpleader suit is not improperly constituted merely because one of the defts. does not claim the whole of the subject-matter.—SECRETARY OF STATE v. MIR MUHAMMAD HUSAIN (1863), 1 Mad. 360.—IND.

PART II. SECT. 3, SUB-SECT. 1.—C.

35 i. Bar to relief.]—On application for a rule nisi to rescind two interpleader orders granted to the sheriff, or to revive a previous rule nisi for the same purpose which had been allowed to lapse, claimant having alleged a different title from that on which the first summons was obtained, claiming first as partner & next as sole owner:—*Held*: the sheriff was entitled



*Sect. 3.—When relief granted: Sub-sect. 1, D. (a)*  
*(b); sub-sect. 2, A., B. & C.]*

estoppel & to direct an issue under the Interpleader Acts to try the question as to the property between pltf. & claimant (*BRETT, L.J.*).

(2) It has been suggested that defts. ought not to be allowed to interplead because claimant L. is a foreigner residing out of the jurisdiction of the High Ct. That is no ground for rejecting this application, although it may be a reason for making him give security for costs (*BRAMWELL, L.J.*).—*ATTENBOROUGH v. ST. KATHARINE'S DOCK CO.* (1878), 3 C. P. D. 450; 47 L. J. Q. B. 763; 38 L. T. 404; 26 W. R. 583, C. A.

*Annotations:—As to (1) Consd. Wright v. Freeman* (1879), 40 L. T. 134. *Folld. De Rothschild v. Morrison, Kekewich, La Banque de Paris et des Pays Bas v. Same, La Banque de France v. Same* (1890), 24 Q. B. D. 750; *Robinson v. Jenkins* (1890), 24 Q. B. D. 275. *Consd. Rogers v. Lambert*, [1891] 1 Q. B. 318. *Distd. Henderson v. Williams*, [1895] 1 Q. B. 521. *Folld. Ex p. Mersey Docks & Harbour Board*, [1899] 1 Q. B. 546. *Generally, Mentd. R. v. Central Criminal Court JJ.* (1886), 18 Q. B. D. 314.

41. ———.]—*ROBINSON v. JENKINS*, No. 215, *post*.

42. ———.]—The bailee of goods cannot avail himself of the title of a third person to the goods as a defence to an action of detinue by the bailor, except by further showing that he is defending the action on behalf & by the authority of such third person.

As soon as there were several rival claimants to the copper, defts. should have instituted interpleader proceedings against the rival claimants. It is true that such proceedings would have been improper by reason of the bailment. But that was decided before C. L. P. Act, 1860 (c. 126), had been passed, & although other decisions in Chancery may be found since that Act, it has been pointed out that the provision in C. L. P. Act, 1860 (c. 126), has materially modified the principles on which that was decided, & has enabled the ct. to grant relief to a person who has entered into a contract with one of the interpleading parties. This was settled by *Attenborough v. St. Katharine Dock Co.*, No. 40, *ante*. That case & the more recent decision in *Robinson v. Jenkins*, No. 215, *ante*, show that, notwithstanding the contract of bailment, defts. could have instituted interpleader proceedings in this case (*LINDLEY, L.J.*).

*ROGERS, SONS & CO. v. LAMBERT & CO.*, [1891] 1 Q. B. 318; 60 L. J. Q. B. 187; 64 L. T. 406; 55 J. P. 452; 39 W. R. 114; 7 T. L. R. 69, C. A.

*Annotations:—Apld. Russian Commercial & Industrial Bank v. Comptoir D'Escompte de Mulhouse*, [1925] A. C. 112. *Refd. Henderson v. Williams*, [1895] 1 Q. B. 521. *Mentd. Bristol & West of England Bank v. Mid. Ry.* (1891), 61 L. J. Q. B. 115.

43. ———.]—*Ex p. MERSEY DOCKS & HARBOUR BOARD*, No. 13, *ante*.

44. ——— *Tenancy.*]—*EVANS v. WRIGHT*, No. 6, *ante*.

*(b) Before Common Law Procedure Act, 1860.*

45. *Bar to relief.—Former law.*]—*CRAWSHAY v. THORNTON*, No. 190, *post*.

46. *Bailment.*]—*LANGSTON v. BOYLSTON* (1793), 2 Ves. 101; *COOPER v. DE TASTET* (1829),

*Taml.* 177; *PEARSON v. CARDON* (1831), 2 Russ. & M. 606; *MASON v. HAMILTON* (1831), 5 Sim. 19; *SLANEY v. SIDNEY* (1845), 14 M. & W. 800; *HORTON v. DEVON (EARL)* (1849), 4 Exch. 497.

47. *Agency.*]—*NICKOLSON v. KNOWLES* (1820), 5 Madd. 47; *SMITH v. HAMMOND* (1833), 6 Sim. 10; *JAMES v. PRITCHARD* (1840), 7 M. & W. 216; *JOHNSON v. SHAW* (1842), 4 Man. & G. 916; *PRICE v. DICKENSON* (1843), 1 L. T. O. S. 232; *PALMER v. PATTERSON* (1844), 4 L. T. O. S. 210; *AUSTIN v. BROWN* (1850), 15 L. T. O. S. 72; *WATTS v. HAMMOND* (1855), 3 Eq. Rep. 641.

48. *Contract.*]—*PATORNI v. CAMPBELL* (1843), 12 M. & W. 277; *TURNER v. KENDAL CORPN.* (1844), 13 M. & W. 171; *LINDSEY v. BARRON* (1848), 6 C. B. 291.

49. *Bill of exchange.*]—*BAKER v. BANK OF AUSTRALASIA* (1857), 1 C. B. N. S. 515.

## SUB-SECT. 2.—TO STAKEHOLDERS.

### A. Possession of Subject-Matter.

50. *Applicant must have possession—Possession parted with—Undertaking to pay equivalent money value.*]—Pltf. having parted with the property, cannot sustain an interpleading bill against different claimants, upon an undertaking to pay over the value to the party entitled.—*BURNETT v. ANDERSON* (1816), 1 Mer. 405; 35 E. R. 723, L. C.

### B. Pending or Expected Action.

*See R. S. C., Ord. 57, r. 1 (a).*

51. *Applicant need not be actually sued.*]—It is sufficient to support a bill of interpleader that each of defts. has a claim to the matter in question, although one only can maintain an action at law, the principle being, to prevent a pltf. from being doubly vexed. It is therefore not necessary that he should have been actually sued.—*MORGAN v. MARSACK* (1816), 2 Mer. 107; 35 E. R. 881, L. C. *Annotation:—Refd. Crawford v. Fisher* (1842), 6 Jur. 576.

52. *Expectation of proceedings—Must be substantial.*]—Where deft. obtained a rule under Interpleader Act, 1831 (c. 58), upon a suggestion that a third party claimed the amount in his hands, for which he was sued, & it afterwards appeared, that deft. had no just expectation that he should be sued by the third party, the ct. discharged the rule with costs.—*HARRISON v. PAYNE* (1836), 2 Hodg. 107.

53. ———.]—The ct. will not grant relief under Interpleader Act, 1831 (c. 58), where the third party has not evinced any intention to sue.—*SHARPE v. REDMAN* (1837), Will. Woll. & Dav. 375; 1 Jur. 775.

54. ——— *Groundless threats.*]—A bill of interpleader contained an allegation that one of defts., W., intended to commence an action. The allegation was denied, & was not proved. The bill also, on the face of it, contained allegations which showed that under the alleged circumstances, the case of interpleader could not arise under the Act. The solr. who filed the bill was at the same

carrier by F. were seized by the sheriff under an execution against P.:—*Held*: the carrier could not call upon the execution creditor & sheriff to interplead with F.—*MERCHANTS BANK v. PETERS* (1884), 1 Man. L. R. 372.—*CAN.*

## PART II. SECT. 3, SUB-SECT. 2.—A.

*e. Applicant must have possession—Possession parted with.*]—Proceedings in the nature of an interpleader suit

are intended solely to relieve stakeholders from cross demands, & lose foundation the moment the stakeholder voluntarily ceases to be such by parting with the goods or their value.—*COUSENS v. MCGEE* (1867), 4 W. W. & A'B. 29.—*AUS.*

*f. ———.]—HENDERSON v. WATSON* (1876), 23 Gr. 355.—*CAN.*

*g. ———.]—Deft., an auctioneer, sold, by the instructions of pltf. some furniture after he had*

received notice of a claim to it under a bill of sale, & disposed of a portion of the proceeds according to pltf.'s direction. Subsequently, a claim was made to the balance by the holder of the bill of sale, & deft. obtained a summoning order:—*Held*: the state of facts did not entitle deft. to an interpleader order.—*POLAND v. COALL* (1873), 1 R. 7 C. L. 108.—*IR.*

*h. ———.]—Re BENFIELD & STEVENS* (1897), 17 P. R. 339.—*CAN.*



time acting for deft., W. He told deft. W. that the claim of his co-deft. was instituted with a view to persecution, when the solr. himself was aware that no defence could be made to co-deft.'s claim. He also omitted to state to his client, pltf., a communication which he received from deft. W. to the effect that he, W., would take no proceedings against pltf.

Deft. W. having obtained an order for taxation of costs due from him to the solr. in the interpleader suit & other matters, petitioned the ct. that in taxing such bill, all items in respect of costs in the interpleader suit might be disallowed.

Ordered that the solr. be disallowed all charges & disbursements in the interpleader suit, & that he pay the costs of the petition.—*Re HOOK, COOK v. ROSSLYN (EARL)* (1861), 3 Giff. 175; 5 L. T. 133; 66 E. R. 371; *sub nom. COOK v. ROSSLYN (EARL), ROSSLYN (EARL) v. WALROND, Re HOOK*, 7 Jur. N. S. 1070.

**55. Proceedings impending between claimants—Knowledge of stakeholder.**—Where the stakeholder alleged that the fund in his hands was less than one of claimants asserted to be the amount, a bill of interpleader cannot be maintained. Nor where, before it was filed, one of claimants had informed the stakeholder that he would file a bill to enforce his demand; & did in fact file his bill on the same day with the interpleader bill, making the only other claimant & the stakeholder parties.—*DIPLOCK v. HAMMOND, ST. MARY'S, NEWINGTON GUARDIANS v. HAMMOND* (1854), 2 Sm. & G. 141; 2 Eq. Rep. 409; 23 L. J. Ch. 550; 2 W. R. 287; 65 E. R. 339; *on appeal*, 5 De G. M. & G. 320, L. JJ.

*Annotations*:—*Mentd. Re Adams, Ex p. Shellard* (1873), L. R. 17 Eq. 109; *Re Whitting, Ex p. Hall* (1879), 10 Ch. D. 615; *Brandt's v. Dunlop Rubber Co.*, [1905] A. C. 454.

### C. Real and Adverse Claims.

*See R. S. C., Ord. 57, r. 1 (a).*

**56. Claim must be real—Assignment of right by one claimant to another—Subsequent repudiation.**—*EAST INDIA CO. v. EDWARDS* (1811), 18 Ves. 376; 34 E. R. 359.

**57. — Priority of one claim clearly apparent.**—(1) An occupier of lands took a lease of the tithes, due from himself to a rector, at a rent reserved. The rent was afterwards assigned by the rector to another person who claimed to be paid the arrears. The lessee having also received notice of a further claim from grantees of annuities, previously charged on the tithes by the rector, who had, as such grantees, subsequently to the title of the rector's assignee, sued out, a *fi. fa. de bonis ecclesiasticis*, against the rector, on a judgment obtained by them on their securities, filed a bill of interpleader against all the parties, & obtained injunctions on paying the rent due from him into ct. On the answers of defts. coming in, the priority of the several titles of claimants being thereby clearly set out, & the rector disclaiming, the ct. dissolved the injunctions,

holding, that in such a case they could not restrain the party who was shown to have a preferable title, from proceeding to enforce it; or to decree that the parties should interplead in a case where the priority of right was so distinctly set forth by the answers. If the case be not such as will support a bill of interpleader, defts. should demur.

(2) In an interpleading suit, one of defts.' answers may be read against the others.—*BOWYER v. PRITCHARD* (1822), 11 Price, 63; 147 E. R. 415.

**58. — Liability of applicant to action—At suit of one claimant.**—Testator gave a legacy of £500 to trustees, upon trust to invest it in govt. or good security, & pay the interest to his widow for life, with remainder over: after his death, his exors., who were different persons from the trustees of the legacy, & the trustees of the legacy stated to a debtor, who owed testator £500 on bond, that they had arranged & agreed to appropriate that debt for the legacy; & from that time, during a period of more than fourteen years, the debtor, with the privity of the trustees, & also of the exors., had paid the interest of the bond to the tenant for life of the legacy: the exors. having called for payment of the bond, & proceeding to sue upon it, while, on the other hand, the surviving trustee of the legacy had given notice to the debtor not to pay it to them:—*Held*: the debtor was entitled to file a bill of interpleader.—*WRIGHT v. WARD* (1827), 4 Russ. 215; 6 L. J. O. S. Ch. 42; 38 E. R. 786, L. C.

*Annotation*:—*Appld. G. S. & W. Ry. v. Corry* (1867), 15 W. R. 650.

**59. — — — — —**—A., by a deed of separation, covenanted with a trustee that he would pay to his wife, or to the trustee, for her separate use, an annuity during the separation; & by the same deed A. assigned leaseholds to the trustee, to secure payment of the annuity. A. regularly paid the annuity to his wife, without the intervention of the trustee. Afterwards, the wife, on the faith of this separate property, borrowed the money of B., who filed his bill against the husband & wife, without making the trustee a party, for payment of his debt out of the annuity. The husband then filed his bill against the trustee & B. & the wife, stating that B. had filed his bill against him, & also that the trustee threatened to distrain for the arrears of the annuity, & praying to be at liberty to pay the arrears into ct., & to be indemnified against the costs of B.'s suit:—*Held*: upon demurrer, that this bill was not sustainable, either as a bill *quia timet* in regard to the costs of B.'s suit, or as a bill of interpleader; inasmuch as B.'s suit, in its then existing frame, was not sustainable against A.—*PALMER v. FRASER* (1839), 3 Y. & C. Ex. 491; 3 Jur. 890; 160 E. R. 796.

**60. — Plaintiff able to pay one claimant—Without incurring risk—Assignment of policy.**—A life insurance co. received notice of an assignment, by an insurer, of a policy which the co. had granted, & the insurer afterwards became bkpt. Soon after the death of the person whose

### PART II. SECT. 3, SUB-SECT. 2.—B.

**55 i. Proceedings impending between claimants—Knowledge of stakeholder.**—Application of bank to compel garnishing creditor of deft. & the assignee of deft.'s deposit receipt to interplead. Deft. had assigned the deposit receipt to his wife who had demanded the money. The bank delayed payment on various pretexts for five days when pltf.'s garnishing order was served. Pltf. eight days afterwards took out a summons to pay over & the bank after seven more days took out the

interpleader summons:—*Held*: the interpleader order should go, as the delay was not unreasonable, & claimants' rights had not been prejudiced.—*SCHMIDT v. DOUGLAS*, 14 C. L. T. Occ. N. 515.—CAN.

### PART II. SECT. 3, SUB-SECT. 2.—C.

**j. Claim must be real.**—Where money was placed in defts.' hands by pltf., on an agreement between pltf. & A., to be paid over by defts. to A., in the whole or in part, on his making up certain accounts & performing his

agreement with pltf., but pltf. sued defts. for the money before they had come to any decision as to A.'s claim, which they were to determine upon:—*Held*: defts. were not entitled to an interpleader.—*COTTON v. CAMERON* (1836), 2 P. R. 62.—CAN.

**k. — — — — —**—*ONTARIO BANK v. HAGGART* (1888), 5 Man. L. R. 204.—CAN.

**l. — — — — —**—*GLYNN v. LOCKE* (1842), 3 Dr. & War. 11.—IR.

**m. — — — — —**—A mere pretext of a conflicting claim will not support a

61. ————.]—DESBOROUGH v. HARRIS, No. 8, ante.

62. ————.]—Policy holders whose claims for payment were disputed by the insurance co., deposited the policy as a security. The depositors brought an action in the name of the depositors against the co., & pending the action, sub-mortgaged the policy with other securities. Afterwards the depositors gave notice to the sub-mtgee. to hold at the disposal of a bank any "balances" which might be due from the sub-mtgee. to the depositors. The attorneys acting in the prosecution of the action requested the bank, if interested in the result of the pending proceedings, to see that funds were supplied for their prosecution, stating at the same time, that similar applications had been ineffectually made to the depositors. The bank took no notice of the application, & afterwards a purchaser of the equity of redemption supplied the requisite funds by means of which the insurance money was recovered:—*Held*: the bank had not lost their priority over the purchaser, & in order to have produced this result the bank ought at least to have been apprised of the purchase, & of the purchaser's advances; the purchaser was entitled to be repaid all the sums which he had expended in the action, & to be paid his costs of a suit instituted by the bank disputing his title to such repayment.

After an award in the action, the insurance co. received notice of an assignment by pltf. of all their property, together with a demand by the assignees for payment of the money recovered in the action. *Semble*: they were not entitled to file a bill of interpleader, as they might safely have paid the money to pltf.'s attorneys.—MYERS v. UNITED GUARANTEE & LIFE ASSURANCE CO., UNITED GUARANTEE & LIFE ASSURANCE CO. v. CLELAND (1855), 7 De G. M. & G. 112; 3 Eq. Rep. 579; 25 L. T. O. S. 109; 1 Jur. N. S. 833; 3 W. R. 440; 44 E. R. 44, L. JJ.

*Annotations*:—*Dbtd.* G. S. & W. Ry. v. Corry (1867), 15

bill of interpleader; the ct. is bound to see that there is a question to be tried.—COCHRANE v. O'BRIEN (1845), 2 Jo. & Lat. 380.—IR.

63 i. *Claim must be adverse—In respect of same subject-matter.*—MCELHERAN v. LONDON MASONIC MUTUAL BENEFIT ASSOCN. (1885), 11 P. R. 181.—CAN.

63 ii. ————.]—GREER v. FAULKNER (1908), 40 S. C. R. 399.—CAN.

63 iii. ————.]—Relief by way of interpleader may be granted to a vendor of land as between two agents

each claiming the same amount as commission on the sale of land, the vendor admitting that the amount is due to one or other of the agents.—WEBB v. RODNEY (1909), 19 Man. L. R. 120.—CAN.

63 iv. ————.]—DAVISON v. LEHBERG (1910), 13 W. L. R. 719.—CAN.

63 v. ————.]—Where the claimants of the proceeds of a policy of fire insurance are jointly interested, but not adversely to one another, in establishing as great a liability as possible in the insurance co., & the question outstanding, once the amount

67. ————.]—A house was insured against fire in the joint names of the lessor & lessee. During the currency of the policy the house was burnt down, & the lessor served notice on the insurance co. under Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, requesting them to cause the insurance money to be laid out & expended in or towards rebuilding the house. The lessee wrote a letter to the insurance co. which the latter contended amounted to a claim that the insurance money should be paid to him. The insurance co. took out an originating summons for relief by way of interpleader under R. S. C., Ord. 57, r. 1 (a):—*Held*: the insurance co. were not entitled to relief by way of interpleader upon the ground (1) that the lessee had not made any claim to the insurance co. money, & therefore there were not "two or more parties making adverse claims" within R. S. C., Ord. 57, r. 1 (a); (2) as the lessor was claiming the performance by the insurance co. of their statutory obligation under sect. 83 of the Act to expend the insurance money in rebuilding the house, & as the lessee was claiming that the insurance co. should pay the money to him, there were not two or more parties making "adverse claims" in respect of a liability of the insurance co. "for any debt, money, goods, or chattels" within R. S. C., Ord. 57, r. 1 (a).—SUN INSURANCE OFFICE v. GALINSKY, [1914] 2 K. B. 545; 83 L. J. K. B. 633; 110 L. T. 358, C. A.

68. ————. *Claim for occupation rent & rent reserved on lease.*—Claim by one for rent reserved on a lease, & by another for rent due for occupation of same premises, not a case of interpleader. This representation of his claim by one which induces pltf. to file a bill of interpleader does not give the ct. jurisdiction to compel interpleading; but the ct. will consider it in giving costs. After an answer which discloses the true nature of the case that it is not one of interpleader, pltf. is not justified in setting down

of such liability is settled, is that of the claimants' respective rights, & priorities under Mechanics' Lien Act, an application by the co. for leave to interplead is not the proper procedure for it to take in respect to the amount which it admits to be due.—*Re LIVERPOOL, ETC., INSURANCE CO. v. KADLAC*, [1918] 2 W. W. R. 727; 13 Alta. L. R. 498.—CAN.

63 vi. ————.]—DORAN v. EVERITT (1839), 2 I. Eq. R. 28.—IR.

63 vii. ————.]—FRENCH v. ROYAL EXCHANGE ASSURANCE CO. (1857), 7 I. Ch. R. 523.—IR.

the cause for hearing.—PAGE v. HILL & WOOD (1832), 1 L. J. Ch. 200.

69. ——— Separate claim for auctioneer's commission.]—Separate claims for commission by rival house agents on a sale of the same house are not such "adverse or conflicting claims to the same subject-matter" as to come under the jurisdiction relating to interpleader issues either under C. C. R. or R. S. C.—GREATOREX v. SHACKLE, [1895] 2 Q. B. 249; 64 L. J. Q. B. 634; 72 L. T. 897; 44 W. R. 47; 39 Sol. Jo. 602; 15 R. 501, D. C.

——— Claim for unliquidated damages.]—See No. 40, ante.

70. ——— By two or more persons.] — SUN INSURANCE OFFICE v. GALINSKY, No. 67, ante.

#### D. Liability to Both Claimants.

71. Interpleader not available.]—(1) A supplemental bill of interpleader held to be regular, although filed in respect of a sum amounting to less than £10.

Pltf., in interpleader, must bear the costs of any proceedings which he may take in the suit that are productive of needless expense; & therefore, where pltf. filed affidavits, verifying the statements of the bill, & entered into evidence in the cause, & obtained a second injunction *ex p.* to restrain proceedings at law, when no such proceedings were threatened, he was ordered to pay the costs thereby incurred.

If the circumstances of a case show that pltf. is liable to both claimants that is no case for interpleader (WIGRAM, V.-C.).

(2) As pltf. in interpleader takes his costs out of the fund in his hands, he should be cautious to avoid burdening that fund to an extent beyond what his own protection may require. I think it right to add, to guard myself on this point, that vexatious conduct, or culpable negligence, on the part of pltf. in the prosecution of an interpleading suit, whereby needless expense is occasioned, ought, in my opinion, to be visited, in all cases, with costs against pltf. (WIGRAM, V.-C.).—CRAWFORD v. FISHER (1842), 1 Hare, 436; 11 L. J. Ch. 273; 6 Jur. 576; 66 E. R. 1103.

72. ——— Payment by bill of exchange—Claim by holder for value & vendor.]—Deft. having purchased cattle from pltf., accepted a bill in payment, with a blank for the name of the drawer, & remitted it by post to pltf. This bill subsequently came into the hands of B. & S. for a valuable consideration. Pltf., denying that he had ever authorised payment by an acceptance, or that he had ever received the bill or indorsed it, brought an action against deft. for the price of the cattle. B. & S. also threatened to commence an action against him upon the bill:—*Held*: deft. was not entitled under Interpleader Act, 1831 (c. 58), s. 1.

*Semble*: to give the ct. jurisdiction under that Act there must be cross claims on one & the same subject-matter, & the party applying must show that he cannot in any case be liable to both claimants.—FARR v. WARD (1837), 2 M. &

70 i. ——— By two or more persons.]—Where a person in good faith, but from wrong information, replevied property which did not belong to him: & after a verdict against him, a new claimant insisted that the property was his, & threatened an action:—*Held*: not a case for an interpleader in the Ct. of Ch.—FULLER v. PATTERSON (1869), 16 Gr. 91.—CAN.

70 ii. ———.]—*Re* CONFEDERA-

LIFE ASSOCN. & CORDINGLY (1900), 20 C. L. T. 32; 19 P. R. 89.—CAN.

70 iii. ———.]—MOLSONS BANK v. EAGER (1905), 6 O. W. R. 93, 180; 10 O. L. R. 452.—CAN.

70 iv. ———.]—Deft. interpleading must allege & show that some person or persons other than pltf. claim the same chattels.—LANCE v. DOMBRAIN (1894), 13 N. Z. L. R. 374.—N.Z.

844; Murp. & H. 244; 6 L. J. Ex. 213; 150 E. R. 1000.

Annotation:—*Re* Slaney v. Sidney (1845), 3 Dow. & L. 250.

73. ——— Claim in respect of goods—Against ship's master.]—SABLICICH v. RUSSELL, No. 17, ante.

74. ——— Against ship's owner.]—VICTOR SÖHNE v. BRITISH & AFRICAN STEAM NAVIGATION CO., LTD., [1888] W. N. 84, D. C.

#### E. Assignment of Debts.

See Law of Property Act, 1925 (c. 20), s. 136; R. S. C., Ord. 57, rr. 1, 4.

75. Debtor may interplead.]—(1) Where a debtor has a claim made against him in an action, & has been notified of the assignment of his debt, part of which he admits to be due & is ready to satisfy, he may interplead as to that part, & defend as to the residue. The debtor in such a case may make his application for relief by way of interpleader, either by proceeding in the action under R. S. C., Ord. 57, rr. 1 & 4, or independently of the action under Jud. Act, 1873 (c. 66), s. 25 (6).

(2) Where the action has been commenced against the debtor, & the latter applies for relief by way of interpleader under Jud. Act, 1873 (c. 66), s. 25 (6), the judge who makes the interpleader order has no jurisdiction to order a stay of proceedings in the action.

(3) Defts. must have their costs of the proceedings in chambers up to the interpleader order, such costs to be deducted out of the fund paid into ct. (DAY, J.).

(4) All the Common Law Statutes as to interpleader are now repealed & the right to that class of relief is regulated by R. S. C., Ord. 57, by which the old practice of the Ct. of Ch. is modified (WILLES, J.).—READING v. LONDON SCHOOL BOARD (1886), 16 Q. B. D. 686; 54 L. T. 678; 34 W. R. 609; 2 T. L. R. 476, D. C.

Annotation:—As to (3) *Folld. Clench v. Dooley, Saunders, Hawksford, Bennett, Claimants* (1886), 56 L. T. 122.

76. ——— Assignment by judgment creditor—Bankruptcy of creditor.]—A judgment creditor assigned the debt, & afterwards became insolvent. The judgment debtor died, & her exor. received notices from three claimants, one from the assignee of the debt, another from the assignee of the judgment creditor in insolvency, & a third from the attorney of the judgment creditor, in respect of his lien for costs; the exor. thereupon filed his bill of interpleader:—*Held*: the bill could be sustained.—JONES v. THOMAS (1854), 2 Sm. & G. 186; 22 L. T. O. S. 301; 18 Jur. 460; 2 W. R. 249; 65 E. R. 358.

77. ——— Bankruptcy of assignor.]—An assignee of book debts sued one of debtors for a debt of £27, the trustee in bkpcy. of the assignor claimed the money, & on the trial of an issue ordered to decide as to the ownership of the debt, disputed the assignment on the ground that the assignee had at the time of the assignment notice of an act of bkpcy. committed by the assignor. The trustee, being unsuccessful, afterwards applied

#### PART II. SECT. 3, SUB-SECT. 2.—D.

71 i. Interpleader not available.]—BARBER v. ROYAL LOAN & SAVINGS CO. (1912), 23 O. W. R. 31; 4 O. W. N. 91; 5 D. L. R. 885.—CAN.

71 ii. ———.]—COCHRANE v. O'BRIEN (1945), 2 Jo. & Lat. 380.—IR.

#### PART II. SECT. 3, SUB-SECT. 2.—E.

75 i. Debtor may interplead.]—DAVIDSON v. DOUGLAS (1865), 12 Gr. 181.—CAN.



*Sect. 3.—When relief granted: Sub-sect. 2, I., H., I.,*

to set aside the assignment upon other grounds:—*Held*: as the trustee might have raised these other grounds at the trial of the issue, & did not do so, he could not set them up upon the present application.—*Re HILTON, Ex p. MARCH* (1892), 67 L. T. 594; 9 Morr. 286.

*Annotations*:—*Reid. Humphries v. Humphries*, [1910] 2 K. B. 531; *Ord v. Ord*, [1923] 2 K. B. 432.

78. — **Written assignment—No sufficient notice thereof.**—*Semble*: the proviso to Jud. Act, 1873 (c. 66), s. 25 (6), as to interpleading applies, though no action has been commenced. Leave to deft. co. to call upon rival claimants to shares to interplead refused, on the ground that there was not sufficient notice of an absolute written assignment of the shares.—*Re NEW HAMBURG & BRAZILIAN RY. CO.*, [1875] W. N. 239; Bitt. Prac. Cas. 57; 1 Char. Cham. Cas. 11.

79. **Absolute assignment in writing—Necessity for—Payment into court under Trustee Relief Acts.**—A banking co. having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into ct. under Trustee Relief Act, after first deducting therefrom their costs of payment in. Upon petition by one of claimants for payment out:—*Held*: the proviso in Jud. Act, 1873 (c. 66), s. 25 (6), only applied to debts of which there had been an absolute assignment in writing; & the banking co., not being trustees within Trustee Relief Act, were not entitled to pay the deposit moneys into ct. thereunder; but petitioner must be taken to have submitted to the jurisdiction under Trustee Relief Act by petitioning the ct., & the bank were entitled to their taxed costs of payment in & of the petition.—*Re SUTTON'S TRUSTS* (1879), 12 Ch. D. 175; 48 L. J. Ch. 350; 27 W. R. 429.

*Compare No. 18, ante.*

#### F. Bills of Sale.

*See BILLS OF SALE*, Vol. VII., p. 128, Nos. 724–730.

#### G. Claims for Unliquidated Damages.

*See, now, R. S. C., Ord. 57.*

80. **Claim for damages only.**—A tenant cannot file an interpleading bill against his landlord. Where one claimant seeks a certain rent from the tenant in possession & the other unliquidated damages for use & occupation he cannot make them interplead.—*JOHNSON v. ATKINSON* (1796), 3 Anst. 798; 141 E. R. 1043.

81. —.]—It appears to me that the provisions contained in Interpleader Act, 1831 (c. 58), s. 6, clearly refer to claims to property in its nature distinct & tangible, & not to a claim which consists only of unliquidated damages (*WILLIAMS, J.*).—*WALTER v. NICHOLSON* (1838), 6 Dowl. 517; 1 Will. Woll. & H. 181; *sub nom.* — *v. NICHOLSON*, 2 Jur. 842.

82. —.]—Deft., the proprietor of a horse repository, sold there by public auction, a horse to pltf. warranted quiet to ride & in harness, but

subject to a condition, by which if considered by the buyer incapable of working from any infirmity or disease it might be returned on the second day after the sale, & the matter determined by veterinary surgeons, according to the terms provided for in such condition. The horse was returned accordingly by pltf., who demanded to have back the money he had paid for the purchase, & this being refused he brought an action against deft. for damages for breach of the warranty. A. B., who had placed the horse at the repository for sale, claimed of deft. the proceeds of the sale, stating that the horse had left the repository perfectly sound:—*Held*: deft. was not entitled to an interpleader order.—*WRIGHT v. FREEMAN* (1879), 48 L. J. Q. B. 276; 40 L. T. 134; *affd.*, 40 L. T. 358, C. A.

83. —.]—A right to interplead under Ord. 57 only arises where there is a liability to pay a specific sum of money in respect of which specific sum two other persons are making claims. Therefore, there is no right to interplead where one of those persons is in substance claiming unliquidated damages.—*INGHAM v. WALKER* (1887), 3 T. L. R. 448, C. A.

84. **Claim for damages in addition to claim for goods.**—*ATTENBOROUGH v. ST. KATHARINE'S DOCK CO.*, No. 40, *ante*.

#### H. Claims against Auctioneers.

**In respect of deposit.**—*See AUCTION & AUCTIONEERS*, Vol. III., p. 27, Nos. 198–201.

**Auctioneers' right to remuneration.**—*See AUCTION & AUCTIONEERS*, Vol. III., p. 32, No. 228.

**Reimbursement & indemnity.**—*See AUCTION & AUCTIONEERS*, Vol. III., p. 37, Nos. 271, 272.

#### I. Contracts of Bailment.

*See Nos. 38–43, ante.*

#### J. Garnishees.

**Garnishee orders generally.**—*See EXECUTION*, Vol. XXI., pp. 617 *et seq.*

85. **Foreign attachment.**—Judgment was issued in the Q. B. Div. in an action upon a policy of marine insurance by B. against A., who received notice about the same time that B. had assigned his debt to C. Shortly afterwards A. was served with an attachment out of the Lord Mayor's Ct. at the suit of D., attaching the debt due from A. to B. Upon applying to C., as assignee from B., C. refused to give any guarantee & left A. to take his own course:—*Held*: A. was entitled to file a bill of interpleader in respect of these conflicting claims for the same debt, & although the attachment in the Lord Mayor's Ct. might be inoperative while the judgment in the Q. B. Div. remained unsatisfied, A. ought not to be put to the trouble of raising such a question, or defending proceedings in which he had no interest whatever.—*NELSON v. BARTER* (1864), 2 Hem. & M. 334; 4 New Rep. 392; 33 L. J. Ch. 706, n.;

*RUTHERS* (1896), 17 P. R. 277.—CAN.

#### PART II. SECT. 3, SUB-SECT. 2.—J.

**n. Only where amount admitted due.**—There being a dispute as to the amount due by the garnishees:—*Held*: they could not obtain an interpleader order.—*MERCHANTS BANK v. MCLEAN* (1888), 5 Man. L. R. 219.—CAN.

**o. —.]—A garnishee may have an interpleader as to the amount he**

#### PART II. SECT. 3, SUB-SECT. 2.—G.

84. **Claim for damages in addition to claim for goods.**—Where grain was shipped over a railway under a contract which provided that it might be deposited in the railway co.'s elevators in common with other grain of like grade, & at its destination was claimed by the indorsee of the bill of lading, & also by an investment co. claiming under a mtge. from the

shipper, an interpleader order was made, upon the application of the railway co. as carriers or bailees, notwithstanding that the specific grain could not be delivered, owing to its having been mixed with other grain in the elevator, as permitted by the contract, & notwithstanding that the investment co.'s claim was, as contended, one for unliquidated damages for conversion of the grain.—*Re CANADIAN PACIFIC RY. CO. & CAR-*

10 Jur. N. S. 832; 12 W. R. 999; 2 Mar. L. C. 64; 71 E. R. 493; *affd.*, 33 L. J. Ch. 705, L. C. Annotation:—*Consd.* G. S. & W. Ry. v. Corry (1867), 15 W. R. 650.

86. —.]—The operation of a garnishee order made under C. L. P. Act, 1854 (c. 125), is not suspended by the existence of an attachment in the Lord Mayor's Ct., the former being a process of execution, the latter merely a process to compel an appearance.—*RICHTER v. LAXTON* (1878), 48 L. J. Q. B. 184; 39 L. T. 499; 27 W. R. 214.

Annotation:—*Reid.* Levy v. Lovell (1880), 14 Ch. D. 234.

87. **Unliquidated claim—Assignment to trustee for creditors.**—A claim on a fire policy having been made against an insurance co. for unliquidated damages, *pltf.*, a judgment creditor for the assured for £127, duly served an *ex p.* garnishee order, under R. S. C., Ord. 45, r. 1, on the co., attaching all debts owing or accruing from them to the assured. The co. did not appear to show cause against it, & the order was made absolute. An award on the claim was afterwards made of £248 due to the assured, who assigned it to trustees for his creditors. *Pltf.* demanded payment under his garnishee order of £127 out of the sum payable by the co., & threatened them with execution, & the trustees claiming the £248, the co. took out an interpleader summons on which an order was made directing the sum of £127 to be paid into ct., & an issue to be tried as to whether that sum was the property of *pltf.* or the trustees:—*Held*: although no attachable debt was in existence at the date of the garnishee order, yet it, not having been set aside, entitled *pltf.* to issue execution for £127, & the interpleader order was wrong.—*RANDALL v. LITHGOW* (1884), 12 Q. B. D. 525; 53 L. J. Q. B. 518; 50 L. T. 587; 32 W. R. 794, D. C. Annotations:—*Mentd.* Vinall v. De Pass, [1892] A. C. 90; *Harris v. Beauchamp* (2) (1894), 63 L. J. Q. B. 480.

88. **Claim by debenture-holder.**—A limited co., to secure the repayment of money advanced to them, issued a debenture whereby they charged with such repayment all their undertaking & all their property & assets. A creditor of the co. having commenced an action against the co. in the county ct., the debenture-holder gave notice to the co. to pay off the debenture, which notice was not complied with. Judgment having been given against the co. in the county ct. action, judgment creditor obtained a garnishee order *nisi* attaching the balance standing to the credit of the co. in their account with their bankers. The debenture-holder gave notice to the bankers, & also to the co. & to judgment creditor, claiming that he was entitled to have the bank balance paid to him; but he did not take any other step to enforce his security. The bankers interpleaded, & the county ct. judge gave judgment in the interpleader proceedings for judgment creditor against the debenture-holder & directed that the garnishee order *nisi* should be made absolute:—*Held*: as nothing had happened to convert the debenture-holder's floating charge into a specific charge, the garnishee order *nisi* was rightly made absolute.—*EVANS v. RIVAL GRANITE QUARRIES LTD.*, [1910] 2 K. B. 979; 79 L. J. K. B. 970; 26 T. L. R. 509; 54 Sol. Jo. 580; 18 Mans. 64, C. A. Annotations:—*Consd.* Heaton & Dugard v. Cutting, [1925]

admits to be due, although a larger amount may be alleged by the attaching creditor to be owing.—*McINTYRE v. WOODS* (1888), 5 Man. L. R. 347.—*CAN.*

#### PART II. SECT. 3, SUB-SECT. 2.—K.

89 i. **Conflicting claims to moneys on policies.**—The *mtgees.* of a policy on

the life of a deceased person claimed payment from the life assurance society of the whole amount payable under the policy, alleging that the whole of it was due to them under the terms of their *mtge.* The widow & administratrix of deceased disputed their right to receive the whole of the money,

1 K. B. 655. *Mentd.* De Beers Consolidated Mines v. British South Africa Co., [1912] A. C. 52; *Sinnott v. Bowden*, [1912] 2 Ch. 414.

#### K. Insurance Claims.

89. **Conflicting claims to moneys on policies.**—Where one part owner has effected an insurance upon the whole ship for himself & the other part owners, & the ship is lost; & one part owner gave notice to the insurance broker not to pay his share to that part owner who effected the insurance, & the latter gives the insurance broker notice not to part with the share till he is paid his lien on the fund:—*Held*: a case of interpleader.—*SUART v. WELCH* (1839), 4 My. & Cr. 305; 3 Jur. 237; 41 E. R. 119.

Annotations:—*Consd.* Crawford v. Fisher (1842), 1 Hare, 436. *Reid.* Evans v. Wright (1865), 5 New Rep. 331.

90. —.]—Where there are two claimants to a fund, & one files a bill against the stakeholder without making the other a party, the stakeholder may file an interpleader bill, & restrain the proceedings in the former suit.—*PRUDENTIAL ASSURANCE CO. v. THOMAS* (1867), 3 Ch. App. 74; 37 L. J. Ch. 202; 16 W. R. 470, L. J.

— **Claims not real or adverse.**—See Nos. 60–62, 66, 67, *ante*.

#### L. Landlord and Tenant.

91. **Interpleader by tenant—Claim adverse to landlord's title.**—(1) A tenant, though threatened with suits at law on a title adverse to his landlord's, cannot make them interplead. (2) *Semble*: such a bill, if the whole rent actually due is less than £10, will be dismissed.—*SMITH v. TARGET* (1795), 2 Anst. 529; 145 E. R. 957.

Annotations:—*As to* (1) *Folld.* Johnson v. Atkinson (1796), 3 Anst. 798. *As to* (2) *Dbtd.* Crawford v. Fisher (1842), 1 Hare, 436.

92. — — —.]—*JOHNSON v. ATKINSON*, No. 80, *ante*.

93. — — — **Arising by act of landlord.**—*THOMOND'S (LORD) CASE* (circa 1528), cited in 9 Ves. at p. 107; 32 E. R. 542.

Annotations:—*Reid.* Cowtan v. Williams (1803), 9 Ves. 107; *Cook v. Rosslyn*, (1859) 1 Giff. 167. *Mentd.* Howard v. Norfolk (1681), 3 Cas. in Ch. 14; *Wensleydale Peerage Case* (1856), 8 State Tr. N. S. 479.

94. — — —.]—The rule, that a tenant cannot file an interpleading bill against his landlord, does not hold, where the question arises upon the act of the landlord subsequent to the lease.—*COWTAN v. WILLIAMS* (1803), 9 Ves. 107; 32 E. R. 542, L. C.

Annotations:—*Folld.* Clarke v. Byne (1807), 13 Ves. 383. *Appld.* Oriental Bank Corpn. v. Nicholson, *Same v. Calrow* (1857), 3 Jur. N. S. 857. *Consd.* Cook v. Rosslyn (1859), 1 Giff. 167.

95. — — —.]—The rule, that a tenant cannot compel his landlord to interplead, does not prevail, where the claim of a third person arises by the act of the landlord, subsequent to the commencement of the relation of landlord & tenant.—*CLARKE v. BYNE* (1807), 13 Ves. 383; 33 E. R. 338, L. C.

Annotation:—*Consd.* Jew v. Wood (1841), 3 Beav. 579.

96. — — — **Indemnity by landlord.**—A lessee may sustain a bill of interpleader against his landlord, the claim against the legal title of the landlord arising out of a transaction to which the landlord was a party.

alleging that they were not entitled to the whole, & that their claim was excessive & inequitable:—*Held*: the case was one in which the society was entitled to take out an interpleader summons.—*Re ELLIS, Exp.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY (1904), 23 N. Z. L. R. 866.—*N.Z.*

*Sect. 3.—When relief granted: Sub-sect. 2, L., M., N., O., P., Q., R., S. & T.; sub-sect. 3, A.]*

It is no objection to such a bill of interpleader, that he has taken a bond of indemnity from his landlord.—*BAINES v. MINIFIE* (1825), 4 L. J. O. S. Ch. 37.

97. ———.] — *COOK v. ROSSLYN* (EARL) (1859), 1 Giff. 167; 28 L. J. Ch. 833; 33 L. T. O. S. 326; 5 Jur. N. S. 973; 7 W. R. 537; 65 E. R. 871.

98. ——— **Adverse claims to possession & rent.]** —Demurrer to a bill of interpleader overruled, where pltf. called in two persons claiming the possession & rent or an equivalent for use & occupation of one of them, the party demurring, had actually obtained a verdict for the value of the use & occupation: it being held that pltf. did not stand in the relation of tenant to the party demurring who had so recovered in the action at law.

Cts. of equity have exercised the jurisdiction which they possess as to exclude all contest by tenants of their landlord's title. The question is whether the parties stood or stand in the relation of landlord & tenant. It does not appear that they did (*GRAHAM, B.*).—*STEPHENS v. CALLANAN & SALWEY* (1823), 12 Price, 158; 147 E. R. 685.

99. ——— **Death of landlord—Adverse claims to estate.]**—Two parties claimed a real estate under different wills, the validity of which were in controversy. An action being brought against the tenant by one of claimants, he filed his bill of interpleader against both claimants & obtained an injunction on bringing his rent into ct. Some delay having occurred in getting in the answer of one of defts., the other, who had filed his answer, moved to dissolve the injunction, & have the rent paid out to him. The answer of the other deft. having been filed before the motion came on, the ct., on the motion, directed an issue to determine the rights of defts. & continued the injunction on the tenant continuing to pay his rent into ct.—*TOWNLEY v. DEARE* (1840), 3 Beav. 213; 49 E. R. 83, L. C.

100. ——— **Tenant attorning to one claimant.]**—Upon the death of a landlord, the tenant, in ignorance of the rights of the parties, attorned & paid rent to A., who claimed as devisee. The right of A. to the property was afterwards disputed by B., the heir:—*Held*: the tenant might maintain a bill of interpleader against A. & B.—*JEW v. WOOD* (1841), 3 Beav. 579; 10 L. J. Ch. 261; 5 Jur. 954; 49 E. R. 228; *affd.*, Cr. & Ph. 185, L. C.

*Annotations*:—*Reid. Crawford v. Fisher* (1842), 1 Hare, 436; *Watts v. Hammond* (1855), 25 L. T. O. S. 39; *Mealor v. Talbot* (1857), 27 L. J. Ch. 165.

101. **Interpleader by landlord—Claims for tenant right.]**—*EVANS v. WRIGHT*, No. 6, *ante*.

#### *M. Wagering Contracts.*

*See, generally, GAMING & WAGERING, Vol. XXV., pp. 394 et seq.*

102. **Racing wager.]**—The ct. will not grant an interpleader rule where an action has been brought against the holder of a stake deposited with him to abide the event of an illegal race.—*APPLEGARTH v. COLLEY* (1842), 2 Dowl. N. S. 223; 11 L. J. Ex. 350.

103. ———.]—Motion, on behalf of the stakeholder of a race run at the Ellesmere races, for an interpleader rule. Interpleader rule granted; pltf. in the action to be pltf. in the issue, & the stakeholder to pay the stake into ct., deducting his costs of obtaining this rule.—*WEBSTER v. CHANDLER* (1844), 4 L. T. O. S. 101, 142.

104. ———.]—In pursuance of a written agreement the two competitors in a trotting match deposited money with a stakeholder who, by a clause in the agreement, agreed with each of them that, in consideration of a commission on the total amount deposited, he would pay over to the winner a sum of money equal to the amount of the stakes actually deposited with him, after deducting commission:—*Held*: under this clause, whether taken by itself or in conjunction with the other clauses of the agreement, no personal liability to pay was undertaken by the stakeholder beyond the liability ordinarily undertaken by a stakeholder & an interpleader issue was rightly ordered in an action by one of the competitors who claimed payment from the stakeholder as winner of the match, when the other competitor also claimed to be winner.—*DOWSON v. MACFARLANE* (1899), 81 L. T. 67; 15 T. L. R. 497, C. A.

105. **Stakes claimed by trustee in bankruptcy.]**—Deft., a professional billiard player, who was then an undischarged bkpt., agreed to play a match at billiards with another billiard player for £100 a side & each party deposited that amount with stakeholders. Deft. won the match, & thereupon both deft. & pltf., his trustee in bkpcy., claimed the stakes. The stakeholders interpleaded; & the money having been paid into ct., an issue was directed to try whether pltf. or deft. was entitled to the money:—*Held*: pltf. was entitled to the whole of the money.—*SHOOLBRED ROBERTS*, [1900] 2 Q. B. 497; 69 L. J. Q. B. 800; 83 L. T. 37; 16 T. L. R. 486; 7 Mans. 388, C. A. *Annotation*:—*Mentd. Affleck v. Hammond*, [1912] 3 K. B. 162.

#### *N. Claims to Title Deeds and Other Documents.*

106. **Title deeds.]**—*SMITH v. WHEELER* (1835), 1 Gale, 163.

107. ———.]—A. being in possession of a house, deposited the title deeds with a bank as security for a loan. Amongst them was what purported to be a grant to B., deceased, in fee. A. died. B.'s heir demanded the grant from the bank, claiming it as his property. A.'s heir, who was in possession of the house, paid off the advance, & demanded the deeds deposited. The bank gave up all but the grant claimed by B.'s heir, which they refused to give to either party. B.'s heir brought trover against the bank; A.'s heir threatened to sue the bank. On a rule under Interpleader Act, 1831 (c. 58), this ct. relieved the bank, though in the relation of bailee to the person represented by claimant.—*ROBERTS v. BELL* (1857), 7 E. & B. 323; 3 Jur. N. S. 662; 119 E. R. 1267.

*Annotation*:—*Consd. Meynell v. Angell* (1862), 1 New Rep. 126.

108. ——— & other papers.]—*WALKER v. KER* (1843), 12 L. J. Ex. 204; 7 Jur. 156.

#### *O. Claims on Negotiable Instruments.*

109. **Claims by holders—Bill of exchange—Against acceptor.]**—Actions were commenced by

#### PART II. SECT. 3, SUB-SECT. 2.—L.

99 i. **Interpleader by tenant—Death of landlord—Adverse claims to estate.]**—*RICHARD v. HYDE* (1840), 2 I. Eq. R. 299.—IR.

#### PART II. SECT. 3, SUB-SECT. 2.—M.

p. **Wager as to identity of horse.]**—C. & W. deposited money with H., who was to hold same until it was decided whether a horse owned by C.

was the same horse as described by B. If so C. won, otherwise W. won. Both now claiming the fund H. obtained an interpleader order.—*Re HYNDMAN* (1909), 12 W. L. R. 166.—CAN.



two persons claiming to be the lawful owners of a bill of exchange against the acceptor. The ct. directed an issue to try who was lawfully entitled to recover on the bill, & relieved the acceptor from all claims in respect of costs.—*REGAN v. SERLE* (1840), 9 Dowl. 193.

110. ———.] — *GERHARD v. MONTAGU & Co.*, No. 15, *ante*.

111. **Claims against holder—Bill of exchange.**]—Where two parties claim a right to a vessel which has been sold, & part of the proceeds is in the hands of a third party, in the form of a bill of exchange, that is a case for interpleader.—*GIBBS v. GIBBS* (1858), 27 L. J. Ch. 577; 31 L. T. O. S. 112; 4 Jur. N. S. 371; 6 W. R. 415. *Annotation*:—*Refd.* *Grimes v. Harrison* (No. 2) (1859), 27 Beav. 198.

#### *P. Money on Deposit at Bank.*

112. **Claim against bank—Public funds.**]—Where money in the public funds is the subject of a suit, to which the bank is made a deft., the ct. will not on the application of the bank make any order on the litigating parties, to restrain them from proceeding at law against the bank to compel a transfer, but they must file a bill of interpleader.—*BIRCH v. CORBYN* (1784), 1 Bro. C. C. 571; 1 Cox, Eq. Cas. 144; 28 E. R. 1304, L. C.

113. ———.]—A sum of money had been deposited by pltf., while sole, with defts., who were bankers; they were afterwards served with a notice by J. M., that pltf. was married to him, & that they should not pay over the money to her. Pltf. disputed the marriage:—*Held*: the case was within Interpleader Act, 1831 (c. 58), s. 1.—*CRELLIN v. LEYLAND* (1842), 6 Jur. 733.

#### *Q. Claims under Bills of Lading.*

114. **Interpleader by captain of ship.**]—Captain may file a bill of interpleader where parties claim adversely under the bill of lading. *Qu.*: where the adverse claims are paramount to the bill of lading.—*LOWE v. RICHARDSON* (1818), 3 Madd. 277; 56 E. R. 510.

#### *R. Claims on Shares.*

115. **Shares as “chattels.”**] — *ROBINSON v. JENKINS*, No. 215, *post*.

#### *S. Claims to Rewards.*

116. **For apprehension of felon.**]—Where two parties claim to be entitled to a reward, deft. when sued by one of them to recover it, is not entitled to the relief given by Interpleader Act, 1831 (c. 58).—*COLLIS v. LEE* (1835), 1 Hodg. 204; *sub nom.* *ALLIS v. LEE*, 5 L. J. C. P. 82.

117. ———.]—A contested claim to a reward advertised for the apprehension of a felon cannot be made the subject of a motion under Interpleader Act, 1831 (c. 58).—*GRANT v. FRY* (1835), 4 Dowl. 135.

118. ———.]—A reward having been offered for

any information that might lead to the discovery of a felon, pltf., who had given material information, brought an action to recover the reward. Deft., the vestry clerk of the parish by whom the reward was offered, having received notice of the claims of several other parties, brought the whole before the ct. upon a rule under Interpleader Act, 1831 (c. 58):—*Held*: the case was not within the statute.—*GAY v. PITTMAN* (1838), 5 Scott, 795; *previous proceedings* (1837), 1 Jur. 775.

#### *T. Other Cases.*

*See* R. S. C., Ord. 57.

119. **Judgment debt—Lien of creditor's attorney for costs.**]—Interpleader on an attorney's claim of lien upon a sum awarded as damages under a judgment obtained by the client against pltf.—*v. BOLTON* (1811), 18 Ves. 292; 34 E. R. 328.

*Annotation*:—*Folld.* *Jones v. Thomas* (1854), 2 Sm. & G. 186.

120. ———.]—*JONES v. THOMAS*, No. 76, *ante*. **Assigned to third party.**]—*See* Sub-sect. 2, E., *ante*.

#### SUB-SECT. 3.—SHERIFFS AND OTHER OFFICERS.

##### *A. Sheriff not bound to Interplead.*

*See* R. S. C., Ord. 57, r. 12.

121. **Seizure in excess of claim—Right of sheriff to withdraw.**]—Where goods seized in execution by a sheriff under a *fi. fa.* have been previously assigned by the execution debtor to a third person as security for a debt, the sheriff is not bound to interplead & thereby enable proceedings to be taken for an order to sell being made by a judge under C. L. P. Act, 1860 (c. 126), s. 13, but is at liberty to withdraw, though the value of the goods seized exceed the sum secured by the bill of sale, & the execution debtor therefore has an equity of redemption which is valuable.—*SCARLETT v. HANSON* (1883), 12 Q. B. D. 213; 53 L. J. Q. B. 62; 50 L. T. 75; 32 W. R. 310, C. A.

*Annotation*:—*Refd.* *Miller v. Solomon*, [1906] 2 K. B. 91.

122. **Bill of sale holder in possession before levy—Intention to interplead expressed by sheriff.**]—*LONDON & BRISTOL MERCANTILE BANK, LTD. v. PHILLIPS* (1907), *Times*, Dec. 21.

123. **Where collusive sale alleged.**]—Under a writ of *fi. fa.*, issued against B., at the suit of C. certain goods were seized in the possession of A. to which he laid claim, under colour of an alleged sale thereof to him by B., & both A. & B. afterwards, at the request, & for the satisfaction of the sheriff, made voluntary declarations of the truth of such a transaction before a comr. appointed to receive declarations under Statutory Declarations Act, 1835 (c. 62). *Qu.*: whether this was a case within Statutory Declarations Act, 1835 (c. 62), at all, & whether the proper course

*under lien note.*]—*Qu.*: whether interpleader proceedings are applicable to a seizure under a lien note, even where legislation requires the seller to appoint the sheriff to make the seizure, & provides that no sale can be made without leave of a judge?—*CANADIAN EQUIPMENT & SUPPLY CO. v. CUSHING*, [1917] 3 W. W. R. 618.—CAN.

#### PART II. SECT. 3, SUB-SECT. 3.—A.

*t. Application of rule.*]—In a suit against the sheriff & an execution creditor, in respect of alleged irregular levy under a writ of execution, the

#### PART II. SECT. 3, SUB-SECT. 2.—P.

113 i. **Claim against bank.**]—A married woman lodged several sums of money in a bank in her own name upon deposit receipts representing herself to be widow. Her husband & a transferee from her both afterwards claimed & brought actions for said moneys:—*Held*: a proper case for interpleader.—*COSTELLO v. MARTIN* (1867), 15 W. R. 548.—IR.

#### PART II. SECT. 3, SUB-SECT. 2.—Q.

*q. Interpleader by harbour com.* — *BELFAST HARBOUR*

*COMRS. v. LAWTHOR* (1864), 16 I. Ch. R. 34.—IR.

#### PART II. SECT. 3, SUB-SECT. 2.—R.

115 i. **Shares as chattels.**]—*VINDIN v. WALLIS* (1864), 24 U. C. R. 9.—CAN.

115 ii. ———.]—*TREKICE v. BURKETT* (1882), 1 O. R. 80.—CAN.

115 iii. ———.] — *Re UNDERFREED STOKER CO. OF AMERICA* (1901), 21 C. L. T. 146; 1 O. L. R. 42.—CAN.

#### PART II. SECT. 3, SUB-SECT. 2.—T.

*r. Whether applicable to seizure*

formed that the sheriff was about to sell, issued a writ in the present action, & obtained an *ex p.* injunction to prevent the sale. Notice of the injunction arrived too late to stop the sale, but it was stopped by pltf's. solr. handing to the sheriff's officer £70 under protest, with a letter requiring the sheriff to issue an interpleader summons as to it, & stating that the payment was made without prejudice to any rights of pltf's. On Feb. 22 a receiver was appointed in the debenture holders' first action. The judge held that the £70 belonged to the debenture holders. The execution creditor appealed:—*Held*: the proper course would have been for the sheriff to take out an interpleader summons when he received the notice of Feb. 18.—*TAUNTON v. WARWICKSHIRE SHERIFF*, [1895] 2 Ch. 319; 64 L. J. Ch. 497; 72 L. T. 712; 43 W. R. 579; 39 Sol. Jo. 522, C. A.

*Annotations*:—*Mentd.* Government Stock Investment & Other Securities Co. v. Manila Ry., [1895] 2 Ch. 551; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

#### B. Relief Discretionary.

*See, now*, R. S. C., Ord. 57, r. 1 (b).

**125. General rule.**—(1) Before the sheriff applies to the ct. under Interpleader Act, 1831 (c. 58), he is bound to inquire into the nature of the claims set up, therefore, if he brings parties before the ct. in consequence of a claim which is clearly bad in point of law, the ct. will compel him to pay the costs.

(2) I am of opinion that applications under this statute [Interpleader Act, 1831] ought not to be considered as a matter of course. It is the duty of the sheriff to make some inquiry before he comes to this ct. But, where conflicting claims are advanced, on which he cannot decide, he may then come to the ct. (*TAUNTON, J.*).

(3) In point of law it is quite clear that, if mtgees. take possession, the growing crops cannot be taken at the instance of an execution creditor pursuing the debtor to judgment (*TAUNTON, J.*).—*BISHOP v. HINXMAN* (1833), 2 Dowl. 166.

#### C. When Sheriff may Interplead.

##### (a) Reasonable Time.

*See, now*, R. S. C., Ord. 57, rr. 16, 17.

**126. General rule.**—A sheriff will not be entitled to relief under Interpleader Act, 1831

sheriff is not obliged to interplead, but may be properly joined in a defence with the execution creditor.—*TAYLOR v. ROBERTSON* (1901), 31 S. C. R. 615.—CAN.

#### PART II. SECT. 3. SUB-SECT. 3.—B.

**125 i. General rule.**—A sheriff must exercise a sound judgment with respect to applying for an interpleader order &, where claimant to the goods seized has clearly no right, the order will not be granted.—*MONITOR PLOW WORKS*

*v. ALLEN* (1877), *temp.* Wood. 165.—CAN.

**125 ii.** —.]—*MACDONALD v. GREAT NORTHWEST CENTRAL RY. CO.* (1894), 10 Man. L. R. 83.—CAN.

#### PART II. SECT. 3. SUB-SECT. 3.—C. (a).

**126 i. General rule.**—A sheriff seizing goods under an execution, & having notice that a third party claims the goods seized, if he desires to interplead, must apply to the ct. promptly, & not

*Annotations*:—*Distd.* *Barker v. Phipson* (1835), 1 Har. & W. 191. *Folld.* *Ridgway v. Fisher* (1835), 1 Har. & W. 189. *Apld.* *Lashmar v. Claringbold* (1836), 2 Har. & W. 87. *Distd.* *Toulmin v. Edwards* (1837), Will. Woll. & Dav. 579.

**128.** —.]—The sheriff having seized goods under a *fi. fa.*, notice was given to him on Jan. 18, that a fiat was about to be sued out against deft.; & on Jan. 28 a claim was made to the goods by the assignees:—*Held*: an application by the sheriff on Jan. 29, for relief under Interpleader Act, 1831 (c. 58), was sufficiently prompt.—*SKIPPER v. LANE* (1834), 4 Moo. & S. 283.

**129.** —.]—The sheriff in applying for relief under the Interpleader Act, 1831 (c. 58), should come promptly, but a late application will in special circumstances be allowed.

Where there was great delay on the part of the sheriff in applying to the ct., in consequence of negotiations between the parties, & the execution creditor afterwards abandons his claims, the ct. refused to make the latter pay costs.—*DIXON v. ENSELL* (1834), 2 Dowl. 621.

**130.** —.]—No rule for interpleading will be granted after a suit has been stayed by injunction.—*ARAYNE v. LLOYD* (1835), 1 Bing. N. C. 720; 1 Hodg. 166; 1 Scott, 609; 131 E. R. 1295.

**131.** —.]—The sheriff is not disqualified from applying under Interpleader Act, 1831 (c. 58), where a whole term has elapsed after a notice of claim under a fiat in bkpcy., if the assignees were not chosen until after the term.—*BARKER v. PHIPSON* (1835), 1 Har. & W. 191.

**132.** —.]—If a sheriff receives notice on Jan. 23, of a claim to goods seized by him under a *fi. fa.*, he will not be entitled to relief under Interpleader Act, 1831 (c. 58), unless he comes to the ct. in Hilary Term.—*RIDGWAY v. FISHER* (1835), 3 Dowl. 567; 1 Har. & W. 189.

*Annotations*:—*Apld.* *Lashmar v. Claringbold* (1836), 2 Har. & W. 87. *Distd.* *Toulmin v. Edwards* (1837), Will. Woll. & Dav. 579. *Refd.* *Barker v. Phipson* (1835), 1 Har. & W. 191; *Re Holt v. Frost* (1858), 28 L. J. Ex. 55.

**133.** —.]—The ct. refused to give a sheriff relief under Interpleader Act, 1831 (c. 58), where a *fi. fa.* was delivered to him two months before notice of a fiat having issued against deft., & no reason was assigned for the delay in the execution.—*LASHMAR v. CLARINGBOLD* (1836), 2 Har. & W. 87.

exercise a discretion by selling or otherwise dealing with the goods.—*HARRIS, SON & CO. v. YORK* (1892), 8 Man. L. R. 89.—CAN.

**a. What amounts to—Application after sale.**—*DARLING v. COLLATON* (1883), 10 P. R. 110.—CAN.

**b. No explanation of delay.**—A writ was delivered to the sheriff on Oct. 9 returnable on the first of Michaelmas Term next. A seizure was made next day, & on Oct. 12 two parties separately gave notice of claim. On

134. —.]—The sheriff must apply to the ct. under Interpleader Act, 1831 (c. 58), in the term next after the claim is made, & soon enough to enable the other parties to show cause in that term. If he does not, either the rule will be discharged, or he must pay the costs of both of the other parties.—*BEALE v. OVERTON* (1837), 2 M. & W. 534; 5 Dowl. 599; Murp. & H. 172; 6 L. J. Ex. 118; 1 Jur. 544; 150 E. R. 869.

*Annotation:—Distd. Toulmin v. Edwards* (1837), Will. Woll. & Dav. 579.

—.]—Goods were seized in execution on Aug. 15, & a notice of claim was given the next day. A second notice of claim was given on Oct. 30, on the part of another person:—*Held*: an application to the ct. by the sheriff under Interpleader Act, 1831 (c. 58), was not too late on Nov. 9, as the second notice of claim was of so peculiar a nature that the sheriff was entitled to some time to inquire into the circumstances.—*TOULMIN v. EDWARDS* (1837), Will. Woll. & Dav. 579.

136. —.]—*FRASER v. BARNES* (1843), 1 L. T. O. S. 149.

137. —.]—On Jan. 16, 1847, the sheriff seized certain goods & moneys of deft. under a *testatum fi. fa.* the net proceeds of which he handed over to pltf. in part satisfaction of their judgment. He at the same time seized certain bills of exchange & a promissory note, which, not being due, he retained. On Feb. 3, he received notice that a fiat in bkpcy. had issued against deft. On Feb. 4, he was ruled to return the writ; & on Feb. 11, he returned what he had done under the writ. On Feb. 18, he received notice that assignees had been appointed; & the bills & note were then claimed on their behalf. After some negotiation with the solr. to the fiat, the sheriff took out an interpleader summons on Apr. 29:—*Held*: he had by his laches disentitled himself to relief.—*MURTON v. YOUNG* (1847), 4 C. B. 371; 2 New Pract. Cas. 215; 16 L. J. C. P. 165; 9 L. T. O. S. 127; 11 Jur. 414; 136 E. R. 550.

138. —.]—*TUFTON v. HARDING*, No. 164, *post*.

139. *Necessity to await proceedings.*—The sheriff need not wait for proceedings to be taken against him before he applies for relief under Interpleader Act, 1831 (c. 58).—*GREEN v. BROWN* (1835), 3 Dowl. 337.

140. *Necessity for notice of claim to execution creditor.*—A sheriff who, under a *fi. fa.* against a railway co., had levied execution on certain goods upon the premises of the co., was served with a notice by a third party that he claimed the goods, & thereupon the sheriff, without giving any notice of this claim to the creditors at whose instance the writ had been sued out, filed a bill of interpleader:—*Held*: pltf. had acted too hastily, & on the proceedings being stayed, must pay the costs of the suit.

the fifth day of Michaelmas Term the sheriff applied for an interpleader:—*Held*: the delay not being accounted for, the application was too late.—*THOMPSON v. WARD* (1855), 1 P. R. 269.—CAN.

c. —.]—*MCMASTER v. MILNE* (1858), 2 P. R. 386.—CAN.

d. *Delay by consent.*—The parties having agreed that the sheriff need not interplead until it was ascertained what the estate of defts., who had become insolvent, would realise:—*Held*: the sheriff was entitled to a reasonable time to inquire into the matter before applying for relief.—*WILKINS v. PEATMAN* (1877), 7 P. R. 84.—CAN.

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It is clear that he [the sheriff] cannot do so [file a bill of interpleader] until he has informed the judgment creditors of the adverse claim & ascertained whether they claim the goods he has seized, or will give them up. I am therefore of opinion that the sheriff who has not done this, is in the wrong, & that the bill must be dismissed with costs to be paid by pltf. (LORD ROMILLY, M.R.).—*DALTON v. FURNESS* (1866), 35 Beav. 461; 55 E. R. 975; *sub nom.* *DUTTON v. FURNESS*, 35 L. J. Ch. 463; 14 L. T. 319; 12 Jur. N. S. 386; 14 W. R. 600.

#### (b) Before Seizure.

See R. S. C., Ord. 57, r. 1 (b).

141. *Intention to seize sufficient.*—A sheriff who intends to levy may, before actual seizure, apply for relief under Interpleader Act, 1831 (c. 58).

A bailiff went to the premises of a deft. & seized the goods there under a *fi. fa.* The goods were in possession of a claimant, who had advertised them for sale on the following day. The sheriff thereupon obtained an interpleader summons, & served it upon the claimant before the sale. The claimant nevertheless proceeded with the sale, & the goods were removed by his direction, notwithstanding the opposition of the sheriff's officers; on the following day, the interpleader summons was heard & dismissed, on the ground that the goods were not in the sheriff's possession. The claimant was, in fact, entitled to the goods under a bill of sale. On motion for an attachment against the claimant for a contempt of ct. in carrying away the goods:—*Held*: he was justified in so doing, the goods being his property, although the interpleader summons was not disposed of.

Interpleader Act, 1831 (c. 58), clearly empowers the sheriff to apply to the ct. if he goes with the intention of levying under a *fi. fa.* & a claim is set up to the goods (POLLOCK, C.B.).—*DAY v. CARR* (1852), 7 Exch. 883; 155 E. R. 1208.

*Annotation:—Distd. Cooper v. Asprey* (1863), 3 B. & S. 932.

142. —.]—The ct. or a judge has jurisdiction to make an interpleader order, on the application of a sheriff intending to seize goods, though before actual seizure; but such jurisdiction will be rarely exercised.

I do not think that in all cases a judge would interfere if the sheriff had not seized, but cases might arise in which great injustice would be done if he did not (MARTIN, B.).

The statute [Interpleader Act, 1831 (c. 58)], in express terms, says, that the sheriff may apply for relief where the goods are taken or intended to be taken in execution . . . there is no doubt about the jurisdiction though probably it will be very rarely exercised (PARKE, B.).—*LEA v. ROSSI* (1855), 11 Exch. 13; 24 L. J. Ex. 280; 19 J. P. 327; 1 Jur. N. S. 384; 156 E. R. 725.

#### PART II. SECT. 3. SUB-SECT. 3.—C. (b).

e. *General rule.*—A sheriff cannot have an interpleader until he has seized the goods.—*GOSLIN v. TUNE* (1845), 2 U. C. R. 177.—CAN.

141 i. *Intention to seize sufficient.*—Where a sheriff intends to take goods under an execution, the ct. has jurisdiction to grant him an interpleader, but this jurisdiction will be rarely exercised, & never unless it is shown that the property or possession in the goods is in deft.—*OGDEN v. CRAIG* (1884), 10 P. R. 378.—CAN.

141 ii. —.]—*HALL v. BOWERMAN* (1900), 19 P. R. 268.—CAN.

141 iii. —.]—*KEENAN v. OSBORNE*

(1904), 24 C. L. T. 132; 7 O. L. R. 134; 3 O. W. R. 143.—CAN.

f. *Seizure of goods alleged exempt*—*Subsequent application for interpleader.*—*Re GOULD v. HOPE* (1893), 20 A. R. 347.—CAN.

g. —.]—A sheriff sued in the county ct. by an execution debtor for damages, the value of implements seized & sold by the sheriff without any special direction from the execution creditor & alleged to be exempt, cannot obtain in that ct. an interpleader order directing the trial of an issue between the execution debtor & the execution creditor, to settle whether the implements were exempt or not.—*FIELD v. HART* (1895), 22 A. R. 449.—CAN.

H H



**Sect. 3.—When relief granted: Sub-sect. 3, D. (b), (c) & (d). Sect. 4: Sub-sect. 1, A. & B.]**

Act, 1709 (c. 14), s. 1, was intended to apply to cases only when the landlord has lost his chances of distraining upon goods by their removal, & Interpleader Act, 1831 (c. 38), does not affect this.—ANON. (1853), 20 L. T. O. S. 238.

**182. Landlord's claim not disputed by execution creditor.]—**Where an execution has been levied, & a landlord makes a claim upon the sheriff for rent, which the execution creditor has not expressly disputed, although the claim may be disputable, whether as regards the amount of rent due, on the construction of the lease, or as regards the liability of the property which has been seized to distress, the sheriff is not entitled to an interpleader, at all events, unless the landlord claims any part of the property. *Semble*: in no case where the claim is for rent can there be an interpleader.—BATEMAN v. FARNSWORTH (1860), 29 L. J. Ex. 365; *sub nom.* BAGSHAW v. FARNSWORTH, 2 L. T. 390.

(c) *Claim by Mortgagee.*

**183. Mortgagee in possession—Execution on growing crops.]—**BISHOP v. HINXMAN, No. 125, *ante*.

Goods subject to bill of sale, *see* R. S. C., Ord. 57, r. 12; *BILLS OF SALE*, Vol. VII., p. 128, Nos. 724–730.

(d) *Partnership Property.*

*See, now*, Partnership Act, 1890 (c. 39), s. 23 (1).

**184. Partnership disputed—Duty of sheriff to sell share.]—**Under Interpleader Act, 1831 (c. 58), s. 6, the ct. will not make a rule for the protection of a sheriff who has levied under a *fi. fa.*, merely because a partner of the debtor has given notice to the sheriff to quit possession on the ground that the goods are partnership property & that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects. The sheriff's duty is to sell the share, though he may not be able to ascertain the amount of actual interest. But the ct. will, in the above case, interfere under the Act for the sheriff's protection, if the creditor disputes the partnership. Where the creditor, having appeared under the interpleader rule & not contested the partnership, whereupon the rule was dismissed, afterwards refused to admit it, & ruled the sheriff to return the writ, the ct. enlarged the latter rule till the creditor should indemnify the sheriff.—HOLMES v. MENTZE (1835), 4 Ad. & El. 127; 4 Dowl. 300; 1 Har. & W. 606; 5 Nev. & M. K. B. 563; 5 L. J. K. B. 62; 111 E. R. 735.

*Annotations*:—*Expld.* Peake v. Carter, [1916] 1 K. B. 652. *Refd.* Garbett v. Veale (1843), 13 L. J. Q. B. 98; *Re* Tamplin, *Ex p.* Barnett (1890), 59 L. J. Q. B. 194.

**185. ———.]—**ANON., [1875] W. N. 204; 1 Char. Cham. Cas. 32; Bitt. Prac. Cas. 22.

**186. ——— Partnership Act, 1890 (c. s. 23 (1).)]—**PEAKE v. CARTER, No. 256, *post*.

**SECT. 4.—CONDITIONS OF RELIEF.**

**SUB-SECT. 1.—NO INTEREST IN SUBJECT-MATTER.**

**A. In General.**

*See* R. S. C., Ord. 57, r. 2 (a).

**187. Charges or costs—Auctioneer's commission.]—**If an action is brought against an

auctioneer for a deposit, he cannot file a bill of interpleader if he insists upon retaining either his commission or the duty.

Interpleader is where pltf. is the holder of a stake which is equally contested by deft. as to which pltf. is wholly indifferent between the parties. . . . That is not this case. . . . Pltf. is not an indifferent stakeholder but has a personal question to maintain with deft. the purchaser (LEACH, V.-O.).—MITCHELL v. HAYNE (1824), 2 Sim. & St. 63; 57 E. R. 268.

*Annotations*:—*Apld.* Bignold v. Audland (1840), 11 Sim. 23. *Refd.* Stuart v. Welch (1839), 4 My. & Cr. 305.

**188. ———.]—**BEST v. HAYES, No. 36, *ante*.

**189. Applicant claiming lien against all parties—Wharfingers' charges.]—**It seems that a wharfinger who claims a lien on goods for wharfage, etc., is not within the meaning of the Interpleader Act, 1831 (c. 58).—BRADDICK v. SMITH (1832), 9 Bing. 84; 2 Moo. & S. 131; 1 L. J. C. P. 154; 131 E. R. 546.

*Annotation*:—*Distd.* Cotter v. Bank of England (1833), 3 Moo. & S. 180.

**190. ———.]—**A. deposited certain iron with B. & co., who were wharfingers, & afterwards directed them to deliver it to C. C. applied to B. & co. to know the particulars of the iron held by them on his account; & B. & co. then wrote a letter to C., saying, that in compliance with his request, they annexed a note of the landing weights of the iron transferred into his name by A. & now held by them, B. & co., at his, C.'s, disposal. B. & co. subsequently received notice from D. that the iron belonged to him, & that it had been deposited with A. as an agent for sale, & that he had without authority pledged it to C. B. & co. then filed a bill of interpleader against C. & D.:—*Held*: after B. & co.'s letter to C. they could not maintain a bill of interpleader against him.—CRAWSHAY v. THORNTON (1837), 2 My. & Cr. 1; 6 L. J. Ch. 179; 1 Jur. 19; 40 E. R. 54, L. C.

*Annotations*:—*Distd.* Stuart v. Welch (1839), 4 My. & Cr. 305. *Consd.* Jew v. Wood (1841), Cr. & Ph. 185. *Folld.* Patoni v. Campbell (1843), 12 M. & W. 277. *Consd.* Lindsey v. Barron (1848), 6 C. B. 291. *Folld.* Horton v. Devon (1849), 4 Exch. 497. *Consd.* Desborough v. Harris (1855), 5 De G. M. & G. 439; Watts v. Hammond (1855), 3 Eq. Rep. 641. *Distd.* Oriental Bank Corp'n. v. Nicholson, Same v. Calrow (1857), 3 Jur. N. S. 857; Evans v. Wright (1865), 5 New Rep. 331. *Consd.* Costello v. Martin (1867), 15 W. R. 548. *N.F.* Attenborough v. St. Katharine's Dock Co. (1878), 3 C. P. D. 450. *Expld.* Rogers v. Lambert, [1891] 1 Q. B. 318. *Refd.* Glyn v. Duesbury (1840), 11 Sim. 139; Crawford v. Fisher (1842), 1 Hare, 436; Turner v. Kendal Corp'n. (1844), 2 Dow. & L. 197; Slaney v. Sidney (1845), 9 Jur. 995; Jones v. Thomas (1854), 22 L. T. O. S. 301; Child v. Mann (1867), L. R. 3 Eq. 806. *Mentd.* King v. Simmonds (1845), 9 Jur. 761.

**Warehouse rent.]—**A claim for warehouse rent is not such an interest in the subject-matter of a suit, as will exclude a deft. from the protection of Interpleader Act, 1831 (c. 58). Neither is it requisite that the right claimed by the third party should be an absolute right of property. It is enough, that deft. has received notice not to deliver the goods over to pltf., until a demand made by the third party, in respect of such goods, has been satisfied.—HARWOOD v. BETHAM (1832), 1 L. J. Ex. 180.

**192. ——— Freight.]—**A party who makes merely a claim of freight upon certain goods in his possession, the property in which is sought by two others, has not such a distinct interest in the goods as will deprive him of the benefit & protection of Interpleader Act, 1831 (c. 58); inasmuch as such claim attaches to the goods

**PART II. SECT. 4, SUB-SECT. 1.—A.**  
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I think that this is not a case within the statute [Interpleader Act, 1831 (c. 58)]. It cannot be said that deft. "does not claim any interest in the subject-matter of the suit." It is a matter of interest to him to know to whom he is to pay over the money (*COLERIDGE, J.*).—*NEWTON v. MOODY* (1839), 7 Dowl. 582; 1 Will. Woll. & H. 554; 3 Jur. 42.

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Colluding may be said to be an equivalent for playing the same game. That is the literal meaning of the word. Here appct. has identified himself in interest. He has a strong interest that one side should succeed rather than the other. In my opinion one of the things intended when these rules were drawn was that the stakeholder who claimed the benefit of the Act should be in a real position of impartiality between the parties (*WILLS, J.*).—*MURIETTA v. SOUTH AMERICAN, ETC. CO., LTD.* (1893), 62 L. J. Q. B. 396; 9 T. L. R. 389; 5 R. 380, D. C.

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*CAN.*  
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#### PART II. SECT. 4, SUB-SECT. 1.—B.

*Indemnity from claimant—  
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claim is made to property

seized in execution, a judge will direct an issue, unless the execution creditors give the sheriff a sufficient indemnity.—*McKAY v. McKAY* (circa 1849), 1 C. L. Ch. 165.—*CAN.*



**Sect. 3.—When relief granted: Sub-sect. 3, D. (b), (c) & (d). Sect. 4: Sub-sect. 1, A. & B.]**

Act, 1709 (c. 14), s. 1, was intended to apply to cases only when the landlord has lost his chances of distraining upon goods by their removal, & Interpleader Act, 1831 (c. 38), does not affect this.—ANON. (1853), 20 L. T. O. S. 238.

**182. Landlord's claim not disputed by execution creditor.]—**Where an execution has been levied, & a landlord makes a claim upon the sheriff for rent, which the execution creditor has not expressly disputed, although the claim may be disputable, whether as regards the amount of rent due, on the construction of the lease, or as regards the liability of the property which has been seized to distress, the sheriff is not entitled to an interpleader, at all events, unless the landlord claims any part of the property. *Semble*: in no case where the claim is for rent can there be an interpleader.—BATEMAN v. FARNSWORTH (1860), 29 L. J. Ex. 305; *sub nom.* BAGSHAW v. FARNSWORTH, 2 L. T. 390.

**(c) Claim by Mortgagee.**

**183. Mortgagee in possession—Execution on growing crops.]—**BISHOP v. HINXMAN, No. 125, *ante*.

Goods subject to bill of sale, *see* R. S. C., Ord. 57, r. 12; **BILLS OF SALE**, Vol. VII., p. 128, Nos. 724–730.

**(d) Partnership Property.**

*See, now*, Partnership Act, 1890 (c. 39), s. 23 (1).

**184. Partnership disputed—Duty of sheriff to sell share.]—**Under Interpleader Act, 1831 (c. 58), s. 6, the ct. will not make a rule for the protection of a sheriff who has levied under a *fi. fa.*, merely because a partner of the debtor has given notice to the sheriff to quit possession on the ground that the goods are partnership property & that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects. The sheriff's duty is to sell the share, though he may not be able to ascertain the amount of actual interest. But the ct. will, in the above case, interfere under the Act for the sheriff's protection, if the creditor disputes the partnership. Where the creditor, having appeared under the interpleader rule & not contested the partnership, whereupon the rule was dismissed, afterwards refused to admit it, & ruled the sheriff to return the writ, the ct. enlarged the latter rule till the creditor should indemnify the sheriff.—HOLMES v. MENTZE (1835), 4 Ad. & El. 127; 4 Dowl. 300; 1 Har. & W. 606; 5 Nev. & M. K. B. 563; 5 L. J. K. B. 62; 111 E. R. 735.

*Annotations*:—*Expld.* Peake v. Carter, [1916] 1 K. B. 652. *Refd.* Garbett v. Veale (1843), 13 L. J. Q. B. 98; *Re* Tamplin, *Ex p.* Barnett (1890), 59 L. J. Q. B. 194.

**185. ———.]—**ANON., [1875] W. N. 204; 1 Char. Cham. Cas. 32; Bitt. Prac. Cas. 22.

**186. ——— Partnership Act, 1890 (c. 39), s. 23 (1).]—**PEAKE v. CARTER, No. 256, *post*.

**SECT. 4.—CONDITIONS OF RELIEF.**

**SUB-SECT. 1.—NO INTEREST IN SUBJECT-MATTER.**

**A. In General.**

*See* R. S. C., Ord. 57, r. 2 (a).

**187. Charges or costs—Auctioneer's commission.]—**If an action is brought against an

auctioneer for a deposit, he cannot file a bill of interpleader if he insists upon retaining either his commission or the duty.

Interpleader is where *pltf.* is the holder of a stake which is equally contested by *deft.* as to which *pltf.* is wholly indifferent between the parties. . . . That is not this case. . . . *Pltf.* is not an indifferent stakeholder but has a personal question to maintain with *deft.* the purchaser (LEACH, V.-C.).—MITCHELL v. HAYNE (1824), 2 Sim. & St. 63; 57 E. R. 268.

*Annotations*:—*Appl.* Bignold v. Audland (1840), 11 Sim. 23. *Refd.* Stuart v. Welch (1839), 4 My. & Cr. 306.

**188. ———.]—**BEST v. HAYES, No. 36, *ante*.

**189. Applicant claiming lien against all parties—Wharfingers' charges.]—**It seems that a wharfinger who claims a lien on goods for wharfage, etc., is not within the meaning of the Interpleader Act, 1831 (c. 58).—BRADDICK v. SMITH (1832), 9 Bing. 84; 2 Moo. & S. 131; 1 L. J. C. P. 154; 131 E. R. 546.

*Annotation*:—*Distd.* Cotter v. Bank of England (1833), 3 Moo. & S. 180.

**190. ———.]—**A. deposited certain iron with B. & co., who were wharfingers, & afterwards directed them to deliver it to C. C. applied to B. & co. to know the particulars of the iron held by them on his account; & B. & co. then wrote a letter to C., saying, that in compliance with his request, they annexed a note of the landing weights of the iron transferred into his name by A. & now held by them, B. & co., at his, C.'s, disposal. B. & co. subsequently received notice from D. that the iron belonged to him, & that it had been deposited with A. as an agent for sale, & that he had without authority pledged it to C. B. & co. then filed a bill of interpleader against C. & D.:—*Held*: after B. & co.'s letter to C. they could not maintain a bill of interpleader against him.—CRAWSHAY v. THORNTON (1837), 2 My. & Cr. 1; 6 L. J. Ch. 179; 1 Jur. 19; 40 E. R. 54, L. C.

*Annotations*:—*Distd.* Stuart v. Welch (1839), 4 My. & Cr. 305. *Consd.* Jew v. Wood (1841), Cr. & Ph. 185. *Fold.* Paton v. Campbell (1843), 12 M. & W. 277. *Consd.* Lindsey v. Barron (1848), 6 C. B. 291. *Fold.* Horton v. Devon (1849), 4 Exch. 497. *Consd.* Desborough v. Harris (1855), 5 De G. M. & G. 439; Watts v. Hammond (1855), 3 Eq. Rep. 641. *Distd.* Oriental Bank Corpn. v. Nicholson, Same v. Calrow (1857), 3 Jur. N. S. 857; Evans v. Wright (1865), 5 New Rep. 331. *Consd.* Costello v. Martin (1867), 15 W. R. 548. *N.F.* Attenborough v. St. Katharine's Dock Co. (1878), 3 C. P. D. 450. *Expld.* Rogers v. Lambert, [1891] 1 Q. B. 318. *Refd.* Glyn v. Duesbury (1840), 11 Sim. 139; Crawford v. Fisher (1842), 1 Haro. 436; Turner v. Kendal Corpn. (1844), 2 Dow. & L. 197; Slaney v. Sidney (1845), 9 Jur. 995; Jones v. Thomas (1854), 22 L. T. O. S. 301; Child v. Mann (1867), L. R. 3 Eq. 806. *Mentd.* King v. Simmonds (1845), 9 Jur. 761.

**191. ——— Warehouse rent.]—**A claim for warehouse rent is not such an interest in the subject-matter of a suit, as will exclude a *deft.* from the protection of Interpleader Act, 1831 (c. 58). Neither is it requisite that the right claimed by the third party should be an absolute right of property. It is enough, that *deft.* has received notice not to deliver the goods over to *pltf.*, until a demand made by the third party, in respect of such goods, has been satisfied.—HARWOOD v. BETHAM (1832), 1 L. J. Ex. 180.

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**202 iii. —**—**HEWITT v. HEISE** (1885), 11 P. R. 47.—CAN.

**Sect. 4.—Conditions of relief: Sub-sect. 1, B.; sects. 2 & 3. Sect. 5: Sub-sect. 1, A. & B.]**

in which he has no interest but which is claimed by a third person, cannot apply to be relieved under the Interpleader Act, 1831 (c. 58), against the claim of pltf. & such third party, if he has an indemnity from claimant.—*TUCKER v. MORRIS* (1832), 1 Cr. & M. 73; 1 Dowl. 639; 2 L. J. Ex. 1; 149 E. R. 319.

*Annotations:—*Reid. *Smith v. Keal* (1882), 9 Q. B. D. 340; *Thompson v. Wright* (1884), 13 Q. B. D. 632.

**203. ———.]—**Where a sheriff has seized goods under a *fi. fa.* & a claim to them is put in by another person, he is not bound to accept an indemnity from the execution creditor, but may obtain relief under the Interpleader Act, 1831 (c. 58), s. 6.—*LEVY v. CHAMPNEYS* (1834), 2 Dowl. 454.

**204. ———.]—**It is not necessary for the sheriff to apply to the different parties for an indemnity, before he applies to the ct. under Interpleader Act, 1831 (c. 58).—*CROSSLEY v. EBERS* (1835), 1 Har. & W. 216.

**205. ———.]—**Objection by claimant.]—The objection that a stakeholder has, by merely taking an indemnity from one of two rival claimants to property in his hands, disentitled himself to relief under Interpleader Acts because he has identified himself with & must be taken to “collude” with claimant who gave the indemnity, cannot be raised by that claimant himself.

The process of interpleader saves circuity of action (*STEPHEN, J.*).—*THOMPSON v. WRIGHT* (1884), 13 Q. B. D. 632; 33 W. R. 96; *sub nom.* *Re THOMPSON & WRIGHT*, 54 L. J. Q. B. 32; 51 L. T. 634, D. C.

#### SUB-SECT. 2.—NO COLLUSION.

*See R. S. C., Ord. 57, r. 2 (b).*

**206. General rule.]—**In interpleader suits, properly so called, where persons having conflicting interests are brought into ct. by a pltf. who has no interest, one of the conditions is, that he should make the ordinary affidavit of there being no collusion between him & either claimant (*LORD WESTBURY, C.*).—*VYVYAN v. VYVYAN* (1861), 4 De G. F. & J. 183; 31 L. J. Ch. 158; 5 L. T. 511; 8 Jur. N. S. 3; 10 W. R. 179; 45 E. R. 1153, L. C.

**207. What is collusion.]—***MURIETTA v. SOUTH AMERICAN, ETC. CO., LTD.*, No. 199, *ante*.

**208. ———.]—**Whether taking indemnity from claimant.]—*THOMPSON v. WRIGHT*, No. 205, *ante*.

**209. Applicant assisting claimant—Placing himself in position to be sued.]—**A party who, by his

own act, is placed in a situation to be sued, cannot call on the ct. to substitute another deft. under Interpleader Act, 1831 (c. 58). Without applying the word “collude” in an offensive since we cannot avoid seeing that deft. had placed himself in the situation in which he now stands at the request & with the view to the interest of his nephew [a claimant] (*TINDAL, C.J.*).—*BELCHER v. SMITH* (1832), 9 Bing. 82; 2 Moo. & S. 184; 1 L. J. C. P. 167; 131 E. R. 545.

*Annotations:—*Distd. *Thompson v. Wright* (1884), 13 Q. B. D. 632. Reid. *Evans v. Wright* (1865), 13 W. R. 468.

**210. ———.]—**Agreement to defeat claim.]—*MURIETTA v. SOUTH AMERICAN, ETC. CO., LTD.*, No. 199, *ante*.

**Applicant accepting indemnity.]—***See* Nos. 202–204, *ante*.

**Collusion between under sheriff & claimant.]—***See* Sect. 3, sub-sect. 3, C. (h), *ante*.

#### SUB-SECT. 3.—WILLINGNESS AND ABILITY TO DISPOSE OF SUBJECT-MATTER AS COURT DIRECTS.

*See R. S. C., Ord. 57, r. 2 (c).*

**211. Payment into court—Before any step in action.]—***Qu.*: whether, upon an interpleading bill, the money ought not to be actually brought into ct. before the motion for an injunction; though the practice seems to have been that it was time enough if brought in upon showing cause against the motion to dissolve the injunction.

In a pure interpleader bill pltf. never can proceed compulsorily by injunction till he has brought the money into ct. (*LORD THURLOW, C.*).—*DUNGEY v. ANGOVE* (1789), 3 Bro. C. C. 36; 29 E. R. 393, L. C.; *subsequent proceedings* (1794), 2 Ves. 304, L. C.

**212. ———.]—**A bill of interpleader is not demurrable, because it does not offer to bring the money claimed into ct. But pltf. must bring it in, before he takes any step in the cause.—*MEUX v. BELL* (1833), 6 Sim. 175; 58 E. R. 560.

**213. ———.]—**Part payment before adverse claim.]—If a part of a sum claimed by the parties has been paid to one of them before adverse claims made, the adverse claimant has a right to have the whole sum he claims paid into ct. on the holder applying for relief under the Interpleader Act, 1831 (c. 58).—*ALLEN v. GILBY* (1834), 3 Dowl. 143.

**214. ———.]—**Unless otherwise ordered by court—Order for payment to authorised person.]—*POWELL v. SONNET*, No. 437, *post*.

**215. Subject matter chose in action—Disposition as court may direct—Equivalent to payment in of money.]—**Shares are chattels within R. S. C.,

**202 iv. ———.]—***JAGGANATH HIRALAL TULKA v. KERA* (1908), 1 L. R. 32 Bom. 592.—IND.

#### PART II. SECT. 4, SUB-SECT. 2.

**207 i. What is collusion.]—***FLYNN v. COONEY* (1899), 18 P. R. 321.—CAN.

**210 i. Applicant assisting claimant—Agreement to defeat claim.]—**A mtgee., under a mtge. which, from certain irregularities in it, was void against subsequent mtgees. or purchasers in good faith for value, took possession of the chattels mentioned in it, & secreted them. An execution was afterwards issued, & the sheriff endeavoured, but was unable, to seize the goods. The execution creditor & deft. were colluding to defeat the mtgee.'s claim:—*Held*: the sheriff was not entitled to an interpleader.—

*OGDEN v. CRAIG* (1884), 10 P. R. 378.—CAN.

**210 ii. ———.]—***COSTELLO v. MARTIN* (1867), 1 I. R. Eq. 50.—IR.

#### PART II. SECT. 4, SUB-SECT. 3.

**k. Security—Necessity for—Claimant out of jurisdiction.]—**Claimant under an interpleader issue, if out of the jurisdiction, is bound to give security.—*WALKER v. NILES* (1870), 3 Ch. Ch. 108.—CAN.

**l. ———.]—**How given.]—In an interpleader action security may be given by bond conditioned to be void on payment to the execution creditor of the appraised value of the goods, or such other sum as the ct. or judge should direct.—*ASHDOWN v. NASH* (1886), 3 Man. L. R. 37.—CAN.

**m. ———.]—**How discharged.]—*TALCOTT v. SICKLESTEEL* (1861), 21 U. C. R. 43.—CAN.

**n. ———.]—**Surety becoming insolvent—Whether claimant barred.]—Upon a sheriff's application, an interpleader order was made in the usual terms, & claimant having given security thereunder by an approved bond for the forthcoming of the goods, the sheriff withdrew from possession. Before the interpleader issue came to trial the goods were sold for taxes, & the surety on the claimant's bond became insolvent:—*Held*: the security had nothing to do with the determination of claimant's rights, but only with the preservation of the property pending the litigation; & the ct. had no right to make an order barring the claim in default of giving fresh security.—



Ord. 57, r. 1, & therefore an interpleader issue can be directed in respect of them.

Pltf. being desirous of selling some shares he had in a limited co., intrusted defts. with the certificate of ownership & a blank transfer. On his withdrawing his authority to sell defts. refused to return the documents, & on his bringing an action for their recovery, they obtained an interpleader order on the ground that B. also claimed the shares:—*Held*: defts., though holding the documents as agents for pltf., might set up a *jus tertii* for the purpose of obtaining an interpleader order.

*Semble*: a chose in action may be the subject of interpleader.

The disposition of a chose in action is equivalent to payment in the case of money or transfer in the case of goods or of a chattel to which that process [interpleader] is applicable (FRY, L.J.).—ROBINSON v. JENKINS (1890), 24 Q. B. D. 275; 59 L. J. Q. B. 147; 62 L. T. 439; 38 W. R. 360; 6 T. L. R. 158, C. A.

*Annotations*:—*Consd.* *Ex p.* Mersey Docks & Harbour Board, [1899] 1 Q. B. 546. *Reid.* Rogers v. Lambert, [1891] 1 Q. B. 318.

## SECT. 5.—THE CLAIM.

### SUB-SECT. 1.—WHO MAY BE CLAIMANTS.

#### A. The Crown.

216. *Whether Crown can be claimant.*—The ct. refused a rule under Interpleader Act, 1831 (c. 58), applied for by a deft., upon affidavits stating that the debts ought to be recovered in the action had been, under a writ of extent issued against pltf., returned by the jury as seized for the Crown. The provisions of Interpleader Act, 1831 (c. 58), do not apply to cases where the Crown is a party interested.—CANDY v. MAUGHAM (1843), 6 Man. & G. 710; 1 Dow. & L. 745; 7 Scott, N. R. 401; 13 L. J. C. P. 17; 2 L. T. O. S. 99; 7 Jur. 1040; 134 E. R. 1078.

*Annotation*:—*Apld.* The Mogileff (No. 2), [1922] P. 122.

217. —.]—Deft. S., a licensed victualler, & customer of pltf., who were a firm of brewers, deposited with them a sum of money, at interest, stating at the same time that it was not his property. Pltf. were afterwards induced to believe that the money was the produce of a robbery committed on a railway co. They filed a bill, alleging that the money was claimed by four parties, viz., by deft. S., by another deft. B. as trustee of the felon, by the railway co. & by the Crown; & prayed for a decree of interpleader. B. & S. disclaimed. Defts., the co. & the Crown, contended that this was not a proper case for interpleader, inasmuch as the co. had consented that the money should be paid to the Crown:—*Held*: there being considerable doubts as to the title both of the co. & of the Crown, the suit was properly instituted, & decree made that the Crown & the co. should interplead, with directions for inquiries as to the title to the sum in question.—REID v. STEARN (1860), 1 L. T. 539; 6 Jur. N. S. 267.

*Annotation*:—*Distd.* The Mogileff (No. 2), [1922] P. 122.

HOGAROOM v. GILLIES (1894), 16 P. R. 260.—CAN.

o. —. *Whether sole bond of claimant sufficient.*—The sole bond, approved by the proper officer of the ct. of a chartered bank, claimant of the goods in question in an interpleader, is sufficient security for the forthcoming of the goods; it is not necessary to procure sureties, nor to give proof by

affidavit of the responsibility of the bank.—ONTARIO BANK v. MERCHANTS BANK OF HALIFAX (1901), 21 C. L. T. 188; 1 O. L. R. 235.—CAN.

p. *Surety* — *Married woman not a proper person.*—MULLIN v. PASCOE (1880), 8 P. R. 372.—CAN.

PART II. SECT. 5, SUB-SECT. 1.—B.  
222 i. *Relief available*—*Service out*

218. —.]—Under a writ of *fi. fa.* taken out by pltf., the Sheriff of Lincoln seized two ships which pltf. alleged were the property of their judgment debtors, a corpn. styled the Russian Volunteer Fleet. The solr. for the Board of Trade gave notice to the sheriff that the ships were the property of His Majesty & requested the sheriff to withdraw. The sheriff thereupon took out an interpleader summons directed to pltf. & to His Majesty represented by the Shipping Controller:—*Held*: on the broad principle that the King could not be made to submit to the jurisdiction of the King's cts. against his will, the ct. could not order an interpleader issue.—THE MOGILEFF (No. 2), [1922] P. 122; 91 L. J. P. 72; 126 L. T. 548; 38 T. L. R. 279; 66 Sol. Jo. 250; 15 Asp. M. L. C. 476, C. A.

#### B. Parties out of Jurisdiction.

See R. S. C., Ord. 11, r. 8 (a); PRACTICE.

219. *Relief available.*—Interpleader upon opposite claims. Interpleader; all defts. but one residing out of the jurisdiction, in Scotland. Pltf., after a reasonable time, having used due diligence to bring them in, being decreed to give up the subject to the only deft. appearing, protected afterwards against the others by injunction, & order, that service on the attorney should be good. Bill of interpleaders sustained upon bills of exchange, received by pltf. as agent to procure payment for his principal, in Scotland, to whom they were remitted against an order for goods, pursued in an action of trover by the party, who so remitted them, & by attachment in Scotland by a creditor of that party.

It was objected that as G. & the attaching creditor are out of the jurisdiction & there is only one creditor within the jurisdiction a bill of interpleader cannot be filed. Upon the authorities that proposition cannot be maintained (LORD ELDON, C.).—STEVENSON v. ANDERSON (1814), 2 Ves. & B. 407; 35 E. R. 373, L. C.

*Annotations*:—*Foll.* Martinus v. Helmuth & Schmitt (1815), Coop. G. 245. *Consd.* Nelson v. Barter (1864), 2 Hem. & M. 334. *Apld.* Credits Gerundeuse v. Van Weede (1884), 12 Q. B. D. 171. *Reid.* East & West India Dock Co. v. Littledale (1848), 7 Hare, 57; Central Railroad & Banking Co. of Georgia v. Mitchell (1865), 2 Hem. & M. 452; Manby v. Robinson (1869), 17 W. R. 479. *Mentd.* Morley v. Rennoldson, Morley v. Linkson (1843), 2 Hare, 570; R. v. Lightfoot (1856), 2 Jur. N. S. 786; Larivière v. Morgan (1872), 7 Ch. App. 550; Weldon v. Gounod (1885), 15 Q. B. D. 622; *Re* King's Trade Mk., [1892] 2 Ch. 462.

220. —.]—Interpleader allowed by a factor against both defts. residing abroad, & one not appearing. The subject, a policy on a cargo lost, for effecting which pltf. claimed to be reimbursed their expenses.—MARTINIUS v. HELMUTH & SCHMIDT (1817), Coop. G. 245; 2 Ves. & B. 412, n.; 35 E. R. 546, L. C.

*Annotations*:—*Reid.* Crawford v. Fisher (1842), 1 Hare, 436; East & West India Dock Co. v. Littledale (1848), 7 Hare, 57.

221. —.]—ATTENBOROUGH v. ST. KATHARINE'S DOCK CO., No. 40, *ante*.

222. —. *Service out of jurisdiction.*—VAN DER KAN & DEITZSMAN v. ASHWORTH & CO., [1884] W. N. 58; Bitt. Rep. in Ch. 202.

*of jurisdiction.*—The ct. has power to, & will in a proper case, give leave to issue & serve an interpleader summons out of the jurisdiction, although no writ has been sued out against appot. in relation to the subject-matter of the proposed interpleader proceedings.—CITY OF DUBLIN STEAM PACKET CO. v. COOPER, [1899] 2 I. R. 381.—IR.



**Sect. 5.—The claim: Sub-sect. 1, B. & C.; sub-sects. 2, 3 & 4, A.]**

**223. —**—Where pltf. sued for goods in the possession of deft., & it appeared that a foreigner residing out of the jurisdiction claimed the right to the same goods & would probably sue deft. in respect of them, the ct. gave deft. leave to serve an interpleader summons out of the jurisdiction upon the foreigner. The effect of service out of the jurisdiction in such a case is to give the foreigner notice of the proceedings within the jurisdiction, so that he may appear & prosecute his claim, or, if he does not appear, so that any future claim, prosecuted by him against deft. in respect of the subject-matter of the section within the jurisdiction may be barred.—**CREDITS GERUNDEUSE, LTD. v. VAN WEEDE** (1884), 12 Q. B. D. 171; 53 L. J. Q. B. 142; 48 J. P. 184; 32 W. R. 414, D. C.

**Annotations:—***Reid. Weldon v. Gounod* (1885), 15 Q. B. D. 622; *Re Bouron, Ex p. Brandon* (1886), 54 L. T. 128; *Re Busfield, Whaley v. Busfield* (1886), 32 Ch. D. 123.

**224. —**—**HENRY & Co. v. ENGLE** (1907), *Halsbury's Laws of England*, Vol. XVII., p. 597, C. A.

#### C. Particular Instances.

**225. Agent—Hiring goods to judgment debtor.]**—In an interpleader issue to try whether certain goods were the property of pltf. as against deft., the execution creditor, it was proved that the goods were, at the time of the seizure, in the possession of the execution debtor to whom they had been let by pltf. The goods were in fact the property of W., who had lent them to pltf., who was his agent, allowing her to let them as owner to whom she would:—**Held**: pltf. had sustained her claim.

The issue in the present case is not whether the goods were the property of [the claimant] absolutely, but whether they were hers against deft. My impression is that this form of issue has been adopted for the express purpose of enabling any person lawfully entitled to possession to sustain his claim (**POLLOCK, C.B.**).—**GREEN v. STEVENS** (1857), 2 H. & N. 146; 5 W. R. 497; 157 E. R. 61.

**Annotations:—***Consd. Richards v. Jenkins* (1886), 17 Q. B. D. 544; *Peake v. Carter*, [1916] 1 K. B. 652.

**226. Assignee of equity of redemption of goods.]**—**USHER v. MARTIN**, No. 31, *ante*.

**227. Bailie—Claiming lien.]**—The ct. will relieve the sheriff under Interpleader Act, 1831 (c. 58), s. 6 in the case of conflicting claims on property seized by him, though that claim is only of a lien & not of the whole property.—**FORD v. BAYNTON** (1832), 1 Dowl. 357.

**228. —**—Goods in the possession of A. having been taken in execution at the suit of B. against C. an interpleader issue was directed, to try whether A., pltf. in the issue, had any property in the goods as against B., deft. in the issue:—**Held**: the issue on pltf.'s part was maintained by showing a lien on the goods for money due to him from C.—**ROGERS v. KENNAY** (1846), 9 Q. B. 592; 15 L. J. Q. B. 381; 11 Jur. 14; 115 E. R. 1401.

**229. Cestui que trust—In possession by trustee's authority.]**—A *cestui que trust* who is in possession

of settled goods by virtue of an authority from the trustees thereof is entitled to same as against the sheriff seizing them for the execution creditor of a debtor living in the house wherein such goods are, & it is not necessary for the trustees to be parties to an interpleader issue directed in order to determine the right of possession.

The question merely is who is the right party to maintain this action & recover the property from the execution creditor. . . . The issue is not whether the property abstractedly considered is in pltf. but as to whether pltf. has a right to the goods as against deft. (**BOVILL, C.J.**).—**SCHROEDER v. HANROTT** (1873), 28 L. T. 704.

**Annotations:—***Consd. Peake v. Carter*, [1916] 1 K. B. 652. *Reid. Flude v. Goldberg* (1915), 85 L. J. K. B. 219.

**230. Debenture-holders—Property of company seized.]**—A limited co. issued debentures secured by a floating charge upon all the property of the co., & also by a deed which vested in a trustee for the benefit of the debenture-holders the leasehold property & uncalled capital of the co., & gave him the right to call upon the co. to vest in him all other property of the co. except chattels within the meaning of Bills of Sale Acts. Before the time for the payment of the amount secured by the debentures had arrived certain goods of the co. charged by the debentures were seized by the sheriff under a *fi. fa.* No winding-up resolution was passed & no receiver appointed, nor did the trustee put in force his powers under the deed, but the debenture-holders claimed the goods, & the sheriff interpleaded:—**Held**: the rights of the debenture-holders prevailed over those of the execution creditor since, the goods seized being validly charged with payment of the debentures, there was no interest of the co. in them available to satisfy the judgment debt.

The sheriff cannot merely by seizing affect the rights of third persons to which property was subject when in the hands of the debtor unless, indeed, such third persons have debarred themselves from the assertion of such rights (**LORD RUSSELL, C.J.**).—**DAVEY & Co. v. WILLIAMSON & SONS**, [1898] 2 Q. B. 194; 67 L. J. Q. B. 699; 78 L. T. 755; 46 W. R. 571; 42 Sol. Jo. 525, D. C.

**Annotations:—***Reid. Re London Pressed Hinge Co., Campbell v. London Pressed Hinge Co.*, [1905] 1 Ch. 578; *Cairney v. Back*, [1906] 2 K. B. 746; *Norton v. Yates*, [1906] 1 K. B. 112; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

**231. Infant.]**—The ct. has power to give a sheriff relief under Interpleader Act, 1831 (c. 58), though the claimant is an infant.—**CLARIDGE v. COLLINS** (1839), 7 Dowl. 698; 3 Jur. 894.

**232. Married woman.]**—**SHINGLER v. HOLT**, No. 387, *post*.

**233. Receiver appointed by court.]**—**PURKISS v. HOLLAND** (1887), 31 Sol. Jo. 702, C. A.

**234. — Goods within jurisdiction—Owners abroad.]**—**LEVASSEUR v. MASON & BARRY**, No. 23, *ante*.

**235. Solicitors—Claiming lien for costs.]**—Where an uncertificated bkpt. brought an action for work done by him, & on a reference a certain sum was found to be due to him, which his assignees thereupon claimed from deft.:—**Held**: on a fresh action

#### PART II. SECT. 5, SUB-SECT. 1.—C.

**a. Cestui que trust.]**—**CONNELL v. HICKOCK** (1888), 15 A. R. 518.—CAN.

**2321. Married woman.]**—**INGRAM v. TAYLOR** (1882), 7 A. R. 216.—CAN.

**r. Attaching creditors.]**—**DOYLE v. LASKER** (1866), 16 C. P. 263.—CAN.

**t. —**—Attaching creditors may be "claimants" within Interpleader Act.—**STANDARD INSURANCE Co. v.**

**HUGHES** (1885), 11 P. R. 220.—CAN.

**a. Execution debtor.]**—Although an execution debtor claiming goods in the possession of an assignee in insolvency may sue the assignee & oblige him to interplead, neither the sheriff nor the execution creditor can do so.—**MCMASTER v. MEAKIN** (1877), 7 P. R. 211.—CAN.

**b. Party claiming a lien.]**—A

party having a lien on lands cannot, under Interpleader Act, claim the money paid to the sheriff as against the execution creditor, even where he has relinquished his title to the land to enable the owner to carry out a sale, & is to receive a portion of the purchase money.—**FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE** (1886), 13 S. C. R. 384.—CAN.

**c. Trustee of will.]**—A married

being brought by the bkpt. for the amount, deft. might call upon the assignees, by an interpleader rule, to support their claim, & upon such rule the lien of the bkpt.'s attorney for their costs in the former action & the reference ought to be satisfied out of the amount claimed.—*JONES v. TURNBULL* (1837), 5 Dowl. 591; 2 M. & W. 601; Murp. & H. 106; 6 L. J. Ex. 166; 1 Jur. 638; 150 E. R. 897.

*Annotation*:—*Consd. Re Meter Cabs*, [1911] 2 Ch. 557.

**236. Trustee — In possession consistent with trust.**—When the goods of a deft., who alleges that he holds them solely as trustee, are taken in execution, deft., in his character of trustee, may, in general, dispute the seizure; & the sheriff, in such case, is entitled to the benefit of an interpleader rule under Interpleader Act, 1831 (c. 58), s. 6. *Qu.*: whether this would be so, if deft. had possessed the goods for a long time under circumstances inconsistent with the trust.—*FENWICK v. LAYCOCK* (1841), 2 Q. B. 108; 1 Gal. & Dav. 532; 11 L. J. Q. B. 146; 6 Jur. 341; 114 E. R. 43.

*Annotation*:—*Reid. Re Morgan, Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93.

**237. — For benefit of creditors.**—When a debtor has made an assignment of his property to a trustee for the benefit of his creditors generally, & when the trustee sets up this deed of assignment against an execution creditor, the onus of proving that the deed is irrevocable & binding, as against such execution creditor, lies on the trustee; that is, the trustee has to prove that the deed has gone beyond the stage of being revocable, by showing that it has been communicated to a creditor, & assented to, or at least not dissented from, by him. The burden of giving such affirmative evidence lies on the person setting up the deed against the execution creditor.—*ADNITT v. HANDS* (1887), 57 L. T. 370.

**238. Trustee in bankruptcy—Added after interpleader issue directed.**—If, after an interpleader issue has been settled, the execution debtor files a petition for liquidation, & the trustee under the liquidation claims the goods in respect of which the issue has been directed, the trustee will, upon his application, be added as a claimant in the trial of the issue.—*BIRD v. MATHEWS* (1882), 46 L. T. 512, C. A.

#### SUB-SECT. 2.—SEVERAL CLAIMANTS.

**239. No bar to relief.**—Interpleader upon notice of a variety of claims by persons, among whom an entire charge upon an estate was split; though no suit instituted; & but one legal right of entry: the principle being, not merely that the payment cannot be safely made, but that the party, entitled to be discharged by a single payment, should not be harassed by a number of suits.—*ANGELL v. HADDEN* (1808), 15 Ves. 244; 33 E. R. 747, L. C.

*Annotations*:—*Reid. Nelson v. Barter* (1864), 2 Hem. & M. 334; *G. S. & W. Ry. v. Corry* (1867), 15 W. R. 650.

**240. —**—A bill was filed by A. stating that B. was a mtgee. with a power of sale, of an estate

belonging to D., & mtgee. of some chattels also belonging to D.; that C. had also an interest in the said chattels; that B., with the assent & concurrence of C., had instructed A. to sell all the property; that A. had sold it, & had the money in his hands; & that A. had afterwards received a notice that D. had been made a bkpt., & that he was required by the assignees not to part with the money, & praying that B., C., & the assignees of D. might interplead together. To this bill B. demurred. The demurrer was overruled.—*FAREBROTHER v. BEALE* (1849), 3 De G. & Sm. 637; 19 L. J. Ch. 149; 14 L. T. O. S. 327; 14 Jur. 215; 64 E. R. 639.

**241. — Though claims unequal.**—Where a fund in the hands of a stakeholder was contested by three parties, one of whom claimed the whole of it & the other two claimed it in certain proportions, & the stakeholder filed a bill of interpleader against the three claimants, the ct. at the hearing, dismissed the bill with costs, as against one of the parties claiming a part of the fund, & decreed that the other two parties should interplead as to the other part.—*HOGGART v. CUTTS* (1841), Cr. & Ph. 197; 10 L. J. Ch. 314; 41 E. R. 465, L. C.

*Annotations*:—*Mentd. Gloucester Corpn. v. Wood* (1843), 13 L. J. Ch. 54; *Suisse v. Lowther* (1843), 7 Jur. 808.

**Inequality of claims.**—See Sect. 3, sub-sect. 1, B., *ante*.

#### SUB-SECT. 3.—SUBSTITUTION AND ADDITION OF CLAIMS.

**242. Claimant added—After proceedings instituted.**—Where a new claim is raised, after a rule *nisi* under Interpleader Act, 1831 (c. 58) has been obtained, the sheriff may make the new claimant a party to the rule.—*KIRK v. CLARK* (1835), 4 Dowl. 363.

**243. — — —**—*IBBOTSON v. CHANDLER* (1841), 9 Dowl. 250; H. & W. 83.

**244. — — —**—Where an interpleader rule was obtained, & afterwards a claim was made by a curator appointed by the Scottish law to the property of a deceased person, the ct. enlarged the rule to enable deft. to make such claimant a party thereto.—*WALKER v. KER* (1843), 12 L. J. Ex. 204; 7 Jur. 156.

**245. — — —**—*BIRD v. MATHEWS*, No. 238, *ante*.

**246. Plaintiff not proceeding to trial—Substitution of plaintiff—Original plaintiff made defendant.**—Where a pltf. in an issue directed under Interpleader Act, 1831 (c. 58) does not proceed to the trial of it, the ct. will not permit another person's name to be substituted, without making the originally appointed pltf. a party to the rule.—*LYDAL v. BIDDLE* (1836), 5 Dowl. 244; 2 Har. & W. 302.

#### SUB-SECT. 4.—REQUIREMENTS AS TO CLAIM.

##### A. Notice of Claim.

**247. By whom given—Whether by actual claimant.**—*LEWIS v. EICKEY*, No. 505, *post*.

#### PART II. SECT. 5, SUB-SECT. 2.

**f. Variation of order.**—*MERCHANTS BANK v. HERSON* (1883), 10 P. R. 117.—CAN.

#### PART II. SECT. 5, SUB-SECT. 4.—A.

**g. Duty of execution creditor—Receipt of sheriff's notice.**—The proper course for an execution creditor on receipt of notice from the sheriff that a claim has been made to goods seized

woman claimed an equitable title to certain goods seized by the sheriff, at suit of a creditor of her husband's. They had been bequeathed to her by will, upon which the probate had never been obtained for her separate use, & in trust for her children. The ct. directed her to obtain probate for her husband as her nominee, & that he should be pltf., as a trustee for her, in an issue directed to try the rights of the parties under Interpleader Act.—

*BURKE v. ROUTLEDGE* (1851), 3 Ir. Jur. 148.—IR.

**d. Trustees of intended settlement.**—*WELLWOOD'S TRUSTEES v. BOSWELL (OR HILL)* (1856), 19 Dunl. Ct. of Sess.) 187; 29 Sc. Jur. 86.—SCOT.

**e. Trustees.**—*LEIGHTON v. LEIGHTON* (1867), 5 Macph. (Ct. of Sess.) 561; 39 Sc. Jur. 28



*Sect. 5.—The claim: Sub-sect. 4, B. & C. Sect. 6: Sub-sects. 1 & 2, A. & B.; sub-sects. 3 & 4, A.]*

*B. Necessity for Writing.*

*See R. S. C., Ord. 57, r. 16.*

*C. Particulars.*

*See R. S. C., Ord. 57, r. 5.*

**248. Necessity for—By claimant.]**—A claimant called upon by a rule under Interpleader Act, 1831 (c. 58), to come in & state his claim, must give the particulars upon his affidavit to enable the ct. to decide even whether he is to be made a party to an issue.—*POWELL v. LOCK* (1835), 3 Ad. & El. 315; 1 Har. & W. 281; 111 E. R. 433; *sub nom. POWELL v. LOCK*, 4 Nev. & M. K. B. 852.

*Annotations:—Distd. Angus v. Wootton* (1838), 3 M. & W. 310. *Expld. Webster v. Delafield* (1849), 7 C. B. 187.

**249. ———.]**—An affidavit must be made by a claimant under Interpleader Act, 1831 (c. 58), before an issue can be directed.—*PEEL v. WETHERBY* (1844), 1 New Pract. Cas. 20; 3 L. T. O. S. 205.

**250. ——— By solicitor—Claimant abroad.]**—*WEBSTER v. DELAFIELD*, No. 309, *post*.

**251. ———.]**—*PLUES v. CAPEL* (1880), 68 L. T. Jo. 354.

**252. ——— By execution creditor.]**—It is not necessary for an execution creditor, appearing on a motion under Interpleader Act, 1831 (c. 58), to produce an affidavit.—*ANGUS v. WOOTTON* (1838), 3 M. & W. 310; 1 Horn & H. 46; 7 L. J. Ex. 82.

**253. ——— By sheriff—Of goods seized.]**—A sheriff under a writ of *fi. fa.* seized & took into his possession certain goods as the property of debt. in an action. The wife of debt. claimed the goods seized as her sole & separate property, & applied in chambers for an order that the sheriff should deliver particulars of the goods that he had seized. On the question being referred by the judge in chambers to this ct.:—*Held*: this was a totally novel application, & ought not under the circumstances to be assented to.—*BAULY v. KROOK* (1891), 65 L. T. 377, D. C.

**254. Effect of—Whether binding on claimant.]**—Where, upon an interpleader summons by the sheriff, a claimant alleges that he is entitled, under a bill of sale or otherwise by way of security for debt, to the goods seized in execution, & an order is made for the sale of the goods & the satisfaction of the claim out of the proceeds of the sale, the claimant is not entitled to demand from the sheriff any sum not included in the particulars of claim on which the order was made.—*HOCKEY v. EVANS* (1887), 18 Q. B. D. 390; 56 L. J. Q. B. 253; 56 L. T. 179; 35 W. R. 265; 3 T. L. R. 319, C. A. *Annotation:—Reid. Peake v. Carter*, [1916] 1 K. B. 652.

**255. ———.]**—Goods having been seized in execution of a judgment recovered against one of

two partners, the other partner claimed them as his sole property. At the trial of an interpleader issue directed to try the validity of that claim, the jury found that the goods were the property of the partnership:—*Held*: upon the special facts of the case, the claimant was precluded from relying upon the title found.—*FLUDE, LTD. v. GOLDBERG*, [1916] 1 K. B. 662, n.; 85 L. J. K. B. 219; 113 L. T. 846; 59 Sol. Jo. 691, C. A.

*Annotation:—Distd. Peake v. Carter*, [1916] 1 K. B. 652.

**256. ———.]**—(1) The general rule upon the trial of an interpleader issue is that, where a claimant claims under a title which he fails to prove, he is not thereby precluded from relying on the title found.

(2) In interpleader proceedings it has not been the practice of the ct. to treat the exact form of the issue as material (*SWINFEN EADY, L.J.*).

(3) Since the Partnership Act, 1890 (c. 39), the partnership goods cannot be seized for a partner's debt, & therefore to prove an interest as partner is to prove that the seizure was wrongful as against the claimant & the sheriff must withdraw. A proper way of deciding whether the claim to such an interest is well founded is in my opinion by interpleader proceedings & I can see no reason in principle or authority why such proceedings do not apply to such a claim (*PICKFORD, L.J.*).—*PEAKE v. CARTER*, [1916] 1 K. B. 652; 85 L. J. K. B. 761; 114 L. T. 273, C. A.

**SECT. 6.—THE APPLICATION.**

**SUB-SECT. 1.—HOW MADE.**

*See R. S. C., Ord. 57, r. 5.*

**257. Ordinary summons—In action already commenced.]**—*READING v. LONDON SCHOOL BOARD*, No. 75, *ante*.

**258. Originating summons.]**—*READING v. LONDON SCHOOL BOARD*, No. 75, *ante*.

**SUB-SECT. 2.—TIME FOR.**

**A. Application by Sheriff.**

*See now, R. S. C., Ord. 57, rr. 16, 17.*

*See Sect. 3, sub-sect. 3, C. (a), ante.*

**B. Application by Stakeholder.**

*See R. S. C., Ord. 57, r. 4.*

**259. Immediately before or after proceedings commenced.]**—A bill of interpleader ought to be filed immediately after or before the commencement of proceedings at law, & not be delayed till after a judgment or verdict has been obtained; &

under his execution, is to make inquiries & satisfy himself as to the title of claimant & within four days after receiving the notice to give notice in writing to the sheriff that he admits or disputes the claim, & in the event of admitting the claim, he will only be liable for the fees & expenses incurred prior to the receipt of the notice by the sheriff.—*EDWARDS v. SEWELL* (1915), 33 W. L. R. 271.—CAN.

**PART II. SECT. 5, SUB-SECT. 4.—C.**

**h. Sufficiency of.]**—The bill stated that pltf. agreed with A. & B. to purchase from them certain land upon certain terms; that he had paid them a portion of the purchase-money; that A. claimed the balance, & that B. & X. also claimed it:—*Held*: the bill sufficiently disclosed the nature of the opposing claims.—*TEES v. SPENCE* (1886), 3 Man. L. R. 430.—CAN.

**k. ———.]**—*TURNER v. TYMCHORAK* (1908), 17 Man. L. R. 687.—CAN.

**l. ———.]**—An objection that a writ of attachment was obtained on material which did not justify it may properly be taken by a claimant on an application for an interpleader order.—*LIVERPOOL v. TAYLOR*, [1920] 3 W. W. R. 62.—CAN.

**PART II. SECT. 6, SUB-SECT. 1.**

**m. Originating notice.]**—There is no authority for launching a motion by a sheriff for an interpleader order by means of an originating notice.—*PEABODYS, LTD. v. PEACE RIVER PACKERS, LTD.*, [1922] 2 W. W. R. 505.—CAN.

**n. Whether notice necessary.]**—In interpleader proceedings other than by the sheriff it is not necessary for appct.

for relief by way of interpleader to notify the parties claiming before applying for relief.—*Re STATE ELEVATOR CO., LTD.*, [1917] 2 W. W. R. 572.—CAN.

**o. In High Court—High Court & county court claims.]**—In case of interpleader by a sheriff between two claimants, one pltf. in a superior ct. suit, the other pltf. in a county ct. suit, the application for an interpleader order was properly made in the superior ct., although the seizure was made under the county ct. writ before the superior ct. writ came into the sheriff's hand.—*STRANGE v. TORONTO TELEGRAPH CO.* (1879), 8 P. R. 1.—CAN.

**PART II. SECT. 6, SUB-SECT. 2.—B.**

**p. After return day of writ.]**—An application by a stakeholder for



therefore, where an interpleading bill was filed, after a verdict had been obtained by one of the parties, & an injunction had been granted on the money being paid into ct.; the ct. dissolved the injunction, though the answer of only one of the parties had come in, pltf. not satisfactorily accounting for the delay in filing his bill.—*CORNISH v. TANNER* (1827), 1 Y. & J. 333; 148 E. R. 699.

*Annotation*:—*Distd. Hamilton v. Marks* (1852), 5 De G. & Sm. 638.

**260. After twice obtaining time to plead.]—**An action of trover was commenced on Dec. 29, & the declaration was delivered on Jan. 12, after which deft. twice obtained time to plead:—*Held*: a rule obtained by deft. under Interpleader Act, 1831 (c. 58), on Jan. 23 was not too late.—*BARNES v. BANK OF ENGLAND* (1838), 1 Will. Woll. & H. 50.

**261. After judgment.]—***CORNISH v. TANNER*, No. 259, *ante*.

**262. — Fixing quantum of damage.]—**It is no objection to a bill of interpleader that it is filed after verdict at law, where the effect of the action at law was to ascertain the quantum of damages due on the claim of pltf. at law (a deft. in equity).—*HAMILTON v. MARKS* (1852), 5 De G. & Sm. 638; 64 E. R. 1278.

**263. —.]—**Leave given, *valeat quantum*, to file a bill of interpleader, on an affidavit by the solr. of pltf. that there was no collusion, pltf. being abroad, & the case being pressing.

L. bought goods, & as he alleged, from M. B., from whom M. had ordered them, commenced in Dec. an action against L. for the price, & arrested him, & in the Feb. following, obtained a verdict. L. obtained from a common law judge stay of execution on paying the purchase money into ct., & applied for a new trial, which on Apr. 16 was refused. He then filed a bill to make M. & B. interplead, & for an injunction to restrain the taking the money out of ct. The injunction was refused.—*LARABRIE v. BROWN* (1857), 1 De G. & J. 204; 23 Beav. 607; 26 L. J. Ch. 416, 605; 29 L. T. O. S. 191; 5 W. R. 538; 44 E. R. 702, L. JJ.

**264. — By consent.]—**Interpleader is not allowable where final judgment has been given by consent, & no other proceeding in the same matter is pending.—*STEVENSON (H.) & SON, LTD. v. BROWNELL*, [1912] 2 Ch. 344; 81 L. J. Ch. 694; 106 L. T. 994; 56 Sol. Jo. 571, C. A.

**265. Failure to apply before claim established—Liability for costs of successful suit.]—**A mtge. was made of estate A. for £300, in which sureties joined to secure the debt. Another mtge. of estate B. was made by the same mtgor. to same mtgee. to secure £1,500 & the title-deeds of other property belonging to the mtgor.'s wife were deposited as collateral security for £300, part of the £1,500. The first £300 was paid off partly by the sureties. Afterwards, the other principal security was realised, & the £1,500 paid off. The mtgee. resisted the delivery of the deposited deeds on the ground that the sureties might have an equity against them, & the sureties were made parties to a suit for delivery of the deeds. The sureties did not assert any claim in the suit:—*Held*: the mtgor. was entitled to a decree for delivery of the deeds, & to the costs of the suit against the mtgee., & the principle of consolidating

securities did not apply to a mere bailment of deeds to secure one of the debts. In such a case the proper remedy is by interpleader, & if a person having a right to file an interpleader bill does not do so, but awaits the suit of one of the claimants, he will, if pltf. establishes his claim, be ordered to pay the costs of the suit.—*CRICKMORE v. FREESTON* (1870), 40 L. J. Ch. 137, L. JJ.

#### SUB-SECT. 3.—SERVICE OF SUMMONS.

*See* R. S. C., Ord. 54, rr. 4B, 4D, 4F (3); Ord. 57, rr. 2, 7.

**266. Sufficiency of service—On solicitor of claimant.]—**To support an application that service of subpoena on a bill of interpleader upon the solr. who brings the action might be deemed good service, it is not only necessary that the party applying should state that he knows not where pltf. at law is to be met with, & that the solr. has refused to appear; but the ct. requires that the solr. should be stated to have positively refused to inform them where he is to be found, & also that the process should have been previously formally tendered to him.—*EAST INDIA CO. & RICHARDSON v. COLLINS & ANLIFFE* (1819), 6 Price, 404; 146 E. R. 848.

**267. — On wife of claimant.]—**Two attempts to serve a rule to appear, under Interpleader Act, 1831 (c. 58), personally, & a service on the wife of the claimant, at his dwelling-house, is not good service.—*LAMBERT v. TOWNSEND* (1832), 1 L. J. Ex. 113.

**268. — On agent of execution creditor.]—**(1) Service of a rule to appear, under Interpleader Act, 1831 (c. 58), s. 6, on the agent to pltf. in the execution, is good service.

(2) The ct. will not make any final order in the absence of a party, without an affidavit that he has been served with the rule to appear.

*Qu.*: whether a judge at chambers has authority, on an enlarged rule of ct., to adjudicate under Interpleader Act, 1831 (c. 58), s. 6. *Semble*: he has.—*PHILLIPS v. SPRY* (1832), 1 L. J. Ex. 115.

#### SUB-SECT. 4.—EVIDENCE AS TO FULFILMENT OF CONDITIONS.

##### A. Application by Sheriff.

*See* R. S. C., Ord. 57, r. 2.

**269. Necessity for affidavit—Denying collusion.]—**Where the sheriff applies for relief under Interpleader Act, 1831 (c. 58), he need not in the affidavit in support of the application deny collusion with the claimants.—*DONNIGER v. HINXMAN* (1833), 2 Dowl. 424.

*Annotation*:—*Mentd. Scott v. Lewis* (1835), 5 Tyr. 1083.

**270. —.]—**The sheriff need not deny collusion, in order to obtain relief under Interpleader Act, 1831 (c. 58).

My impression was, that the sheriff being a public officer, it was not necessary for him to deny collusion in order to obtain relief under the statute. . . . It appears to me, therefore, that the sheriff is entitled to relief on the affidavit he has made (*PATTESON, J.*).—*DOBBINS v. GREEN* (1834), 2 Dowl. 509.

*Annotation*:—*Mentd. Scott v. Lewis* (1835), 5 Tyr. 1083.

relief after the return day of the writ, is too late unless the delay be satisfactorily explained.—*COLE v. McFAUL* (1844), 1 U. C. R. 276.—*CAN.*

**PART II. SECT. 6, SUB-SECT. 3.**  
**q. Sufficiency of service—On law & land agent of one claimant.]—***SEALY v. BLUNDELL* (1832), Glascock, 177.—*IR.*

**r. Omission to serve—Cured by appearance.]—***MASLIN v. CASEY* (1882), 1 N. Z. L. R. 138 (S. C.).—*N.Z.*

6.—*The application: Sub-sect. 4, A. & B. Sect. 7: Sub-sects. 1 & 2, A. & B. (a), (b) & (c), C. & D.]*

271. ———.]—When the sheriff applies for relief under Interpleader Act, 1831 (c. 58), he need not in his affidavit deny collusion with the party.—*BOOND v. WOODALL* (1835), 2 Cr. M. & R. 601; *Tyr. & Gr. 11*; 5 L. J. Ex. 9; 150 E. R. 256; *sub nom. BOND v. WOODHALL* 4 Dowl. 351.

*Annotation:—Folld. Roberts v. Asksen* (1848), 12 Jur. 440.

272. ———.]—A sheriff who applies for relief under Interpleader Act, 1831 (c. 58), s. 6, need not in his affidavit deny collusion with the claimant.—*ROBERTS v. ASKSEN* (1848), 12 Jur. 440.

273. ———.]—In applying for an interpleader summons a sheriff need not, as a general rule, file an affidavit in support of his application, such affidavit being wholly unnecessary, & if he does so file an affidavit he will not be entitled to the costs of the same. His proper course is to wait & see if an affidavit is necessary, in which case he can ask for & obtain an adjournment for an affidavit to be filed.—*STOCKER v. HEGGERTY* (1892), 67 L. T. 27; 36 Sol. Jo. 490, D. C.

#### *B. Application by Stakeholder.*

*See R. S. C., Ord. 57, r. 2.*

274. *Contents of affidavit—Subject-matter of claim.*—A party seeking the benefit of Interpleader Act, 1831 (c. 58), must state in the affidavit, upon which his motion is founded, the specific sum or goods in his hands which are claimed by a third person. His affidavit must also negative any collusion with such third claimant.—*BUTLER v. —* (1833), 3 L. J. C. P. 62.

275. ——— *No collusion.*—*BUTLER v. —*, No. 274, *ante*.

276. ———.]—An interpleader bill cannot be filed without an affidavit by all the plffs. as to no collusion, unless a satisfactory reason can be given why some of the plffs. have not joined in such affidavit.—*GIBBS v. GIBBS* (1857), 5 W. R. 243.

277. ——— *Rebuttal.*—Pltf.'s affidavit of no collusion in an interpleader suit cannot be rebutted before the hearing by a counter affidavit; & pltf. is entitled, notwithstanding such counter affidavit, to an order for payment of the money into ct., & for an injunction. Pltf.'s right to this protection is not lost by his filing additional affidavits to verify the statements in the bill; but in a case where a charge of collusion was made the ct. put pltf. under an undertaking as to damages.—*MANBY v. ROBINSON* (1869), 4 Ch. App. 347; 38 L. J. Ch. 309; 20 L. T. 385; 17 W. R. 479, L. J. J.

278. ——— *Officer of company as applicant.*—Where a bill of interpleader is filed by the officer of a co. on behalf of the co., the affidavit annexed ought to state, not that pltf. does not collude, but that, to the best of his knowledge & belief, the

co. do not collude with defts.—*BIGNOLD v. AUDLAND* (1840), 11 Sim. 23; 9 L. J. Ch. 266; 59 E. R. 781.

*Annotation:—Consd. G. S. & W. Ry. v. Corry* (1867), 15 W. R. 650.

279. *By whom affidavit made—Solicitor.*—Where a bill of interpleader had annexed to it only an affidavit of pltf.'s solr. that there was no collusion, a demurrer was allowed.—*WOOD v. LYNE* (1850), 4 De G. & Sm. 16; 64 E. R. 714.

*Annotation:—Consd. G. S. & W. Ry. v. Corry* (1867), 15 W. R. 650.

280. ——— *Applicant abroad.*—*LARABRIE v. BROWN*, No. 263, *ante*.

281. ——— *Several applicants with same agent—Undertaking by applicants to file.*—Where in an interpleader suit there are several plffs. residing in different parts of the country, & there is evidence that they all conducted their business through the same agent in London & solr., the ct. will allow the bill to be filed upon an affidavit of no collusion by such agent & solr. only, but will not thereupon grant the ordinary injunction till the hearing, but merely an *interim* order for a reasonable time, upon an understanding that plffs. will themselves in the meantime make the requisite affidavit.—*NELSON v. BARTER* (1864), 2 Hem. & M. 334; 10 L. T. 491; 10 Jur. N. S. 611; 12 W. R. 857; 71 E. R. 493.

*Annotation:—Refd. G. S. & W. Ry. v. Corry* (1867), 15 W. R. 650.

282. ——— *More than one applicant—All applicants.*—*GIBBS v. GIBBS*, No. 276, *ante*.

283. ——— *Affidavits of some only.*—Where it appeared that there was not sufficient time subsequently to settling the bill, for all the plffs. to make the usual affidavit as to collusion between themselves & defts., the ct. permitted the bill to be filed upon the affidavit of some of the plffs. only.—*GLOVER v. REYNOLDS* (1867), 16 L. T. 84.

### SECT. 7.—THE ORDER.

#### SUB-SECT. 1.—IN GENERAL.

*Jurisdiction to make—Court or judge.*—*See R. S. C., Ord. 57, rr. 7–10.*

—— *Masters.*—*See R. S. C., Ord. 57, rr. 7–10; Ord. 54, r. 12.*

—— *District registrar—Cause or matter proceeding in district registry.*—*See R. S. C., Ord. 35, r. 5 (f); r. 6.*

284. *Decision made under misapprehension of facts—Order not drawn up—Order stayed—Issue reheard.*—Where an order has not been drawn up, whether it were an order made in chambers or in ct., the judge has a right, if something is brought to his attention which he has not sufficiently considered, to stay the drawing up of the order & rehear the matter before making a final order (*KAY, J.*).—*Re ROBERTS, EVANS v. THOMAS*, [1887] W. N. 231.

*Annotation:—Mentd. Rackham v. Tabrum* (1923), 129 L. T. 24.

#### PART II. SECT. 6, SUB-SECT. 4.—B.

i. *By whom affidavit made—Secretary of corporation.*—The lessees, a corpn., having filed a *cause* petition for interpleader, in which the affidavit of no collusion was sworn by the secretary:—*Held*: the affidavit was sufficient.—*GREAT SOUTHERN & WESTERN RY. CO. v. CORRY, TURQUAND* (1867), 15 W. R. 650.—*IR.*

#### PART II. SECT. 7, SUB-SECT. 1.

a. *Jurisdiction to make—Absentee*

*claimant.*—*WILLARD v. BLOOM* (1918), 41 D. L. R. 1; 13 O. W. N. 160.—*CAN.*

b. ——— *Parties barred.*—*GALT v. MCLEAN* (1890), 6 Man. L. R. 424.—*CAN.*

c. *Contents of—Direction to pay sheriff's costs.*—An interpleader order may direct payment of the sheriff's costs.—*ASHDOWN v. NASH* (1886), 3 Man. L. R. 37.—*CAN.*

d. ——— *Reservation as to costs.*—The costs of an interpleader issue

should not be reserved by the interpleader order to be disposed of in chambers, but should be left to be dealt with by the trial judge.—*GROTHE v. PEARCE* (1893), 15 P. R. 432.—*CAN.*

e. ———.]—Where an interpleader issue is directed at the instance of a sheriff, the general rule is that the order should direct the sheriff to withdraw from possession upon payment to the sheriff by claimant of the possession money from the date of the order, not from the date of the

**285. Order exempting sheriff from liability—Subsequent rescission of order—Effect of.]—**Where an interpleader order provided that no action should be brought against the sheriff, & the order was subsequently rescinded owing to the default of the execution creditor to return the issue:—*Held*: claimant had no cause of action against the sheriff for the original seizure.—**MARTIN v. TRITTON & JAMESON** (1884), 1 Cab. & El. 226, C. A.

*Compare* No. 443, *post*.

## SUB-SECT. 2.—NON-APPEARANCE OF PARTIES.

### A. In General.

*See* R. S. C., Ord. 57, r. 10.

**286. One claimant not appearing—Decree barring claim—Costs of parties appearing.]—****HODGES v. SMITH** (1787), 1 Cox, Eq. Cas. 357; 29 E. R. 1202.

*Annotation*:—**Expld.** **Angell v. Hadden** (1809), 16 Ves. 202.

**287. ——— Recovery of special damage.]—**Goods consigned to A., & warehoused at the London docks, were claimed by B. The dock co. required an indemnity of A., the original consignee, before delivering them to him; A. refused, & brought an action of trover, with counts for special damage, for the detention. On motion by the co. for relief under Interpleader Act, 1831 (c. 58), B., upon due notice, not appearing:—*Held*: the claim of B. against the co. was barred, but A. ought not, by reason of the Act, to be precluded from recovering for his special damage, if any. The rule was made, that on defts. undertaking to deliver up the wine, then, if A. should accept same, the action should be discontinued on payment of costs by defts.; but if A. should go on with the action, the count in trover should be struck out, and A. proceed for the special damage only.—**LUCAS v. LONDON DOCK CO.** (1832), 4 B. & Ad. 378; 110 E. R. 498.

**288. Summons to appear—Affidavit of service—Necessity for.]—****PHILLIPS v. SPRY** (1832), 1 L. J. Ex. 115.

### B. Where Sheriff is Applicant.

#### (a) Non-Appearance of Claimant.

*See* R. S. C., Ord. 57, r. 10.

**289. Claim barred as against sheriff.]—****BOWDLER v. SMITH**, No. 544, *post*.

**290. Claim barred generally.]—**On application to the ct. by a sheriff under Interpleader Act, 1831 (c. 58), s. 6, a third party served with the rule, & not appearing, is barred by sect. 3 from further prosecuting any claim brought in question by the rule, as well as where such application is made by a deft. under sect. 1. The ct., on such application, will, on proper grounds shown, order the sheriff, or the execution creditor, to pay to a third party appearing & successfully prosecuting his claim, his costs of such appearance.—**FORD v. DILLY** (1833), 5 B. & Ad. 885; 2 Nev. & M. K. B. 662; 110 E. R. 1019.

**291. ———.]—**Pltf., a sheriff, levied upon certain goods in the possession of defts., who were agents for their sale, & who proceeded with the sale which had been advertised. Defts., by inadvertence, failed to appear upon an interpleader summons taken out by pltf. in the action con-

cerning which pltf. was obeying the writ of *fi. fa.*, & defts. were barred. They subsequently attempted to rescind the order, but failed & their appeal to the ct. was also dismissed. This action was brought to recover the proceeds of the sale:—*Held*: defts. could not set up as a defence to the action the facts by which they claimed to be entitled to the goods upon which pltf. had levied.—**WILLIAMS v. RICHARDSON** (1877), 36 L. T. 505.

**292. Subsequent action against barred claimant—Defence available.]—****WILLIAMS v. RICHARDSON**, No. 291, *ante*.

*Compare* No. 406, *post*.

*See, further*, **ESTOPPEL**, Vol. XXI., pp. 140 *et seq.*

#### (b) Non-Appearance of Execution Creditor.

*See* R. S. C., Ord. 57, r. 10.

**293. Whether claim barred—As against other claimant.]—****LEWIS v. JONES**, No. 158, *ante*.

**294. ——— As against sheriff.]—****LEWIS v. JONES**, No. 158, *ante*.

**295. ——— Sheriff ordered to withdraw.]—**Goods, being seized by the sheriff under a *fi. fa.*, were claimed adversely to the execution creditor. On an interpleader rule obtained by the sheriff under Interpleader Act, 1831 (c. 58), s. 6, claimant & the sheriff appeared, but not the execution creditor. Claimant supported his title by affidavit. The ct. refused to order generally that the execution creditor should be barred of his demand; but made a rule that the sheriff should withdraw from possession, & the execution creditor take no proceedings against him in respect of the goods now claimed.—**DOBLE v. CUMMINS** (1837), 7 Ad. & El. 580; 2 Nev. & P. K. B. 575; Will. Woll. & Dav. 682; 7 L. J. Q. B. 12; 112 E. R. 589.

#### (c) Non-Appearance of Claimant and Creditor.

*See* R. S. C., Ord. 57, r. 10.

**296. Both parties barred as against sheriff—Sale of goods to satisfy sheriff's charges.]—**Upon a rule of interpleader obtained on behalf of the sheriff, neither pltf. nor claimant appearing after service of the rule, the ct. ordered so much of the goods to be sold as would satisfy the sheriff's charges, & the rest to be abandoned.—**EVELEIGH v. SALSURY** (1836), 3 Bing. N. C. 298; 5 Dowl. 369; 3 Scott, 674; 132 E. R. 425.

**297. ———.]—**Where none of the parties appear to a rule obtained by the sheriff under Interpleader Act, 1831 (c. 58), the ct. upon motion will order the parties to be enjoined from bringing an action against the sheriff, who is exonerated from liability, & will order it to be referred to the prothonotary to ascertain what portion of the goods in question should be sold to pay the sheriff his expenses, poundage, etc.—*Re* **CAMBRIDGE SHERIFF** (1836), 6 L. J. C. P. 30.

#### C. Where Applicant is Defendant in the Action.

*See* R. S. C., Ord. 57, r. 10.

**Claimant not appearing—Liability for costs.]—***See* No. 567, *post*.

#### D. Effect of Order in Bankruptcy Proceedings.

*See* R. S. C., Ord. 57, r. 10; **BANKRUPTCY**, Vol. IV., pp. 86, 87, Nos. 778–781.

or of the making of the claim.—**KEBLER v. HAZLEWOOD** (1883), 1 Man. L. R. 31.—CAN.

**f. ———.]—****LEECH v. WILLIAMSON** (1884), 10 P. R. 226.—CAN.

## PART II. SECT. 7, SUB-SECT. 2.—B. (a).

**289 i. Claims barred as against sheriff.]—**Where a sheriff obtains a rule calling upon parties to sustain their

claims to property seized, & one party fails to appear, his claim as against the sheriff is barred.—**JOHNSON v. BALDWIN** (1844), 1 U. C. R. 280.—CAN.



*Sect. 7.—The order: Sub-sects. 3 & 4, A., B. & C.]*

**SUB-SECT. 3.—SUBSTITUTION OF CLAIMANT FOR DEFENDANT.**

*See R. S. C., Ord. 57, r. 7.*

**298. Power of court to order.]**—A horse, pointed out by A., an execution creditor, as the property of B., the execution debtor, having been seized under a *fi. fa.*, C., claiming property, brought trespass against the sheriff, who applied for relief under Interpleader Act, 1831 (c. 58). The ct., instead of directing an issue, ordered that the action of trespass should proceed, & that A.'s name should be substituted for that of the sheriff, subject to the terms usually imposed where an issue is directed.

*Qu.*: as to the form of an issue, where consequential damage is insisted on by claimant.—*BROWN v. LUDHAM* (1843), 6 Man. & G. 169; 6 Scott, N. R. 934; 1 L. T. O. S. 257; 134 E. R. 852.

*Annotation*:—*Reid*. *Carpenter v. Pearce* (1858), 27 L. J. Ex. 143.

**299. —.]**—An auctioneer was employed to sell land by auction: the purchaser of a lot paid a deposit, but, not being satisfied with the title, refused to complete the purchase & sued the auctioneer for the deposit: the vendor gave deft. notice to hold the money for her, as forfeited. Deft. applied to have the vendor made deft. The ct., the solvency of the vendor appearing doubtful, made the rule absolute, on the money being brought into ct. & security for costs being given to pltf.; but refused to order that the costs of the original deft. should be paid out of the money.—*DELLER v. PRICKETT* (1850), 15 Q. B. 1081; 20 L. J. Q. B. 151; 16 L. T. O. S. 212; 15 Jur. 168; 117 E. R. 769.

*Annotation*:—*Expld.* *Ridgway v. Jones* (1860), 1 L. T. 368.

**300. Limitation of defence of substituted defendant.]**—*GERHARD v. MONTAGU & Co.*, No. 15, ante.

**SUB-SECT. 4.—ISSUE.**

**A. In General.**

*See R. S. C., Ord. 57, r. 7.*

**B. Payment into Court pending Issue.**

*See R. S. C., Ord. 57, r. 7; Appendix K, Form 54.*

**301. Whether necessary—Claimant a receiver**

**sd by court.]**—*PURKISS v. HOLLAND* (1887), Jo. 702, C. A.

**302. — Second execution by different creditor—Further payment into court.]**—Where goods seized in execution under a judgment have been claimed & claimant has paid into ct. money to abide the event of an interpleader issue between himself & the execution creditor, & the goods are again seized in execution by another judgment creditor & again claimed by claimant & an interpleader issue is ordered to prevent the goods being sold, claimant must pay money into ct. as security to the second execution creditor, & to abide the event of the second interpleader.—*KOTCHIE v. GOLDEN SOVEREIGNS, LTD.*, [1898] 2 Q. B. 164; 67 L. J. Q. B. 722; 78 L. T. 409; 46 W. R. 616, C. A.

**303. Sum insufficient to satisfy judgment—Second execution.]**—*HADDOW v. MORTON*, No. 588, post.

**Sale of goods seized—Notwithstanding payment into court.]**—*See EXECUTION*, Vol. XXI., p. 520, No. 960.

**Payment out of court.]**—*See Nos. 437–442, post.*

**C. Security for Costs.**

*See R. S. C., Ord. 57, r. 15; &, generally, PRACTICE.*

**304. When ordered—Ordinary rules as to litigants apply.]**—*RHODES v. DAWSON*, No. 314, post.

**305. — Claimant insolvent.]**—An action having been brought by the assignees of a bkpt., against a banker, to recover money deposited with him by bkpt., & bkpt. claiming the money as trustee of a marriage settlement, alleging it to be part of the trust fund, the ct., on an interpleader rule, directed an issue between bkpt. & his assignees, to try whether the money was part of the trust fund, or not, in which the *cestui que trust* was to find security for pltf.'s (bkpt.'s) costs.—*FROST v. HEYWOOD* (1843), 2 Dowl. N. S. 801; 12 L. J. Ex. 242; 7 Jur. 179.

*Annotations*:—*Reid*. *Ridgway v. Jones* (1860), 6 Jur. N. S. 223. *Mentd.* *Duncan v. Cashin* (1875), L. R. 10 G. P. 554.

**306. — —.]**—*RIDGWAY v. JONES*, No. 313, post.

**307. — Claimant out of jurisdiction.]**—A party made deft. under an interpleader rule is entitled to demand security for costs from a pltf. residing beyond the jurisdiction of the ct.—*BENAZECH v. BESSETT* (1845), 1 C. B. 313; 2

*LTD. v. BRENTON* (1913), 26 W. L. R. 161; 15 D. L. R. 92; 6 Sask. L. R. 277.—CAN.

**PART II. SECT. 7, SUB-SECT. 4.—B.**

**o. Whether necessary.]**—The gross proceeds of a sale of goods in an interpleader matter should be paid by the sheriff into ct. without deducting anything for his expenses.—*ONTARIO BANK v. REVELL* (1886), 11 P. R. 249.—CAN.

**PART II. SECT. 7, SUB-SECT. 4.—C.**

**305 i. When ordered—Claimant insolvent.]**—Interpleader Act, 1877, s. 10, does not place a sheriff in a more advantageous position than an ordinary suitor, & the fact that a claimant is a married woman & in financial straits, is not a ground for ordering security for the sheriff's costs.—*SWEETMAN v. MORRISON* (1884), 10 P. R. 446.—CAN.

**307 i. — Claimant out of jurisdiction.]**—*BRUCE v. ANCIENT ORDER OF UNITED WORKMEN* (1906), 11 O. L. R. 633; 7 O. W. R. 177.—CAN.

**PART II. SECT. 7, SUB-SECT. 3.**

**298 i. Power of court to order.]**—Where a party in the position of a mere stakeholder is made a deft. in a suit, his proper course is to pay the money into ct. & ask that the parties really interested may be substituted for himself as defts.—*ASSARAM BURTEAH v. COMMERCIAL TRANSPORT ASSOCN.* (1866), 2 Ind. Jur. N. S. 113.—IND.

**PART II. SECT. 7, SUB-SECT. 4.—A.**

**g. Jurisdiction to make.]**—The master in chambers made an order directing an interpleader issue to be tried between pltf. & certain attaching creditors as to the validity of pltf.'s judgment & execution:—*Held*: the issue directed was warranted by Interpleader Act, 1877, s. 10.—*LEECH v. WILLIAMSON* (1884), 10 P. R. 226.—CAN.

**h. Issue in general terms—Claimant restricted to original claim.]**—*THOMPSON v. DE LISSA* (1881), 2 N. S. W. L. R. 165.—AUS.

**k. How framed.]**—The proper

frame of an interpleader issue between claimant & an attaching creditor is whether the goods attached were at the time of seizure the property of claimant as against the attaching creditor & not as against the absconding debtor.—*DOYLE v. LASKER* (1866), 16 C. P. 263.—CAN.

**l. —.]**—*MONTGOMERY v. HUNTER*, [1919] 2 W. W. R. 461.—CAN.

**m. Time for making.]**—Where no time has been limited by an interpleader order for pltf. to make up the issue, the ct. will order the issue to be made up by claimants by a certain day, or on default thereof to be barred from prosecuting the claim.—*SHIELS v. DAVIS* (1850), 6 U. C. R. 628.—CAN.

**n. Failure to make.]**—Upon the application of a sheriff, an interpleader order was made, directing an issue to be tried between the claimants & the execution creditors:—*Held*: the sheriff had no status to apply for an order barring claimants, on the ground that they had not complied with the terms of the order.—*KENT & BROWN*,

Dow. & L. 801; 1 New Pract. Cas. 164; 14 L. J. C. P. 148; 4 L. T. O. S. 374; 9 Jur. 376; 135 E. R. 560.

*Annotations*:—*Distd.* Belmonte v. Aynard (1879), 4 C. P. D. 221. *Reid.* Rhodes v. Dawson (1886), 16 Q. B. D. 548.

308. ———.]—WILLIAMS v. CROSLING, No. 315, *post*.

309. ———.]—Upon an application for a rule or order under Interpleader Act, 1831 (c. 58), an affidavit by claimant himself, in support of his claim, is not indispensable. *Semble*: no affidavit at all is necessary.

The sheriff having seized goods under a *fi. fa.*, a claim was made on behalf of A., who was resident in Paris. Upon an interpleader summons, A.'s attorney made an affidavit, that he had been informed, & from documents, vouchers, & receipts in his possession, believed, that the goods seized were the *bond fide* property of A.:—*Held*: this was a sufficient maintaining of the claim, to justify the judge or the ct., on the judge's refusal, in directing an issue; & it was made part of the rule, that claimant should give security for costs.—WEBSTER v. DELAFIELD (1849), 7 C. B. 187; 6 Dow. & L. 597; 18 L. J. C. P. 186; 13 Jur. 635; 137 E. R. 76.

*Annotation*:—*Reid.* Peake v. Carter, [1916] 1 K. B. 652.

310. ———.]—ATTENBOROUGH v. ST. KATHARINE'S DOCK CO., No. 40, *ante*.

311. ———.]—In the case of a person claiming against a fund in ct. under an inquiry in ordinary circumstances, the ct. will not order security for costs to be given by a claimant who is a foreigner resident out of the jurisdiction; but where the circumstances are such that claimant is in the position of pltf. he will be ordered to give security, the case being then analogous to a case of interpleader.—*Re* MILWARD & Co. [1900] 1 Ch. 405; 69 L. J. Ch. 247; 82 L. T. 339, C. A.

*See, also*, No. 318, *post*.

312. ——— Solvency of claimant doubtful.]—DELLER v. PRICKETT, No. 299, *ante*.

313. ——— Discretion of court.]—Pltf., the assignee of an insolvent debtor, sued deft. for the proceeds of goods intrusted to him by the insolvent before his insolvency, for sale. The insolvent claimed them as exor., & the assignee & the insolvent were ordered to interplead, on deft. bringing the money into ct. The ct. refused to make it a condition of the order, that the insolvent or deft. should give security for costs.—RIDGWAY v. JONES (1860), 29 L. J. Q. B. 97; 1 L. T. 368; 6 Jur. N. S. 223; 8 W. R. 185.

*See, further*, PRACTICE.

314. Who may be ordered to give—Real position |

307 ii. ———.]—In an interpleader issue between an execution creditor & a foreign claimant the latter was ordered to give security for costs.—ADANAC GRAIN CO., LTD., TRUSTEE v. INTERNATIONAL GRAIN, ETC. CO., LTD. & SEARS, [1923] 1 W. W. R. 265.—CAN.

*Defendant out of jurisdiction.*—Under Ord. 63, r. 5, a deft. out of the jurisdiction may be ordered to give security for costs.

Where a party has been made deft. by an interpleader order, an application for security for costs may be made after the interpleader order has been granted.—ROSS v. McDOUGALL (1893), 40 N. S. R. 133.—CAN.

q. ——— Party out of jurisdiction.]—Owing to there being no rule in Ontario similar to the English rule, there is no power to order security in an interpleader issue, one of the parties is out of the

jurisdiction.—CANADIAN BANK OF COMMERCE v. MIDDLETON (1887), 12 P. R. 121.—CAN.

r. ———.]—Security for costs may be ordered in interpleader proceedings. The party substantially & in fact moving the proceedings, whether pltf. or deft. in the interpleader issue, should, if resident out of the jurisdiction, give security to the opposite party.—*Re* ANCIENT ORDER OF FORESTERS & CASTNER (1890), 14 P. R. 47.—CAN.

t. ——— Not until issue directed.]—Pending an interpleader summons, an order was made for the examination of claimant upon an affidavit filed by her. Thereupon claimant applied for & obtained an order staying proceedings until security for costs was given by pltf., a foreign execution creditor. Upon appeal from the county ct.:—*Held*: no order for security could be made until an issue

of parties to be considered.]—In considering whether parties to an interpleader issue ought to be required to give security for costs, the rules applicable to ordinary litigants to be observed, even although the interpleader proceedings have not been instituted by a sheriff; & in applying those rules the question, whether a party to an interpleader issue is to be treated as a pltf. or as a deft., must be decided by the real merits of the case, & not by the mere form of the issue itself.

Deft. entered into a contract with R., for the execution of certain repairs to her residence. R. employed pltf. to do the work. Afterwards a petition under the Bkpcy. Act, 1893 (c. 52), was presented against R., & a receiving order was made. Pltf. thereupon commenced the present action to recover the cost of the work, & deft. having interpleaded, it was ordered that the amount in dispute should be paid into ct., & an interpleader issue was directed in which R. should be pltf. & pltf. in the action deft. The creditors of R. accepted a composition in satisfaction of their claims, & he was not adjudged a bkpt. The Q. B. Div. having ordered that R. should give security for the costs of the interpleader issue:—*Held*: the order was wrongly made, & must be set aside.

In considering whether parties to interpleader proceedings ought to be required to give security for costs, the rules applicable to ordinary litigants ought to be observed (LINDLEY, L.J.).—RHODES v. DAWSON (1886), 16 Q. B. D. 548; 55 L. J. Q. B. 134; 34 W. R. 240; 2 T. L. R. 255, C. A.

*Annotations*:—*Apud.* Cook v. Whellock (1890), 24 Q. B. D. 658. *Reid.* Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co., [1923] 2 K. B. 166; Knight v. Ponsonby, [1925] 1 K. B. 545. *Mentd.* *Re* Sartoris's Estate, Sartoris v. Sartoris, [1892] 1 Ch. 11; *Re* Smith. *Ex p.* Mason, [1893] 1 Q. B. 323; *Re* Berry, Duffield v. Williams, [1896] 1 Ch. 939; Paterson v. Gas Light & Coke Co. (1896), 74 L. T. 280; Blackett v. Blackett, [1902] P. 170; *Re* Teale, *Ex p.* Blackburn (1912), 106 L. T. 893.

315. ——— Defendant in Issue—Substantial plaintiff.]—Pltf. resided in Scotland & having obtained judgment, issued a *fi. fa.* under which the sheriff was in possession of the goods of deft., when the latter became bkpt., & his assignees claimed the goods. The sheriff applied to a judge under Interpleader Act, 1832 (c. 58), who ordered the assignees to take the goods; & upon paying the amount of the execution into ct. an issue was directed to be tried between the assignees, pltf., & the execution creditor:—*Held*: deft. in the issue must give security for costs.—WILLIAMS v. CROSLING (1847), 3 C. B. 957; 4 Dow. & L.

was directed.—BUCHANAN v. CAMPBELL (1890), 6 Man. L. R. 303.—CAN.

a. ——— Execution creditor defendant—Effect of delay.]—An execution creditor made deft. in an interpleader issue, may be ordered to give security.—LOVELL v. WARDROPER (1868), 4 P. R. 265.—CAN.

313 i. ——— Discretion of court.]—MCPHILLIPS v. WOLF (1887), 4 Man. L. R. 300.—CAN.

313 ii. ———.]—A party to an interpleader issue may be ordered to give security for costs.—SWAIN v. STODDART (1888), 12 P. R. 490.—CAN.

b. ——— Party out of jurisdiction.]—In a sheriff's interpleader the party out of the jurisdiction, whether claimant or execution creditor, may be ordered to give security for costs to his opponent in the issue.—KNICKERBOCKER TRUST CO. OF NEW



**Sect. 7.—The order: Sub-sect. 4, C.; sub-sect. 5, A., B. & C.; sub-sects. 6, 7 & 8, A., B. & C.]**

660; 2 New Pract. Cas. 112; 16 L. J. C. P. 112; 8 L. T. O. S. 390; 136 E. R. 384.

**Annotations:—**Folld. *Tomlinson v. Land & Finance Corpn.* (1884), 14 Q. B. D. 539. *Apld.* *Rhodes v. Dawson* (1886), 16 Q. B. D. 548.

**316. ———.] —**In an interpleader issue directed upon an application by a sheriff, who has received a notice of a claim to goods seized by him under a writ of *fi. fa.* in execution of a judgment, both pltf. & deft. in the issue are really in the position of pltf. in an ordinary action, & therefore, deft. in the interpleader issue may be ordered to give security for costs in any case in which a pltf. may be so ordered, & the rule, that a deft. cannot be compelled to give security for costs, does not apply.—*TOMLINSON v. LAND & FINANCE CORPN.* (1884), 14 Q. B. D. 539; 53 L. J. Q. B. 561, C. A.

**Annotations:—***Apld.* *Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co.*, [1923] 2 K. B. 166. *Refd.* *Rhodes v. Dawson* (1886), 16 Q. B. D. 548.

**317. ——— Claimant substituted as defendant.] —***DELLER v. PRICKETT*, No. 299, *ante*.

**318. ——— Plaintiff out of jurisdiction — At instance of defendant interested as plaintiff.] —**Where one of defts. in an interpleader issue is really interested in the result thereof as a pltf., he is not entitled to call upon pltf. in the issue to give security for costs upon the ground that the latter is a foreigner residing abroad.—*BELMONTE v. AYNARD* (1879), 4 C. P. D. 352; *sub nom.* *BELMONTE v. GÜTSCHOW*, 27 W. R. 789, C. A.

**Annotations:—***Distd.* *Tomlinson v. Land Finance Corpn.* (1884), 14 Q. B. D. 539. *Consd.* *Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co.*, [1923] 2 K. B. 166. *Refd.* *Rhodes v. Dawson* (1886), 16 Q. B. D. 548; *Re Milward*, [1900] 1 Ch. 405.

**319. Increase of security—Jurisdiction to order.] —**

**—Qu.:** where, upon an interpleader, a party has been let in to defend on the condition of his paying the money into ct. & giving security for costs to an amount to be fixed by the master, on whose decision security has been given to a certain amount, if the ct. can order that security to be increased. At all events, the ct. will not do so merely because it turns out that, by reason of commissions or from other causes which were not unforeseen when the master settled the amount of security, the costs are likely to exceed the amount for which the security was given.—*FOSTER v. COLBY* (1857), 27 L. J. Ex. 55.

**Annotation:—***Apld.* *Haseltine v. Watkins* (1858), 28 L. J. Ex. 40.

**320. Non-compliance with order—Effect of.] —**A sum of money had been paid into ct. to await the result of an interpleader issue; the execution creditor who was deft. in the issue lived abroad, & was ordered to provide security for costs, & for that purpose proceedings were stayed. About five months afterwards, as no security had been given, the ct. granted the claimant leave to sign judgment for the money in ct., unless deft. found security in a fortnight.—*MELIN v. DUMONT* (1869), 20 L. T. 366; 17 W. R. 673.

**Annotation:—***Refd.* *Tomlinson v. Land & Finance Corpn.* (1884), 53 L. J. Q. B. 561.

*YORK v. WEBSTER* (1896), 17 P. R. 189. —CAN.

**320 i. Non-compliance with order—Effect of.] —***WORKMEISTER v. HEALY* (1876), 1 L. R. 10 C. L. 450.—IR.

**320 i. Non-compliance with order—Effect of.] —**Deft. in an interpleader issue was ordered to give security for costs. After long delay an order was made that he do give security within a limited time or that his claim be barred.—*CANADIAN PACIFIC RY. CO.*

*v. FORSYTH* (1885), 3 Man. L. R. 45.—CAN.

**320 ii. ———.] —***HOWE v. MARTIN* (1890), 6 Man. L. R. 615.—CAN.

**d. Application for — How intitled.] —**An application for security for costs of interpleader proceedings, made after the issue of the interpleader order, must be styled not in the original cause, but in the interpleader issue.—*MCMASTER v. JASPER* (1886), 3 Man. L. R. 605.—CAN.

## SUB-SECT. 5.—SUMMARY DECISION.

### A. In General.

*See* R. S. C., Ord. 57, rr. 8, 9.

**321. What amounts to—Decision to dispose of claim in a summary manner.] —***BRYANT v. READING*, No. 445, *post*.

**322. ———.] —***HARBOTTLE v. ROBERTS*, No. 457, *post*.

**323. ——— Decision under R. S. C., Ord. 57, r. 9—Without directing issue—Or stating case.] —***Re TARN, TARN v. TARN*, No. 455, *post*.

**324. ———.] —**Where an interpleader proceedings a judge decides the question as one of law under R. S. C., Ord. 57, r. 9, without directing the trial of an issue, or ordering a special case to be stated, his decision is a summary decision within C. L. P. Act, 1860 (c. 126), s. 17, & is not subject to appeal even by leave.—*VAN LAUN & CO. v. BARING BROTHERS & CO.*, [1903] 2 K. B. 277; 72 L. J. K. B. 756; 89 L. T. 120; 52 W. R. 59, C. A.

**Annotations:—***Expld. & Apld.* *Harbottle v. Roberts*, [1905] 1 K. B. 572. *Refd.* *Cox v. Bowen*, [1911] 2 K. B. 611.

**325. When made—Ownership of goods clear.] —***DISCOUNT BANKING CO. OF ENGLAND & WALES v. LAMBARDE*, No. 9, *ante*.

**Whether appeal lies.] —***See* Sect. 10, *post*.

### B. Jurisdiction.

*See* R. S. C., Ord. 57, rr. 8, 9.

**326. Subject-matter in dispute over £50.] —**The practice in chambers not to try an interpleader matter summarily where the value of the thing in dispute is over £50 is not a rigid rule of law, but a rule of practice not to be lightly departed from except in an exceptional case like this, where the judge thinks that he ought to deal with the case in a summary way under Ord. 57, r. 8.—*VICTOR v. CROPPER* (1886), 3 T. L. R. 110, C. A.

**327. ———.] —***HARBOTTLE v. ROBERTS*, No. 457, *post*.

### C. Consent of Parties.

*See* R. S. C., Ord. 57, r. 8.

**328. Necessity for.] —**The ct. has no power under the Interpleader Act, 1831 (c. 58), to dispose summarily of the matter in dispute between the parties, who appear on the sheriff's rule, without the consent of both pltf. & claimant.—*CURLEWIS v. POCKOCK* (1836), 5 Dowl. 381.

**329. ———.] —***HARRISON v. WRIGHT*, No. 331, *post*.

**330. Must appear on face of order.] —***HARRISON v. WRIGHT*, No. 331, *post*.

**331. Not appearing on face of order—Award acted on by parties.] —**The goods of a debtor, seized by the sheriff under an execution, having been claimed by a third party, the sheriff brought pltf. & claimant before a judge, who decided that the property belonged to claimant, & ordered pltf. to pay the costs of claimant & of the sheriff, & the goods to be delivered up to claimant. The order was not stated on the face of it to have been made by consent, but was, in fact, so made; & pltf. paid the costs accordingly, but having

## PART II. SECT. 7, SUB-SECT. 5.—B.

**326 i. Subject-matter in dispute over £50.] —***Re WELSH, WELSH v. BAILEY & VINCENT* (1902), 22 N. Z. L. R. 587.—N.Z.

## PART II. SECT. 7, SUB-SECT. 5.—C.

**330 i. Must appear on face of order.] —***BANK OF HAMILTON v.* (1888), 15 A. R. 500.—CAN.



discovered that there was other property in the debtor's possession not belonging to claimant, he ruled the sheriff to return the writ, & on his returning *nulla bona*, brought an action for a false return:—*Held*: (1) the judge had no power under Interpleader Act, 1831 (c. 58), to make such an order without the consent of the parties; (2) although the order in question was bad under Interpleader Act, 1831 (c. 58), as no consent appeared upon the face of it, still that it was binding upon the parties as a decision of the judge in the nature of an award, & made by consent.—*HARRISON v. WRIGHT* (1845), 13 M. & W. 816; 2 Dow. & L. 695; 14 L. J. Ex. 196; 153 E. R. 342.

*Annotations*:—*Refd.* *Howard v. Gosset*, *Gosset v. Howard* (1847), 6 State, Tr. N. S. 319; *Dale's Case*, *Enraght's Case* (1881), 6 Q. B. D. 376.

#### SUB-SECT. 6.—SPECIAL CASE.

*See* R. S. C., Ord. 57, r. 9.

**332. Master's note on facts.]**—*NEWMAN v. OUGHTON*, [1911] 1 K. B. 792; 80 L. J. K. B. 673; 104 L. T. 211; 27 T. L. R. 254; 55 Sol. Jo. 272, D. C.

*Annotation*:—*Mentd.* *Edgelow v. MacElwee*, [1918] 1 K. B. 205.

For rules relating to special cases, *see* R. S. C., Ord. 34; & generally, PRACTICE.

#### SUB-SECT. 7.—TRANSFER TO COUNTY COURT.

*See* Supreme Court of Judicature Act, 1884 (c. 61), s. 17: & now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 204.

**333. What may be transferred—Whether mere issue for trial.]**—*VIZARD v. GILL*, *VIZARD v. MAULE* (1893), 95 L. T. Jo. 255.

#### -SECT. 8.—SALE.

##### A. Discretion of Court to Order.

*See* R. S. C., Ord. 57, r. 12.

**334. When just & reasonable.]**—Where a person claims as absolute owner goods which have been seized in execution, & the sheriff interpleads, the ct. or a judge has jurisdiction to order a sale of the goods & payment of the proceeds into ct., if it seems just & reasonable to make that order.—*PAQUIN, LTD. v. ROBINSON* (1901), 85 L. T. 5, C. A.

*See, also*, No. 326, *ante*.

##### B. When Court will Order.

*See* R. S. C., Ord. 57, r. 12.

**335. Special circumstances.]**—An order will not be made for the sale of goods seized in execution under C. L. P. Act, 1860 (c. 126), s. 13, except in special circumstances, nor, *semble*, unless the value of the saleable goods is shown to exceed the amount of the secured debt.—*PEARCE v. WATKINS* (1861), 2 F. & F. 377.

**336. Secured debt—Value of saleable goods exceeding amount of debt.]**—*PEARCE v. WATKINS*, No. 335, *ante*.

**337. ———.]**—A debtor gave a bill of sale of goods as security for a loan. The sheriff having

taken the goods in execution on behalf of a judgment creditor of the grantor, the grantee gave the sheriff notice of his claim. The sheriff took out an interpleader summons & on the same day a receiving order in bkpcy. was made against the grantor, & he was afterwards adjudged bkpt. The official receiver did not claim the goods under Bkpcy. Act, 1890 (c. 71), s. 11, but appeared on the hearing of the interpleader summons & concurred with the judgment creditor in asking for a sale under R. S. C., Ord. 57, r. 12, & an order for the sale was accordingly made. It appeared on the evidence that the sale of the goods by the sheriff was not likely to produce enough to pay what was due on the bill of sale:—*Held*: assuming Ord. 57, r. 12, not to be defeated by Bkpcy. Act, 1890 (c. 71), a sale ought not to be ordered & as it was very doubtful whether the goods would realise enough to pay the bill of sale holder, & neither the official receiver nor the judgment creditor were willing to redeem or to give a guarantee against loss if the proceeds of sale proved insufficient, the proper course was to order the sheriff to withdraw.

*Semble*: Bkpcy. Act, 1890 (c. 71), only puts an end to an execution at the option of the trustee in bkpcy., & if he chooses to assert his rights under that sect. the execution creditor has none; but if the trustee instead of asserting his rights, supports the execution creditor, sect. 11 does not invalidate the execution.

There are three cases which arise in practice. First of all, the case where the security is ample & where the bill of sale holder tries to assert his rights so as to defeat the execution creditor. That is the common case which C. L. P. Act, 1860 (c. 126), s. 13, was intended to rectify. . . . That is a plain case; in such a case a sale will be ordered. The next case is where the security is plainly deficient. Then if there were a sale there would not be a surplus, whence it follows that the only proper course is to direct the sheriff to withdraw. . . . The third case is somewhat more difficult. When it is doubtful whether the security is sufficient to pay off the secured creditor or not, what is the right course to take? The proper course in such a case is for the ct. to say "unless the execution creditor will guarantee the secured creditor against loss by sale, we will not order the sale" (*LINDLEY, M.R.*).—*STERN v. TEGNER*, [1898] 1 Q. B. 37; 66 L. J. Q. B. 850; 77 L. T. 347; 46 W. R. 82; 42 Sol. Jo. 31; 4 Mans. 328, C. A.

*Annotations*:—*Refd.* *Paquin v. Robinson* (1901), 85 L. T. 5. *Mentd.* *Re Davies, Ex p. Equitable Investment Co.* (1897), 4 Mans. 358.

**338. — Security deficient—Sheriff ordered to withdraw.]**—*STERN v. TEGNER*, No. 337, *ante*.

**339. — Sufficiency of security doubtful—On guarantee against loss by execution creditor.]**—*STERN v. TEGNER*, No. 337, *ante*.

##### C. Appointment of Receiver in lieu of Sale.

*See* R. S. C., Ord. 57, r. 12.

**340. Discretion of court to order.]**—An interpleader issue being ordered to try the right to goods seized in execution, the ct. or a judge may, under Jud. Act, 1873 (c. 66), s. 25 (8), & R. S. C., Ord. 57, r. 15, order that, instead of a sale by the sheriff, a receiver & manager of the

PART II. SECT. 7, SUB-SECT. 7.  
e. *Transfer to county court—Whether subsequent transfer by consent to another county court permissible.]*—An interpleader issue & all subsequent proceedings were transferred to the

county ct. of M. By a subsequent order made on consent, the trial of such issue was withdrawn from M., & a special case was agreed on, & the venue changed from M. to Y., where the special case was argued:—*Held*:

the transfer to the M. county ct. was final, & there was no jurisdiction to transfer the issue or any part of it, or to change the venue to any other county ct.—*COYNE v. LEE* (1887), 14 A. R. 503.—CAN.

*Sect. 7.—The order: Sub-sect. 8, C., D., E., F. & G.; sub-sect. 9, A. & B.]*

property be appointed.—*HOWELL v. DAWSON* (1884), 13 Q. B. D. 67, D. C.

*Annotation:—Reid. Paquin v. Robinson* (1901), 85 L. T. 5.

#### *D. Duties and Liabilities of Sheriff.*

*See R. S. C., Ord. 57, r. 12.*

**341. Whether bound to interplead—Claim under bill of sale—Right of sheriff to withdraw.]—***SCARLETT v. HANSON*, No. 121, *ante*.

—.] *See, also, Sect. 3, sub-sect. 3, ante.*

#### *E. Application of Proceeds of Sale.*

*See R. S. C., Ord. 57, rr. 12, 15.*

**342. Claimant claiming under bill of sale—Interest.]—**A sheriff seized goods in execution under a judgment of the High Ct. The goods were claimed by the grantee of a bill of sale as security for a debt due to him from the judgment debtor. The debt was payable with interest at a high rate per cent. by instalments extending over a period of several months the greater part of which had not expired. The sheriff interpleaded, & a judge at chambers on the application of the judgment creditor under R. S. C., Ord. 57, r. 12, ordered the sale of the goods & the payment to claimant of the balance of his debt with interest at the agreed rate but only up to the time of such payment. On appeal:—*Held*: the power of the judge to make an order as to the application of the proceeds of the sale upon such terms as may be just was not limited by the practice of the cts. of equity in suits for redemption; the judge had power to make the order & the order was just.—*FORSTER v. CLOUSER*, [1897] 2 Q. B. 362; 66 L. J. Q. B. 693; 76 L. T. 825, C. A.

*Annotations:—Consd. Stern v. Tegner* (1897), 4 Mans. 328. *Apld. West v. Diprose*, [1900] 1 Ch. 337. *Reid. Re Davies, Ex p. Equitable Investment Co.* (1897), 77 L. T. 567; *Wickens v. Shuckburgh* (1898), 78 L. T. 213.

**343. ———.]—**Principal & interest secured by bill of sale were payable by equal monthly instalments. The borrower authorised the lender to sell, & out of the proceeds deduct the amount for which she was "liable":—*Held*: on sale interest ceased to run, & the lender was entitled to retain unpaid principal & interest to date only.

In my view, I ought to apply exactly the same principle to a sale under that authority as I should apply in case of a sale by the mtgee. under a power. or in distributing the proceeds of a sale by a sheriff under the interpleader rule. . . . I hold that from the moment the money was received interest ceased to run. I intend to follow the rule laid down in *Forster v. Clouser*, No. 342, *ante* (*COZENS-HARDY, J.*).—*WEST v. DIPROSE*, [1900] 1 Ch. 337; 69 L. J. Ch. 169; 82 L. T. 20; 64 J. P. 281; 48 W. R. 389; 44 Sol. Jo. 175; 7 Mans. 152.

#### *F. Damage occasioned by Sale.*

*See R. S. C., Ord. 57, r. 12.*

**344. Liability of execution creditor for—Withdrawal of execution creditor—Subsequent to order.]—**Goods were seized under a *fi. fa.* issued upon a judgment on a warrant of attorney, after an act of bkpcy. committed by debtor, against whom a fiat

issued before the goods were sold. The assignees gave the sheriff notice not to sell & he brought the parties before a judge by an interpleader order. The judge directed that the goods should be sold, & the money brought into ct. to abide the event of an issue to be tried between the execution creditor & the assignees. The latter made no objection & did not suggest any other mode of disposing of the goods, which were accordingly sold by the sheriff's auctioneer. The execution creditor subsequently abandoned all claim to the goods, & the proceeds of the sale were paid out of ct. to the assignees:—*Held*: the assignees were not entitled, as matter of law, to recover, in an action of trover against the execution creditor, the difference between the produce of the sale & the value of the goods at the time of the seizure; & it was no misdirection in the judge to state to the jury, that, if they thought the sale was *bona fide*, they might consider the produce of it as the measure of damages.—*WHITMORE v. BLACK* (1844), 13 M. & W. 507; 2 Dow. & L. 445; 14 L. J. Ex. 19; 4 L. T. O. S. 99; 8 Jur. 1103; 153 E. R. 211; *previous proceedings*, 3 L. T. O. S. 164.

**345. ———.]—**Claimant in an interpleader issue cannot recover against the execution creditor damages sustained by the sale of his goods or otherwise after the making of the order.—*WALKER v. OLDING* (1862), 1 H. & C. 621; 1 New Rep. 103; 32 L. J. Ex. 142; 7 L. T. 633; 9 Jur. N. S. 53; 11 W. R. 186; 158 E. R. 1033.

#### *G. Bankruptcy of Execution Debtor.*

*See R. S. C., Ord. 57, r. 12.*

**346. Right of trustee in bankruptcy.]—**The goods of a trader were seized on Aug. 19, under an execution in respect of a judgment debt of £115. The holder of a bill of sale for £37 10s. claimed the goods & the sheriff issued an interpleader summons. On Aug. 28, a judge ordered that the sheriff should sell the goods & out of the proceeds pay £37 10s. into ct. & pay the balance to the execution creditor & that an issue should then be tried between him & the bill of sale holder as to the property in the goods at the time of the seizure. On Sept. 7, before the sheriff had sold, the trader filed a liquidation petition:—*Held*: the trustee in the liquidation was entitled to the goods subject to the claim of the bill of sale holder.—*Re HAYDON, Ex p. HAILING* (1877), 7 Ch. D. 157; 47 L. J. Bcy. 25; 37 L. T. 809; 26 W. R. 182, C. A.

*Annotation:—Consd. Re Chiangetti, Ex p. Trustee* (1921), 91 L. J. K. B. 70.

**347. ———.]—**Goods of debtor were taken in execution by pltf. under a judgment for a sum exceeding £20. The goods having been claimed by a third person an interpleader order was made on Mar. 16 directing that, unless payment were made or security given by claimant according to the provisions of the order the sheriff should sell the goods & pay the proceeds of the sale into ct. Claimant did not comply with the provisions of the order & ultimately withdrew his claim. On Mar. 28, the goods were sold & the proceeds paid into ct. on April 6. On Apr. 7, notice of a bkpcy. petition having been presented against debtor was served on the sheriff, & debtor was adjudged

#### **PART II. SECT. 7, SUB-SECT. 8.—D.**

**1. Whether sheriff liable—Satisfactory security ordered—Surety person out of jurisdiction.]—**The sheriff having obtained an interpleader order, it was directed by the ct. that in the meantime the sheriff should sell the goods claimed, taking satisfactory security for the payment. The sheriff did sell,

& took as security an undertaking from persons not resident within the jurisdiction, which he subsequently offered to assign to the now pltf., in whose favour the issue had been found, but it was declined. Being pressed by pltf. to give him the benefit of his writ, he returned *nulla bona*:—*Held*: such wilful misconduct as rendered the sheriff & his sureties liable.—

*CLANDINAN v. DIXON* (1852), 9 U. C. R. 266.—CAN.

**g. ———.]—***CLARKE v. FARRELL* (1881), 31 C. P. 584.—CAN.

#### **PART II. SECT. 7, SUB-SECT. 8.—E.**

**h. Who entitled—Creditors' Relief Act.]—***MARTIN v. FOWLER* (1912), 46 S. C. R. 119; 6 D. L. R. 243.—CAN.

bkpt. on such petition:—*Held*: under Bkpcy. Act, 1883 (c. 52), ss. 45, 46, the trustee in bkpcy. of debtor was entitled as against pltf. to the money in ct.—*HEATHCOTE v. LIVESLEY* (1887), 19 Q. B. D. 285; 56 L. J. Q. B. 645; 36 W. R. 127; *sub nom. Re LIVESLEY, HEATHCOTE v. LIVESLEY*, 51 J. P. 471.

*Annotation*:—*Apld. Re Chiangetti, Ex p. Trustee* (1921), 91 L. J. K. B. 70.

348. —.]—Under Bkpcy. Act, 1890 (c. 71), s. 11 (1), though interpleader proceedings are pending when notice of a receiving order is served on the sheriff, he is bound, on being so served, to deliver the goods or their proceeds to the official receiver, & is not entitled, as against the official receiver or the trustee in bkpcy., to costs for any time for which he may remain in possession after he has been so served.—*Re HARRISON, Ex p. ESSEX SHERIFF*, [1893] 2 Q. B. 111; 62 L. J. Q. B. 266; 68 L. T. 590; 41 W. R. 512; 9 T. L. R. 396; 37 Sol. Jo. 426; 10 Morr. 106; 5 R. 367, D. C.

*Annotations*:—*Distd. Re Hurley* (1893), 41 W. R. 653.

*Consd. Re Rogers, Ex p. Sussex Sheriff*, [1911] 1 K. B. 104.

*Mentd. Re Thomas, Ex p. Middlesex Sheriff*, [1899] 1 Q. B. 460.

349. —.]—*STERN v. TEGNER*, No. 337, *ante*.

350. —.]—By a deed of gift dated Oct. 7, 1919, debtor, who was adjudged bkpt. on Nov. 23, 1920 “in consideration of his natural love & affection for the donee” purported to assign & convey to his sister, resp., “the business carried on by him at 58a Old Compton Street, Soho, & the stock-in-trade, wine & produce in & about the said premises.” At the date of the deed petitioning creditors were proceeding to enforce judgment under R. S. C., Ord. 14, & on Mar. 18, 1920, obtained final judgment against debtor for £527 7s. 4d. for goods sold & costs. On Mar. 20, 1920, execution was levied. Upon such levy being made, resp. claimed under the deed of gift the whole of the furniture & stock seized by the sheriff. An interpleader summons was taken out by the sheriff, & upon the hearing thereof, on Mar. 26, 1920, the master ordered claimant to pay into ct. £600 or give security for such amount, & in default the sheriff was authorised to sell the property seized & pay the proceeds into ct. to abide the result of an issue directed to be tried between claimant & execution creditors. Pursuant to the order the sheriff sold the goods on Apr. 28, 1920, & on May 20, 1920 paid the sum of £202 12s. 2d. into ct. On Nov. 3, 1920, the parties to the interpleader summons agreed to divide the money between them & to withdraw the record; these terms were embodied in an order of the master of that date. In the meantime, however, a receiving order was made on Nov. 1, 1920, & petitioning creditors, the execution creditors, informed the Official Receiver of the sum of money being in ct. & of the terms of settlement so agreed as aforesaid. Thereupon the Official Receiver intervened, & on Nov. 1, 1920, gave notice in writing to the Paymaster-General of the Supreme Ct. of the receiving order, & this notice had the effect of preventing the order being acted upon. The trustee moved for a declaration that the deed of gift was void as against him:—*Held*: the deed of gift was a voluntary settlement & being

made within two years of the bkpcy., was void, but the execution having been completed & the proceeds held by the sheriff for fourteen days, the trustee's title was barred, because, although the execution was not completed before the sheriff had been in possession for twenty-one days the act of bkpcy. thereby created had not occurred within three months of the presentation of the petition & was not therefore available to establish the trustee's title.—*Re CHIANDETTI, Ex p. TRUSTEE* (1921), 91 L. J. K. B. 70; 37 T. L. R. 984; [1921] B. & O. R. 82.

As to rights of execution creditors generally, see *BANKRUPTCY*, Vol. V., pp. 808 *et seq.*

#### SUB-SECT. 9.—STAY OF PROCEEDINGS.

##### A. In General.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 41; R. S. C., Ord. 57, r. 6.

##### B. Against Sheriff.

351. *Jurisdiction of court to grant.*—(1) Goods seized by the sheriff under a *fi. fa.* against A., out of the Exch. Ct., were claimed by B., to whom they were restored upon the establishment of her right upon an issue directed, at the sheriff's instance, under Interpleader Act, 1831 (c. 58). B. afterwards brought trespass against the sheriff for breaking & entering her house, on the occasion of the seizure. This ct. refused to stay the proceedings holding the relief & protection afforded to the sheriff by Interpleader Act, 1831 (c. 58), s. 6, to be confined to disputed claims to the goods seized, or to their proceeds. *Semble*: (2) if the proceeding in this ct. were a violation of the interpleader order, the application for relief, should have been made to the ct. in which the interpleader took place.—*HOLLIER v. LAURIE* (1846), 3 C. B. 334; 15 L. J. C. P. 294; 10 Jur. 860; 136 E. R. 134; *sub nom. OLLIER v. TODD, LAURIE & CHAPLIN*, 7 L. T. O. S. 260.

*Annotations*:—*As to* (1) *Distd. Jessop v. Crawley* (1850), 15 Q. B. 212. *Consd. Winter v. Bartholomew* (1856), 11 Exch. 704. *Refd. Smith v. Critchfield* (1885), 14 Q. B. D. 873.

352. —.]—*ABBOTT v. RICHARDS*, No. 443, *post*.

353. —.]—This ct. will not interfere to protect a sheriff who is threatened with an action by one person for seizing, under a writ issued out of this ct., goods alleged to belong to another person, a deft.—*ONYON v. WASHBOURNE* (1850), 14 Jur. 497.

354. —.]—A judge at chambers on an interpleader order has authority to restrain an action against the execution creditor, as well as against the sheriff.—*CARPENTER v. PEARCE* (1858), 27 L. J. Ex. 143.

*Annotation*:—*Refd. Cramer v. Matthews* (1881), 7 Q. B. D. 425.

See, also, No. 285, *ante*.

355. — *Misconduct of sheriff.*—*WINTER v. BARTHOLOMEW*, No. 162, *ante*.

356. — *Mistake of sheriff.*—*WINTER v. BARTHOLOMEW*, No. 162, *ante*.

#### PART II. SECT. 7, SUB-SECT. 9.—A.

k. *Infant claimant—Stay pending of next friend—Delay in application.*—*GRANT v. MCKAY* (1894), 10 Man. L. R. 243.—CAN.

*proceedings.*—Where a garnishing order is made in an action for a dis-

puted claim before judgment & the garnishee, admitting his debt, pays the money into ct. with notice that it is claimed by another party, & then applies for an interpleader issue to be tried between pltf. & such other party as claimant, it is proper to stay the trial of the interpleader issue until it be seen whether pltf. will recover

judgment against original deft.—*HOUGH v. DOLL* (1895), 10 Man. L. R. 679.—CAN.

#### PART II. SECT. 7, SUB-SECT. 9.—B.

m. *Substantial grievance of plaintiff.*—*ROBLIN v. MOODIE* (1856), 2 P. R. 216.—CAN.



## INTERPLEADER.

*Sect. 7.—The order: Sub-sect. 9, B., C. & D.; sub-sect. 10. Sect. 8: Sub-sects. 1 & 2, A.]*

357. ———.]—SMITH *v.* CRITCHFIELD, No. 163, *ante*.

358. ———.]—SALBERG *v.* MORRIS (1887), 4 T. L. R. 47, D. C.; *subsequent proceedings, sub nom.* MORRIS *v.* SALBERG (1889), 22 Q. B. D. 614, C. A.

359. ——— Substantial grievance of plaintiff.]—SMITH *v.* CRITCHFIELD, No. 163, *ante*.

360. ———.]—The sheriff held not entitled to protection against an action of trespass in wrongfully entering a house & taking certain goods in execution, where a substantial grievance had been done to the person whose house was entered.—DE COPPETT *v.* BARNETT (1901), 17 T. L. R. 273, C. A.

*Compare* EXECUTION, Vol. XXI., pp. 553, 554, Nos. 1263–1271.

### C. Against Execution Creditor.

361. Jurisdiction of court to grant.] — CARPENTER *v.* PEARCE, No. 354, *ante*.

362. Writ issued pending hearing of issue.]—Pending the hearing of an interpleader summons by a judge in chambers, a pltf. issued a writ of summons & deft. gave an undertaking to appear to it:—*Held*: the writ was properly issued.

If it were inequitable to continue the action the proper course would have been to have moved for a stay of proceedings (DENMAN, J.).—HOOKE *v.* IND, COOPE & Co. (1877), 36 L. T. 467.

*D. Under Judicature Act, 1873, s. 25 (6).*

*See* R. S. C., Ord. 57, r. 6.

363. Separate proceedings.] — READING *v.* LONDON SCHOOL BOARD, No. 75, *ante*.

*See, now, Law of Property Act, 1925 (c. 20), s. 136.*

### SUB-SECT. 10.—ENFORCEMENT OF ORDERS.

364. Disobedience to order—Attachment.]—Where an interpleader order directed the sheriff to sell, unless claimant paid money into ct. within seven days, & within that time deft. became bkpt., & the sheriff thereupon gave up possession, & did not sell. The ct. refused to make a rule absolute to attach the sheriff.—COLLINS *v.* CLIFF (1863), 2 New Rep. 334; 8 L. T. 466; 11 W. R. 786.

365. ———.]—The sheriff had a discretion before he obtained the interpleader order, but after he had applied for an order in respect of each claimant, & had obtained a protection in certain terms, he was bound to obey the order. I am inclined to think that the sheriff might be attached for not obeying the order made at his own instance (BRETT, L.J.).—ANGELL *v.* BADDELEY (1877), 3 Ex. D. 49; 47 L. J. Q. B. 86; 37 L. T. 653; 26 W. R. 137, C. A.

*See* CONTEMPT OF COURT, Vol. XVI., pp. 46 *et seq.*

### PART II. SECT. 7, SUB-SECT. 10.

364 i. Disobedience to order—Attachment.]—The sheriff, upon pltf. refusing to indemnify, applied to the ct. for an interpleader order, which was granted. Pending the interpleader issue pltf. offered the indemnity, & the sheriff sold & paid the proceeds to pltf. Upon an application to the party in whose favour the interpleader issue had been found by the jury:—*Held*: the sheriff was liable to an attachment for selling the goods in violation of the interpleader order, obtained at his instance, & for his own protection.—

HENDERSON *v.* WILDE (1849), 5 U. C. R. 585.—CAN.

364 ii. ———.] — MACLEAN *v.* ANTHONY (1884), 6 O. R. 330.—CAN.

366 i. Prevention of execution of order of court—Committal for contempt.]—Judgment debtor, upon hearing that judgment had gone or was about to go against her, turned all the property she had into money & sent it to a friend in a foreign country, where it remained, & upon her examination she refused or professed to be unable to give any information as to where it was. After she had had ample

366. Prevention of execution of order of court—Committal for contempt.]—Sheriff's officers went to the house of a party to execute a writ of *fi. fa.*, & took possession of his goods. An auctioneer & others claimed them under a bill of sale, & proceeded to sell them, notwithstanding the resistance of the officers, whom they treated with considerable violence; whereupon the sheriff took out an interpleader summons, & served it. They disregarded this, & completed the sale & removed the goods:—*Held*: a contempt of ct., both at common law & under Interpleader Act, 1831 (c. 58).—COOPER *v.* ASPREY (1863), 3 B. & S. 932; 32 L. J. Q. B. 209; 8 L. T. 355; 9 Jur. N. S. 1198; 11 W. R. 641; 122 E. R. 349.

*See* CONTEMPT OF COURT, Vol. XVI., pp. 32 *et seq.*; SHERIFFS & BAILIFFS.

367. Order for payment out of court—Creditor's suit pending against claimant.]—Where a judge's order had been obtained, ordering the payment of a sum of money out of ct. to a person claiming under an interpleader rule, this ct. will not refuse to enforce the order, though a suit of a creditor against claimant is pending in Chancery; for the right of the receiver cannot be recognised where no injunction has been served upon the officers of the ct.—SMITH *v.* CLINCH (1843), 7 Jur. 129.

## SECT. 8.—THE ISSUE.

### SUB-SECT. 1.—IN GENERAL.

*See* R. S. C., Ord. 57, r. 7.

368. "Interpleader issue"—Technical term.]—The words "interpleader issue ordered" are technical terms (COZENS-HARDY, M.R.).—MASON *v.* BOLTON'S LIBRARY, LTD., [1913] 1 K. B. 83; 107 L. T. 673; 57 Sol. Jo. 96; *sub nom.* CHETWYND'S TRUSTEE *v.* BOLTONS LIBRARY, LTD., 82 L. J. K. B. 217; 20 Mans. 1, C. A.

369. Purpose of issue—To satisfy conscience of court.]—CARNE *v.* BRICE, No. 411, *post*.

370. ———.]—The ct. will not set aside a verdict on the ground that the wrong party was allowed to begin at the trial, unless it is manifest that some injustice or injury has resulted from the error; & therefore, if on the trial of a feigned issue, directed for the purpose of informing the conscience of the ct., the judge calls on the wrong party to begin, the ct. will not grant a new trial if they consider the verdict supported by the evidence.—EDWARDS *v.* MATTHEWS (1847), 4 Dow. & L. 721; 16 L. J. Ex. 291; 9 L. T. O. S. 151; 11 Jur. 398.

*Annotations:—Reid.* Brandford *v.* Freeman (1850), 5 Exch. 734; *Leete v.* Gresham Life Insce. Soc. (1851), 15 Jur. 1161.

371. ———.]—(1) A claimant was pltf., & an execution creditor deft., in an interpleader issue, to try whether certain goods were, at the time of the seizure thereof by the sheriff under a writ of execution, the goods of pltf. Pltf. proved a valid bill of sale to him of the goods:—*Held*:

opportunity to become aware of her position, but had done nothing towards satisfying pltf.'s claim, an order was made for her committal to gaol for three months & for payment by her of the costs of the motion.—MCKINNON *v.* CROWE (1896), 17 P. R. 291.—CAN.

### PART II. SECT. 8, SUB-SECT. 1.

n. Purpose of issue.]—The question on an interpleader issue is not whether the execution creditor had a right to seize the goods under his writ, but whether pltf. had such an interest in them as entitled him to

it was competent for deft. to defeat pltf.'s title by proving a prior bill of sale to a third party.

(2) The object of the issue is to satisfy the conscience of the judge whether he ought to order the proceeds of the execution to be paid over to claimant or to the execution creditor (PARKE, B.).—GADSDEN v. BARROW (1854), 9 Exch. 514; 2 C. L. R. 1063; 23 L. J. Ex. 134; 2 W. R. 241; 156 E. R. 220.

*Annotations:*—As to (1) *Consd.* Green v. Stevens (1857), 2 H. & N. 146. *Expld.* Shingler v. Holt (1861), 7 H. & N. 65. *Consd.* Richards v. Jenkins (1886), 17 Q. B. D. 544. As to (2) *Refd.* Edwards v. English (1857), 7 E. & B. 564; Peake v. Carter, [1916] 1 K. B. 652. *Generally, Mentd.* Nicholson v. Cooper (1858), 31 L. T. O. S. 184; Daniel v. Rogers, [1918] 2 K. B. 228.

372. ———.]—(1) In an interpleader issue between a claimant under a *bond fide* bill of sale duly registered & an execution creditor of the assignor the latter cannot set up a prior bill of sale to a third party, also *bond fide*, but void as against execution creditors for want of due registration under 17 & 18 Vict. c. 36, s. 1.

(2) The object of an issue is to inform the conscience of the ct. (CROMPTON, J.).—EDWARDS v. ENGLISH (1857), 7 E. & B. 564; 26 L. J. Q. B. 193; 29 L. T. O. S. 89; 3 Jur. N. S. 934; 5 W. R. 507; 119 E. R. 1355.

*Annotations:*—As to (1) *Consd.* Richards v. Jenkins (1886), 17 Q. B. D. 544. *Refd.* Smale v. Burr (1872), L. R. 8 C. P. 64. As to (2) *Refd.* Peake v. Carter, [1916] 1 K. B. 652. *Generally, Mentd.* Re Barrand, *Ex p.* Cochrane (1876), 34 L. T. 950; Chapman v. Knight (1880), 5 C. P. D. 308; Lyons v. Tucker (1881), 6 Q. B. D. 660; Re Toomer, *Ex p.* Blalberg (1883), 23 Ch. D. 254.

373. ———.]—PLUMMER v. PRICE, No. 377, *post*.

374. Reference to arbitrator—In lieu of issue—Power of court.]—On an application to a judge at chambers, under Interpleader Act, 1831 (c. 58), an order was made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed. The ct. refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties, an administratrix, had obtained since the hearing at chambers.—DRAKE v. BROWN (1835), 2 Cr. M. & R. 270; 5 Tyr. 1067; 4 L. J. Ex. 313; 150 E. R. 117.

375. Execution creditor becoming party to issue—Effect of—Liability for acts of sheriff.]—If a sheriff's officer, without any direction from the execution creditor, or any interference by him, in executing a *fi. fa.* seize a stranger's goods, who makes a claim, & the officer takes out an interpleader summons, & the execution creditor appears & accepts an issue to try the ownership of the goods, the execution creditor does not thereby become liable to an action of trespass for the wrongful act of the sheriff's office in taking the goods.—WOOLLEN v. WRIGHT (1862), 1 H. & C.

554; 31 L. J. Ex. 513; 10 W. R. 715; 158 E. R. 1005; *sub nom.* WRIGHT v. WOOLLEN, 7 L. T. 73, Ex. Ch.

*Annotations:*—*Refd.* Blaker v. Seager (1897), 76 L. T. 392. *Mentd.* Durant v. Roberts & Keighley, Maxted, [1900] 1 Q. B. 629.

376. Undecided issue—Effect of—Stay of execution.]—An interpleader issue which remains undecided will operate as a stay of execution so as to prevent the judgment creditor serving on debtor a bkpcy. notice according to the provisions of Bkpcy. Act, 1883 (c. 52), s. 4 (1) (g).—*Re* FORD, *Ex p.* FORD (1886), 18 Q. B. D. 369; 56 L. J. Q. B. 188; 56 L. T. 166; 3 Morr. 283, D. C.

*Annotations:*—*Distd.* Re Bates, *Ex p.* Lindsay (1887), 57 L. T. 417. *Appld.* Re Phillips, *Ex p.* Phillips (1888), 5 Morr. 40; Re Follows, *Ex p.* Follows, [1895] 2 Q. B. 521. *Mentd.* Lee v. Dangar, Grant, [1892] 1 Q. B. 231; R. Debtor, *Ex p.* Judgment Creditor (1902), 71 L. J. K. B. 664; Re H. B., [1904] 1 K. B. 94.

## SUB-SECT. 2.—FORM.

### A. In General.

See R. S. C., Ord. 57, r. 7.

377. Immaterial—General rule.]—Claimant in an interpleader issued claimed all the goods seized. At the trial it appeared that the bulk of the goods belonged to claimant, but a portion belonged to third parties, who made no claim, & the verdict was entered for claimant as to the former, & for deft., the execution creditor, as to the latter part of the goods:—*Held*: claimant was entitled to the money which he had paid into ct.

I am clearly of opinion that the form of the issue is of no consequence because it is directed for the purpose of informing the conscience of the ct. (BRAMWELL, L.J.).—PLUMMER v. PRICE (1878), 39 L. T. 657, C. A.; *previous proceedings, sub nom.* PRICE v. PLUMMER (1877), 26 W. R. 45.

*Annotation:*—*Refd.* Peake v. Carter, [1916] 1 K. B. 652.

378. ———.]—The form of the interpleader issue is immaterial & it has always been so regarded (WILLS, J.).—RICHARDS v. JENKINS (1886), 17 Q. B. D. 544; 55 L. J. Q. B. 435; 55 L. T. 397; 34 W. R. 739; 2 T. L. R. 819, D. C.; *on appeal* (1887), 18 Q. B. D. 451, C. A.

*Annotations:*—*Refd.* Peake v. Carter, [1916] 1 K. B. 652. *Mentd.* Japp v. Campbell (1887), 57 L. J. Q. B. 79; Usher v. Martin (1889), 24 Q. B. D. 272; Jennings v. Mather, [1901] 1 K. B. 108.

379. ———.]—PEAKE v. CARTER, No. 256, *ante*.

See, also, Nos. 371, 372, *ante*, No. 411, *post*.

380. ——— As to time at which right to be ascertained.]—MANSFORD v. TONGE, CURRY & Co. (1850), 16 L. T. O. S. 197.

381. ——— Claim to all goods seized—Particulars.]—Where an interpleader issue is settled in the common form to try whether the goods

resist the seizure.—GRANT v. WILSON (1859), 17 U. C. R. 144.—CAN.

*o. Issue to be taken distributively.*]—An interpleader issue is to be taken distributively, & an assignee claiming should succeed as to any part of the goods of which there has been a change of possession, though as to the rest the assignment may be void for want of registration.—FEEHAN v. BANK OF TORONTO (1860), 10 C. P. 32.—CAN.

## PART II. SECT. 8, SUB-SECT. 2.—A.

377 i. Immaterial—General rule.]—It is immaterial whether an interpleader issue refers to "the goods seized," or "the goods seized, or any part thereof." Under the former words claimant may prove for a portion of the goods seized.

—STEPHENS v. MCARTHUR (1889), 6 Man. L. R. 111.—CAN.

*p. Proper issue.*]—VAN EVERY v. ROSS (1861), 11 C. P. 133.—CAN.

*q. ———.*]—Under 46 & 47 Vict. c. 30, the proper issue to direct is "Whether at the time of the seizure of the goods by the sheriff the goods were the property of the claimant as against the execution creditor."—KEELER v. HAZLEWOOD (1883), 1 Man. L. R. 31.—CAN.

*r. Real point at issue should be stated.*]—If it had been intended that only the debtor's special interest, in the goods should be sold by the sheriff under an execution, not the goods themselves, the interpleader should have been framed to meet such a case.

—MUCKLESTON v. SMITH (1867), 17 C. P. 401.—CAN.

*t. ———.*]—In all cases where an issue is directed a specific question or questions raising the real point or points in issue should be stated. The old traditional form of issue between an execution creditor & a claimant "whether at the time of the seizure the goods were the goods of the claimant as against the execution creditor" should be abandoned, & the real question asked, for instance, "was the bill of sale from the judgment debtor to the claimant fraudulent or, alternatively, was it invalid as against the execution creditor by reason of irregularities, non-registration, non-renewal, or as the case may be?"—



**Sect. 8.—The issue: Sub-sect. 2, A., B., C. & D.; sub-sects. 3, 4 & 5.]**

seized "or any part thereof" were at the time of the seizure the property of claimant, & it appears that claimant claims a part only, the goods seized being more than sufficient to satisfy the judgment of the execution creditor, claimant will be ordered to specify the goods claimed by him.—**PRICE v. PLUMMER** (1877), 26 W. R. 45; *subsequent proceedings, sub nom. PLUMMER v. PRICE* (1878), 39 L. T. 657, C. A.

*Compare No. 385, post.*

**382. Claim for consequential damage.]—BROWN v. LUDHAM**, No. 298, *ante*.

**383. Clerical error on face of issue—Issue not invalidated.]—**A mistake appearing on the face of an interpleader issue as to the statute under which it is directed does not invalidate the issue.—**SAUNDERSON v. PERRIN** (1870), 22 L. T. 419.

#### *B. Sheriff's Interpleader.*

*See R. S. C., Ord. 57, r. 7.*

**384. "Whether claimant entitled."]—**Under a feigned issue, brought to try the right of property in certain goods which had been seized under an execution against A.:—*Held*: the question for the jury was, not whether the goods were the property of pltf. in the feigned issue, or of A., but merely whether they were or were not the property of the former.—**GREEN v. ROGERS** (1845), 2 Car. & Kir. 148, N. P.

*Annotations:—Distd. Flude v. Goldberg*, [1915] 2 K. B. 157. *Refd. Green v. Stephens* (1857), 29 L. T. O. S. 83.

**385. — "As against execution creditor"— "To all goods seized."]—**Where the declaration in an issue under Interpleader Act, 1831 (c. 58), states that "divers goods & chattels" were seized under a *fi. fa.*, & avers that "the said goods & chattels" were the property of pltf., unless pltf. proves that the whole of the goods belong to him, deft. will be entitled to a verdict. *Semble*: if part of the goods belonged to pltf., the judge would ask the jury to find specially.—**MOREWOOD v. WILKES** (1833), 6 C. & P. 144, N. P.

**386. — — —.]—GREEN v. STEVENS**, No. 225, *ante*.

*— — —.]—*On an interpleader at the instance of a sheriff, an issue was tried, whether certain goods seized were the property of the claimant as against the execution creditor, when it appeared that the claimant was a married woman living apart from her husband in adultery with G. the execution debtor, & the goods were seized in a house in which they were living together. The judge told the jury that the question was whether, looking at the subject as if the claimant had been a single woman, as between her & G. the goods belonged to G. The jury having found a verdict for the claimant:—*Held*: the verdict was right notwithstanding that the claimant was a married woman.—**SHINGLER v. HOLT** (1861), 7 H. & N. 65; 30 L. J. Ex. 322; 5 L. T. 76; 9 W. R. 871; 158 E. R. 394; *sub nom. BIRD v. CRABB, SHINGLER v. HOLT*, 7 Jur. N. S. 866.

*Annotation:—Refd. Duncan v. Cashin* (1875), L. R. 10, C. P. 554.

**388. — — —.]—SCHROEDER v. HANROTT**, No. 229, *ante*.

**BROTHERS & Co. v. JENKINS**, 3 D. L. R. 329; 2 W. W. R. 684.—**CAN.**

**a. — — —.]—**Where an interpleader issue relates to a transaction between a debtor & creditor which is impeached by another creditor on the ground of fraud, the question intended to be

raised should be put in definite form.—**HUNTER v. LAWRIE**, [1925] 1 D. L. R. 658; 1 W. W. R. 411; 35 Man. L. R. 126.—**CAN.**

**PART II. SECT. 8, SUB-SECT. 2.—B. b. Facts & circumstances should be disclosed.]—**The facts & circum-

**389. — — —.]—**The sheriff seized all the goods in a house under writs of *fi. fa.* at the suit of T. & other creditors. Claimants claimed all the goods, & the other creditors having abandoned their executions, an order was made upon an interpleader summons that the sheriff should sell a sufficient quantity of the goods to satisfy T.'s execution, & should pay the proceeds into ct. to abide the event of an issue between claimant & T. The sheriff sold goods sufficient to satisfy T.'s execution, & paid the proceeds into ct. There then remained a large quantity of goods unsold:—*Held*: the proper form of issue was whether the goods seized & sold by the sheriff, or some part thereof, were the property of claimant as against T.—**TEBB v. POWELL** (1905), 93 L. T. 468, C. A.

**390. — — — "At time of execution."]—SCHROEDER v. HANROTT**, No. 229, *ante*.

**391. — — —.]—**In an interpleader issue between the execution creditor & a claimant, it is for claimant to show that, at the moment before execution was levied, he had a title to the goods.

Claimant let goods on hire to W., & became bkpt. He did not inform his trustee of the existence of the goods, but continued to receive from W. payment for the hire of the goods. The goods having been taken in execution under a judgment recovered against W., an interpleader issue was ordered between claimant & the execution creditor:—*Held*: the execution creditor was entitled to succeed, since claimant's title to the goods passed on his bkpcy. to his trustee, & the estoppel created against W. by his payment for their hire gave claimant no interest in the goods as against the execution creditor.—**RICHARDS v. JENKINS** (1887), 18 Q. B. D. 451; 56 L. J. Q. B. 293; 56 L. T. 591; 35 W. R. 355; 3 T. L. R. 425, C. A.

*Annotations:—Distd. Usher v. Martin* (1889), 24 Q. B. D. 272. *Refd. Jennings v. Mather*, [1901] 1 K. B. 108. *Peake v. Carter*, [1916] 1 K. B. 652. *Mentd. Japp v. Campbell* (1887), 57 L. J. Q. B. 79.

**392. — — —.]—DISCOUNT BANKING CO. OF ENGLAND & WALES v. LAMBARDE**, No. 9, *ante*. *See, also*, No. 371, *ante*, No. 412, *post*.

#### *C. Bankruptcy of Parties.*

**393. "Whether assignees in bankruptcy or execution debtor entitled."]—**In an interpleader suit where after a seizure a receiving order had been made against his execution debtor, the form seems to have been whether the assignees in bkpcy. or the execution creditor were entitled to the moneys in the sheriff's hands.—**PARKER v. BOOTH** (1831), 8 Bing. 85; 1 Moo. & S. 156; 1 L. J. C. P. 37; 131 E. R. 333.

**394. — — —.]—NORTHCOTE v. BEAUCHAMP** (1831), 1 Moo. & S. 158; cited in 8 Bing. at p. 86; 131 E. R. 333.

**Receiver appointed by court—Subsequent liquidation of defendant company.]—See No. 23, ante.**

#### *D. Amendment.*

*See R. S. C., Ord. 57, r. 7.*

**395. Addition of claims.]—ESCHGER, GHESQUIER & Co. v. MORRISON, KEKEWICH & Co.** (1890), 6 T. L. R. 145, C. A.

stances should be disclosed in the interpleader proceeding.—**MCBRIDE v. BROOKS** (1911), 16 W. L. R. 271; 4 Sask. L. R. 124.—**CAN.**

**PART II. SECT. 8, SUB-SECT. 2.—D. c. Misnomer.]—**One of pltf's. in an interpleader issue was misnamed,



## SUB-SECT. 3.—HOW INTITULED.

**396. Claim abandoned—Subsequent application for costs.]—**An issue was directed under Interpleader Act, 1831 (c. 58), & afterwards the claim was abandoned:—*Held*: on an application to the ct. for costs, that an affidavit in support of it must be intituled in the names of the parties in the original cause.—*ELLIOT v. SPARROW* (1835), 1 Har. & W. 370.

## SUB-SECT. 4.—PARTIES.

See R. S. C., Ord. 57, r. 7.

**397. Who entitled to be plaintiff—Sheriff's interpleader.]—***BENTLEY v. HOOK*, No. 172, *ante*.

**398. ———.]—**M. owed S. a sum of money for which S. had M.'s promissory note as a security. S. applied for payment. M. proposed that an inventory should be made of the goods on his premises, & that S. should take them at a valuation in discharge of the debt. S. consulted his attorney, who prepared a document. After the preparation of the document, M. delivered the inventory to S. & S. & M. insured the goods against fire in their joint names, & S. gave up to M. the promissory note, which was destroyed. S. at the same time credited M. in his book to the amount of the debt. S. took possession of a few articles included in the inventory, for which M. had no use, but M. remained in possession of the rest of the goods as before. The goods in question being seized by the sheriff in execution at the suit of a third party against M., S. claimed them as his own & sued the sheriff in the county ct. for taking them, & in order to maintain his claim, offered the document in evidence. This was objected to, & rejected for want of a stamp:—*Held*: as M. was in possession of the goods, it lay on S. to prove clearly that they were his; & as the document which contained the terms of the agreement between M. & S. was inadmissible for want of a stamp, no other evidence of a sale

was admissible, & consequently the facts above stated were no evidence for the jury of S.'s title to the goods.—*YORKE v. SMITH* (1851), 21 L. J. Q. B. 53; *sub nom. SMITH v. YORKE*, 16 Jur. 63.

*Compare* No. 15, *ante*.

**399. Substitution of party to issue—Power of court—Claimant refusing to proceed to trial.]—***LYDAL v. BIDDLE*, No. 246, *ante*.

**400. ——— Real claimant for party having no interest.]—***MERRICK v. WEBBER* (1843), 1 L. T. O. S. 233.

**401. Parties companies having members in common.]—**Judgment was entered up by a banking co. against the public officer of another banking co., under Country Bankers Act, 1826 (c. 46), ss. 9, 12; & a *sci. fa.* issued for the purpose of having execution, under sect. 13, against individual members. One of the alleged members obtained a rule *nisi* for setting aside the warrant of attorney; & the ct. thereupon ordered an issue to be tried, upon the question, among others, whether the shareholders of the latter co. were indebted to the former in any & what sum:—*Held*: the defts. on such issue could not object that some parties on the record were members of both cos.—*BOSANQUET v. WOODFORD* (1843), 5 Q. B. 310; 1 Dav. & Mer. 419; 13 L. J. Q. B. 93; 2 L. T. O. S. 227; 8 Jur. 242; 114 E. R. 1266.

*Annotations:—Refd. Harvey v. Scott* (1847), 11 Q. B. 92. *Mentd. Bosanquet v. Graham* (1843), 6 Q. B. 601, n.; *R. v. Stainforth* (1847), 11 Q. B. 66.

**402. Addition of parties—Power of court.]—***BIRD v. MATHEWS*, No. 238, *ante*.

## SUB-SECT. 5.—TRIAL.

**Whether by jury.]—**See R. S. C., Ord. 36, rr. 2, 6, 7.

**403. Right to begin—Defendant setting up affirmative.]—**In an issue under Interpleader Act, 1831 (c. 58), pltf's. averred in the declaration that certain goods were not the property of pltf's. or

being named "Robert Mar Fisher," instead of "Robert Mar Shaw":—*Held*: this variance was not a ground of non-suit, but merely a question of identity, which could be shown at the trial, & amendment could be made at the trial.—*FISHER v. BROCK* (1892), 8 Man. L. R. 137.—CAN.

**d. As to parties.]—**Re *SMITH* (1912), 23 O. W. R. 186; 4 O. W. N. 188; 6 D. L. R. 849.—CAN.

## PART II. SECT. 8, SUB-SECT. 4.

**397 i. Who entitled to be plaintiff—Sheriff's interpleader.]—**Where the proceeds of a life insurance policy were claimed by the widow of assured & also by an assignee for value, & it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, & had subsequently by writing assumed to limit such benefit to \$1, & had then made the assignment to the other claimant:—*Held*: the latter should be pltf. in an interpleader issue ordered to be tried between claimants.—*Re HUBBELL* (1900), 19 P. R. 240.—CAN.

**e. ——— Execution creditor—Claimant in possession at time of seizure.]—***Semble*: if claimant be in possession at the time of the seizure, the execution creditor should be pltf. in the interpleader issue.—*DUNCAN v. TEES* (1885), 11 P. R. 66.—

**———.]—**Where claimant is in possession of the goods at the time of seizure, execution creditor is made pltf. in the interpleader ——— directed on the sheriff's applica-

tion.—*FARLEY v. PEDLAR* (1901), 21 C. L. T. 294; 1 O. L. R. 570.—CAN.

**g. ———.]—***DICKSON v. PODERSKY*, [1918] 1 W. W. R. 636; 13 Alta. L. R. 110; 39 D. L. R. 584.—CAN.

**Goods seized in possession of mortgagee.]—**In Apr. 1892, pltf. placed a writ of *fi. fa.* against the goods of deft. in the sheriff's hands. The sheriff seized certain goods as the property of deft., but they were claimed by the C. Bank. They had been mortgaged to the bank in Jan. 1892, & were taken possession of by the bank a few days before the seizure, & at that time were in the actual possession of the bank. An interpleader issue was directed & the question was which party should be made pltf. in the issue:—*Held*: the execution creditors should be made pltf's.—*UNION BANK OF CANADA v. TIZZARD*, 9 Man. L. R. 149.—CAN.

**k. ———.]—**In interpleader issue between execution creditors & claimant the former should be made pltf's.—*HERR v. CRAIGMYLE TRADING Co.*, [1919] 1 W. W. R. 679.—CAN.

**l. ——— Claimant—Garnishee admitting liability to judgment debtor.]—**A garnishee admitted his liability to the judgment debtor, but suggested that B. claimed the money under an assignment made to him by the judgment debtor. Upon settling the form of the order for an issue:—*Held*: B., claimant, ought to be pltf.—*MCPHILLIPS v. WOLF* (1887), 4 Man. L. R. 300.—CAN.

**m. ——— Execution debtor in**

**possession.]—**Where goods seized by a sheriff under execution are at the time in the possession of execution debtor, & the sheriff interpleads in consequence of a claim made upon them by a person out of possession, claiming by transfer from the execution debtor, claimant should be pltf. in the interpleader issue. *Semble*: claimant should, as a rule, be made pltf., where he claims by transfer from the execution debtor, whether he is in possession or not.—*DORAN v. TORONTO SUSPENDER Co.* (1890), 14 P. R. 103.—CAN.

**n. Substitution of party to issue.]—***BLAKE v. MANITOBA MILLING Co.* (1891), 8 Man. L. R. 427.—CAN.

**o. Multiplicity of parties to be avoided.]—**The tendency of modern practice is to dispense with parties, where it can be done with safety.—*MCDONALD v. REID* (1877), 25 Gr. 139.—CAN.

**p. Party to be ordered—Need not be named or served.]—**Party to be ordered need not be named as a resp. nor served.—*BOYLE v. MCCABE* (1911), 19 O. W. R. 948; 24 O. L. R. 313; 2 O. W. N. 1346.—CAN.

**q. Whether properly made party—Several execution creditors—One not desiring to contest claim.]—***DUNDAS v. DARVILL* (1887), 12 P. R. 347.—CAN.

## PART II. SECT. 8, SUB-SECT. 5.

**r. Necessity for notice.]—**Notice of trial is an essential in interpleader & feigned issues, as in ordinary cases.

**Sect. 8.—The issue: Sub-sects. 5, 6 & 7.]**

either of them. Plea, that the goods were the property of pltf. or one of them:—*Held*: on this issue deft. had the right to begin.—HUDSON v. BROWN (1839), 8 C. & P. 774, N. P.

**404. — Wrong party beginning—New trial.]**—EDWARDS v. MATTHEWS, No. 370, *ante*.

—.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 43 *et seq.*

**405. Defendant may show not proper case for interpleader.]**—(1) Deft., in an interpleading suit may show, at the hearing, that the case is not a proper one for interpleader.

(2) In an interpleader suit, the ct. cannot make a hostile decree against pltf. beyond the subject of the suit.—TOULMIN v. REID (1851), 14 Beav. 499; 21 L. J. Ch. 391; 51 E. R. 377.

*Annotation*:—*Generally*, *Mentd.* Manby v. Robinson (1869), 17 W. R. 479.

**406. Non-appearance of claimant—Nonsuit—New trial.]**—When a cause is called on, & pltf. is not present, the common rule is that he must be nonsuited. Is there anything in interpleader cases to alter this? I know of nothing. If you went before a judge, you might ask leave to have the issue tried, on payment of costs (MAULE, J.).—REDBURN v. HOPKINSON (1851), 16 L. T. O. S. 342.

*Compare* Nos. 289–291, *ante*.

**407. Scope of order—Confined to subject-matter of suit.]**—TOULMIN v. REID, No. 405, *ante*.

**408. Right of counsel to address jury—Counsel for purchaser.]**—In interpleader counsel for the purchaser from claimant will not be heard.—GAYTON v. ESPIN (1859), 1 F. & F. 722, N. P.

**409. Discovery & interrogatories—Delivery of interrogatories.]**—Interrogatories may be delivered on an interpleader issue.—WHITE v. WATTS (1862), 32 C. B. N. S. 267; 31 L. J. C. P. 381; 6 L. T. 187; 142 E. R. 1146.

—.]—*See, generally*, R. S. C., Ords. 31, 57, r. 13; & DISCOVERY, Vol. XVIII., p. 180, No. 1322.

**410. Strict adherence to technical rules.]**—I do not think that in an interpleader we are confined to strict technical rules . . . the ct. is not bound to adhere to every technicality (BLACKBURN, J.).—WATERTON v. BAKER (1868), 17 L. T. 494.

*Annotation*:—*Reid*. Williams v. Rymer (1895), 39 Sol. Jo. 641.

**SUB-SECT. 6.—RIGHT TO SET UP JUS TERTII.**

*See* R. S. C., Ord. 57, r. 7.

**411. Claimant must show title in himself—Bankruptcy of execution debtor.]**—Goods purchased by a married woman out of the proceeds of her separate estate, may be taken under an execution issued against her husband. *Semble*: whether living separate from him or not.

An issue directed under Interpleader Act, 1831

(c. 58), is for the purpose of informing the conscience of the ct.; therefore, where goods had been purchased by a married woman out of the

proceeds of her separate estate, the goods had been seized by the sheriff under an execution against her husband, & an issue had been directed between the execution creditor, & the trustees of the marriage settlement, for the purpose of trying their respective rights; but the form of the issue was whether the goods in question were the goods of the husband, the ct. would not allow the trustees to give in evidence that the husband had become a bkpt. a second time, & had not paid 15s. in the pound, for the purpose of showing that the property in the goods was not in him, but in his assignees.—CARNE v. BRICE (1840), 7 M. & W. 183; 8 Dowl. 884; H. & W. 23; 10 L. J. Ex. 28; 4 Jur. 1115; 151 E. R. 731.

*Annotations*:—*Consd.* Leake v. Loveday (1842), 4 Man. & G. 972; Gadsden v. Barrow (1854), 9 Exch. 514; Richards v. Jenkins (1886), 17 Q. B. D. 544. *Reid*. Chase v. Goble (1841), 2 Man. & G. 930; Lane v. Grylls (1862), 6 L. T. 533; Peake v. Carter, [1916] 1 K. B. 652. *Mentd.* Tugman v. Hopkins (1842), 4 Man. & G. 389; Edwards v. English (1857), 7 E. & B. 564; Fleet v. Perrins (1869), L. R. 4 Q. B. 500; Norman v. Villars (1877), 36 L. T. 663.

**412. —.]**—Upon an interpleader issue directed at the instance of the sheriff between the assignees of a bkpt. & an execution creditor, the assignees must rely on their own title & cannot set up the *jus tertii*.—BELCHER v. PATTEN (1848), 6 C. B. 608; 6 Dow. & L. 370; 18 L. J. C. P. 60; 12 L. T. O. S. 220; 12 Jur. 1028; 136 E. R. 1387.

*Annotation*:—*Consd.* Richards v. Jenkins (1886), 17 Q. B. D. 544.

**413. — Title to possession only.]**—GREEN v. STEVENS, No. 225, *ante*.

**414. —.]**—RICHARDS v. JENKINS, No. 391, *ante*.

**415. Right of execution creditor—Bankruptcy of execution debtor.]**—The sheriff seized under a *fi. fa.* at the suit of G. certain goods in the possession of one W. The goods were claimed by G. & H. respectively under three several mtges. from W. Upon an issue directed under Interpleader Act, 1831 (c. 58), to try their right, C. & H. being pltf., & G., the execution creditor, deft.:—*Held*: it was competent to deft. to set up the title of the assignees of W., who had become bkpt.—CHASE v. GOBLE (1841), 2 Man. & G. 930; 3 Scott, N. R. 245; 10 L. J. C. P. 216; 5 Jur. 608; 133 E. R. 1021.

*Annotations*:—*Expld.* Edwards v. English (1857), 7 E. & B. 564. *Consd.* Shingler v. Holt (1861), 7 H. & N. 65; Richards v. Jenkins (1886), 17 Q. B. D. 544. *Reid*. Re Kerslake, *Ex p.* Allum (1853), 1 Bankr. & Ins. R. 47.

**416. — Where defendant in issue.]**—GADSDEN v. BARROW, No. 371, *ante*.

**417. —.]**—RICHARDS v. JENKINS, No. 391, *ante*.

**418. — Title of third party under void bill of sale.]**—EDWARDS v. ENGLISH, No. 372, *ante*.

**419. — Goods seized including articles pawned—Receiver appointed of pawnbroker's business.]**—A receiver was appointed, in an action in

WILSON v. DEWAR (1866), 4 P. R. 13.—CAN.

t. *Nonsuit.*—Pltf. may be nonsuited on the trial of a feigned issue under the Interpleader Act.—BRYSON v. CLANDINAN (1850), 7 U. C. R. 198.—CAN.

u. *Verdict not in accordance with evidence—New trial.*—MAY v. ROUTLEGE (1864), 14 C. P. 534.—CAN.

a. *New trial—Application for—To whom made.*—Where there has been a trial by jury in an interpleader issue directed by the Ch. Div., an application for a new trial must be made to

a Div. Ct., & not to a single judge.—COLE v. CAMPBELL (1883), 9 P. R. 498.—CAN.

b. *Motion for new trial—Contents of affidavit.*—A verdict having been taken in an interpleader suit in the absence of deft., upon a clear *prima facie* case, deft., upon a motion for a new trial, swore that he had not information of the trial coming on in time to be present, & his attorney swore that from information obtained from pltf.'s brother he verily believed deft. had a good defence on the merits:—*Held*: not sufficient, without show-

ing facts upon which his belief was founded; & sufficient cause for his absence not being shown, a new trial was refused.—PROUDFOOT v. HARLEY (1862), 11 C. P. 389.—CAN.

c. —.]—VIDAL v. BANK OF UPPER CANADA (1865), 15 C. P. 421.—CAN.

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**412i. Claimant must show title in himself.]**—BRYCE BROTHERS v. KINNEAR (1892), 14 P. R. 509.—CAN.

**412ii. —.]**—FITZPATRICK v. DAWES (1907), E. D. C. 391.—S. AF.



the Q. B. Div., to receive the profits & other moneys receivable from the pawnbroker's business carried on by deft. Subsequently to the appointment of the receiver, but before he perfected his security, a writ of *fi. fa.* was issued to the sheriff to recover a sum of money ordered to be paid by deft. in an action in the Ch. Div., in pursuance whereof the sheriff took possession of certain goods, & chattels in the possession of deft., including various articles pawned with her & not yet redeemed. The receiver perfected his security, & claimed the redeemable pledges in defendant's house:—*Held*: deft., as pawnbroker, had a qualified property in the articles pawned with her & not yet redeemed, which was not intercepted by the appointment of a receiver; & therefore the sheriff was entitled to hold such articles on behalf of the execution creditor, & to receive money paid to redeem same.—*Re ROLLASON, ROLLASON v. ROLLASON, HALSE'S CLAIM* (1887), 34 Ch. D. 495; 56 L. J. Ch. 768; 56 L. T. 303; 35 W. R. 607; 3 T. L. R. 326.

420. — Claimant having only equity of redemption—Bill of sale over goods.]—*USHER v. MARTIN*, No. 31, *ante*.

421. Grounds of defence—Time for raising.]—*Re HILTON, Ex p. MARCH* (1892), 67 L. T. 594; 9 Morr. 286.

*Annotations*:—*Reid. Humphries v. Humphries*, [1910] 2 K. B. 531; *Ord v. Ord*, [1923] 2 K. B. 432.

422. Right of trustee in bankruptcy—Against execution creditor.]—*JENNINGS v. MATHER*, No. 32, *ante*.

423. Claimant failing to prove title set up—Whether entitled to rely on title found.]—*FLUDE, LTD. v. GOLDBERG*, No. 255, *ante*.

424. — — —.]—*PEAKE v. CARTER*, No. 256, *ante*.

#### SUB-SECT. 7.—EVIDENCE.

*See, generally*, EVIDENCE, Vol. XXII., pp. 53 *et seq.*

425. Admissibility—General rule.]—Of late years there has been no difference between the evidence received on the trial of an interpleader issue & in other cases (*MELLOR, J.*).—*EMMOTT v. MARCHANT* (1878), 3 Q. B. D. 555; 38 L. T.

508; *sub nom. HALKETT v. EMMOTT*, 47 L. J. Q. B. 436; 26 W. R. 632, D. C.

*Annotation*:—*Mentd. Re Wood, Ex p. Hattle* (1878), 39 L. T. 373.

426. — Issue in form of action for money had & received.]—On the trial of an issue directed under Interpleader Act, 1831 (c. 58), to be in the form of an action for money had & received, evidence may be received, which in an ordinary case would only strictly be admissible under a special count.—*POOLEY v. GOODWIN* (1835), 4 Ad. & El. 94; 1 Har. & W. 567; 5 Nev. & M. K. B. 466; 111 E. R. 722.

*Annotations*:—*Mentd. Hart v. Hart* (1841), 1 Hare, 1; *Crowther v. Solomons* (1848), 6 C. B. 758; *Closmadeuc v. Carrel* (1856), 18 C. B. 36; *Marine Investment Co. v. Havside* (1872), L. R. 5 H. L. 624.

427. — Award in arbitration between execution debtor & claimant.]—On an issue between the landlord & an execution creditor of the tenant, whether the crops at a certain time were the property of the party so found to have been tenant, the award was held to be admissible in evidence on part of the landlord.—*THORPE v. EYRE* (1834), 1 Ad. & El. 926; 3 Nev. & M. K. B. 214; 110 E. R. 1462.

428. — Admission of execution debtor.]—On the trial of an issue directed to try whether goods seized under a *fi. fa.* sued out against A., at the suit of deft., were the goods of pltf., the declarations of A., as to the property of the goods, are not receivable in evidence on the part of pltf.—*STOTHERT v. JAMES* (1843), 1 Car. & Kir. 121, N. P.

429. — — — Before execution.]—On the trial of an issue directed to try whether goods seized by the sheriff of H. under a *fi. fa.* against G. were the goods of pltf., pltf.'s counsel proposed to give evidence of a statement made by G., before the execution went in, that he, G., was indebted to pltf., & was going to assign his goods to him, by way of payment:—*Held*: this evidence was not receivable.—*PROSSER v. GWILLIM* (1843), 1 Car. & Kir. 95, N. P.

*Annotation*:—*Consd. Coole v. Braham* (1848), 3 Exch. 183.

430. — — — Before assignment.]—On an interpleader issue to try the right to certain goods claimed by pltf. under an assignment to secure a debt alleged to be due to him, the admissions of the assignor before the date of the assignment,

#### PART II. SECT. 8, SUB-SECT. 7.

d. *General rule.*]—Interpleader orders should be granted with extreme caution, & only after strong presumptive evidence of the goods being debtor's, which should ordinarily appear by his being in possession, by an affidavit of the belief of the sheriff, if he has such belief, & by a similar affidavit of the execution creditor.—*DUNCAN v. TEES* (1885), 11 P. R. 66.—CAN.

e. *Admissibility—Evidence to prove judgment obtained by fraud.*]—An interpleader issue provided for the trial of the question whether the writs of execution of pltf. against L., or some or one of them, were entitled to priority over the writ of execution of deft. against L., with respect to the proceeds of the sale of the goods & chattels of L. realised by the sheriff:—*Held*: it was open to pltf. on this issue to show at the trial that there was no debt owing from L. to deft., & that the judgment was merely a fraudulent device to defeat, delay or defraud creditors, & so void as against pltf.—*NEWMAN v. LYONS* (1892), 8 Man. L. R. 271.—CAN.

f. *Onus of proof—Execution creditor & claimant.*]—In an interpleader issue between an execution

creditor as pltf. & claimant as deft., the former asserting that certain goods at the time of seizure were the property of execution debtor as against claimant; as the burden of proof is on pltf., deft., although he has set up title to himself in the goods, can rely upon a finding that the goods were partnership property & therefore not seizable under an execution against one partner.—*WRIGHT v. JONES*, [1919] 4 W. W. R. 582; 49 D. L. R. 27.—CAN.

g. — — —.]—On an interpleader issue between claimant of goods & execution creditors, where the goods at the time of seizure under execution were not in the actual or apparent possession of execution debtor the *onus* is on the execution creditors to establish the right to seize them, & they should be pltf. in the issue. If in such case claimant is made pltf. & the ct. disbelieves his evidence of ownership, but there is no evidence contradicting him, judgment should still be given for claimant because execution creditors have not satisfied the *onus* of proof which was upon them.—*SKAGEN v. SMITH & BALKWELL*, [1920] 2 W. W. R. 841; 53 D. L. R. 245.—CAN.

h. — — — Execution creditor.]—An interpleader action wherein pltf.,

execution creditors of D., had seized certain goods alleged to belong to D., while in possession of defts.:—*Held*: pltf. had not satisfied the *onus* upon them of showing that the goods in question were not the property of defts., & dismissed the action with costs.—*REINHARDT BREWERY v. NIPISING COCA COLA BOTTLING WORKS* (1912), 23 O. W. R. 377; 4 O. W. N. 366; 8 D. L. R. 261.—CAN.

k. — — —.]—*FOLKINS & CAMPBELL v. PUDWILL*, [1919] 3 W. W. R. 583.—CAN.

l. — — — Goods not in possession of judgment debtor—At time of seizure.]—Where goods at the time of the seizure are not in the actual or apparent possession of judgment debtor, the *onus* is upon the execution creditor to establish his right to seize them. This *onus* he can discharge by showing that the goods seized belong to judgment debtor or that they were before seizure the property of judgment debtor & that he conveyed them to a near relative under suspicious circumstances, in which case the *onus* is placed on claimant.—*MASSEY-HARRIS Co. v. DELL*, [1919] 1 W. W. R. 1033.—CAN.

m. — — — Claimant—Goods in possession of judgment debtor—At time of



**Sect. 8.—The issue: Sub-sect. 7. Sects. 9 & 10: Sub-sect. 1.]**

that he was indebted, are not receivable in evidence for pltf.—*COOLE v. BRAHAM* (1848), 3 Exch. 183; 18 L. J. Ex. 105; 12 L. T. O. S. 272.

**431. — When objections must be made.]—**

On an interpleader issue, a post-nuptial settlement, executed when the assignor was perfectly solvent:—*Held*: (1) not invalid as against subsequent creditors; (2) describing a ship-coal broker & merchant as a merchant was a sufficient description under the Bill of Sale Act, 1854 (c. 36). *Qu.*: whether such objections are admissible, on the trial of an interpleader issue.

Any legal objection of this kind ought to be made before the judge at chambers, when the issue is discussed (*CHANNELL, B.*).—*GUGEN v. SAMPSON* (1866), 4 F. & F. 974, N. P.

*Annotation*:—*Refd.* *Emmott v. Marchant* (1878), 3 Q. B. D. 555.

**432. — Notices to execution creditor.]—**

Notices in a suit in which execution has been levied, sent by pltf. & his solr. to the execution creditor, claiming the goods seized under the *fi. fa.* & to try the validity of which an interpleader issue has been directed, are admissible in such issue.—*BENNETT v. HARTHILL* (1847), 8 L. T. O. S. 451, N. P.

**433. — Bill of sale by sheriff.]—**In an interpleader suit the question being between a claimant under a bill of sale from the sheriff & an execution creditor, the bill of sale, though it may not *per se* be sufficient *prima facie* evidence of the title of claimant, is so, coupled with some evidence of a prior seizure by the sheriff.—*HORNIDGE v. COOPER* (1858), 27 L. J. Ex. 314.

**434. Must be confined to issue directed.]—**On a feigned issue between execution creditor & assignees, the declaration reciting an execution

& fiat in bkpcy. & a wager on the question, "whether the execution was valid against the fiat," pltf. is not entitled by the terms of the issue to dispute the bkpcy.—*LINNIT v. CHAFFERS* (1843), 4 Q. B. 762; *Dav. & Mer.* 14; 12 L. J. Q. B. 367; 1 L. T. O. S. 228; 114 E. R. 1084.

**435. —.]—**A railway co. gave a Lloyd's bond to their contractor, who handed it to pltf. to secure an advance of £10,000 then made to him by pltf. The pltf. having, in the name of the obligee, brought an action against the co. upon the bond, it was compromised before judgment on the terms that the co. should transfer to him the whole of their rolling stock as security. The rolling stock was transferred accordingly, but was subsequently seized by debt., an execution creditor of the co. On the trial of an interpleader issue between pltf. & debt.:—*Held*: no evidence was admissible to impeach the original legality of the bond.—*BLACKMORE v. YATES* (1867), L. R. 2 Exch. 225; 36 L. J. Ex. 121; 16 L. T. 288; 15 W. R. 750.

*Annotation*:—*Refd.* *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169.

**438. Commission for examination of witnesses — Order to send abroad property in dispute.]—**

In interpleader proceedings as to the right to the possession of a stamp album, one of claimants applied for an order that the album might be sent abroad for inspection by witnesses who were to be examined there on commissoin:—*Held*: the ct. had jurisdiction to make such order under R. S. C., Ord. 37, r. 5, & R. S. C., Ord. 50, r. 3.—*CHAPLIN v. PUTTICK*, [1898] 2 Q. B. 160; 67 L. J. Q. B. 516; 78 L. T. 410; 46 W. R. 481; 14 T. L. R. 365, C. A.

*Annotation*:—*Consd.* *Steamship New Orleans Co. v. London & Provincial Marine & General Insee.*, [1909] 1 K. B. 943.

— **Notice of commission.]—**See EVIDENCE, Vol. XXII., p. 592, Nos. 6514, 6515.

*seizure.*]—In the interpleader issue between execution creditor on whose behalf the sheriff has seized goods as of the judgment debtor, & a claimant to said goods, where the goods seized are at the time of the seizure in the actual or apparent possession of judgment debtor, the presumption is that the goods are his, & the *onus* is upon claimant to establish title thereto.—*MASSEY-HARRIS Co. v. DELL*, [1919] 1 W. W. R. 1033.—CAN.

**n. Proof of debt of creditor.]—**In an interpleader issue, pltf., attacking a transaction between debt. & claimants, must prove that he is a creditor.—*PALMER v. ROSS* (1911), 18 W. L. R. 204; 3 Sask. L. R. 397.—CAN.

**o. Proof of judgment — Prior execution.]—**Interpleader issue to try the right to goods in possession of & bought by pltf. at sheriff's sale under *fi. fa.* against execution debtors, as against debt., the execution creditor:—*Held*: pltf. was not bound to prove a judgment to support the prior execution under which she bought the goods.—*HAMMILL v. DE WOLF* (1861), 10 C. P. 419.—CAN.

**p. Execution creditor need not prove judgment & execution.]—**On a sheriff's interpleader, it is not necessary for the execution creditor to prove the judgment & execution.—*RIPSTEIN v. BRITISH CANADIAN LOAN & INVESTMENT Co.* (1890), 7 Man. L. R. 119.—CAN.

**q. —.]—**Deft. was not required in an interpleader issue between himself & an assignee in insolvency, to prove his judgment & execution.—*MCWHIRTER v. LEARMOUTH* (1868), 18 C. P. 136.—CAN.

**r. —.]—***HOLDEN & ADAMSON v. LANGLEY, PATTERSON v. LANGLEY* (1862), 11 C. P. 407, 411.—CAN.

**t. Proof of indebtedness.]—**It is not necessary at the trial of an interpleader issue for pltf., although he is pltf. in the issue, to prove debt.'s indebtedness at least in the absence of evidence on the part of claimant to show that it did not exist.—*TURNER v. TYMCHORAK* (1908), 8 W. L. R. 484; 17 Man. L. R. 687.—CAN.

**a. Proof of claimant's title.]—**On an interpleader issue to try the title to goods seized, pltf. claimed all, asserting that he had derived some by purchase from the assignee of execution debtor, & others by subsequent purchase from third parties. The assignment being invalid:—*Held*: it was necessary for him to show what goods he was entitled to without it, & on his failure to do this the jury were rightly directed to find for debts.—*CRAPPER v. PATERSON* (1860), 19 U. C. R. 160.—CAN.

**b. Proof of title — Not necessary to prove absolute title — Interest in property sufficient.]—***WITT v. STOCKS*, [1917] 1 W. W. R. 1451; 11 Alta. L. R. 154.—CAN.

**c. Identity of goods — Sufficiency of proof.]—**In an interpleader issue, pltf. rested his case upon proof of a chattel mtge. of certain goods mentioned therein, made to him by execution debtor & duly filed:—*Held*: clearly insufficient, for it afforded no proof that the goods mortgaged were the same as those seized by the sheriff & claimed.—*JONES v. JENKINS* (1866), 25 U. C. R. 151.—CAN.

**d. Presumption of ownership of movable from possession — Rebuttal.]—**Possession of a movable raises a presumption of ownership, & therefore a person claiming the ownership in an interpleader suit, on the ground that he had bought such movable from a

person whom he has allowed to remain in possession of it, must rebut the presumption by clear & satisfactory evidence.—*ZANDBERG v. VAN ZYL* (1910), App. D. 302.—S. AF.

**e. Examination of witness — Common Law Procedure Act, 1854, s. 46.]—**On the return of a sheriff's interpleader summons, the evidence of the judgment debtor may be taken under above sect., if the judge or referee see fit to direct it.—*PHILLIPS ELECTRICAL WORKS v. ARMSTRONG, NORTH-WEST THOMPSON & HUSTON ELECTRIC Co., CLAIMANTS* (1892), 8 Man. L. R. 48.—CAN.

**f. —.]—**Under above sect. a judgment creditor who claims that prior judgments are fraudulent & void, & is called upon by interpleader summons issued at the instance of the sheriff to maintain or abandon his claim, may examine the judgment debtor as to the nature of his dealings with the other judgment creditors, & as to the indebtedness on which such other judgments were obtained, & such examination may be used upon the return of the interpleader summons.—*CARSCADEN v. ZIMMERMAN* (1893), 9 Man. L. R. 178.—CAN.

**g. Weight of evidence — Evidence taken on commission — Findings of judge.]—**Where the evidence on an interpleader issue is taken before a comr. & afterwards submitted to the trial judge, the same weight is not to be given to the findings of the judge as if the witnesses had been examined before him in open ct., the ct. being in as good a position as the trial judge to form an opinion as to the credibility of witnesses, & the weight to be given to their evidence.—*MALZARD v. HART* (1897), 27 S. C. R. 510; 28 N. S. R. 431.—CAN.

## SECT. 9.—PROCEEDINGS AFTER TRIAL OF ISSUE.

**437. Payment out of court—To whom payment may be ordered to be made—Person authorised by all parties.]—**In an interpleading suit, the ct. will order the money, which has been brought in by pltf. to be paid to a person having authority from all defts. to receive it, though some of defts. have not appeared: & for that purpose a reference will be directed to the master to inquire, whether a sufficient authority to receive the money has been given.

If in a common interpleading bill counsel were to come to the bar & before any of defts. had appeared were to ask that the money might be paid to a person duly authorised by all to receive it, the ct., if satisfied of the sufficiency of the authority, would order the payment to be made to that person on behalf of all (LORD ELDON, C.).—**POWELL v. SONNET** (1826), 3 Russ. 556; 38 E. R. 683, L. C.

**438. — When payment may be made—Not before judgment.]—**Upon an issue under Interpleader Act, 1831 (c. 58), where money is paid into ct. to abide the event, the successful party is not allowed to take the money out of ct. after verdict & before judgment.—**COOPER v. LEAD SMELTING CO.** (1833), 9 Bing. 634; 1 Dowl. 728; 2 Moo. & S. 810; 131 E. R. 752.

*Annotation:—***Folld. King v. Birch** (1844), 3 L. T. O. S. 159.

**439. — — — — —.]—**In a feigned issue, the successful party is not entitled to take the money out of ct. after verdict, & before judgment signed. *Qu.*: whether a bill of exceptions lies upon a feigned issue which is not directed for the purpose of informing the conscience of the ct.—**KING v. BIRCH** (1844), 3 L. T. O. S. 159; *subsequent proceedings* (1845), 7 Q. B. 669.

**440. — — — — — Claimant clearly entitled to portion of sum.]—**An interpleader order having been made for payment into ct. of a sum of money, the freight of a ship, in a dispute between ship-owners & charterers, the ct., on its appearing upon affidavits that the larger portion was plainly due to the former, ordered it to be paid out of ct. to them; & directed an action to try the question between the parties, instead of an issue, in order that a commission might issue to examine the master, who was about to sail on a voyage.—**Re MERSEY DOCK BOARD & FREIGHT OF DIN MANIN** (1863), 11 W. R. 283.

— **Enforcement of order.]—***See* No. 367, *ante*.

**441. — Application for—How intitled.]—**Where money is paid into ct. to abide the event of the interpleader issue, the application by the successful party for payment out must be entitled in the original action & not in the issue.—**LEVI v. COYLE** (1843), 2 Dowl. N. S. 932; 7 Jur. 724; *sub nom. LEVI v. COYLE*, 12 L. J. Q. B. 294; *sub nom. LANE v. LEVI*, 1 L. T. O. S. 151.

**442. — — — — —.]—**Upon a motion in an interpleader rule, the affidavits should be intitled in the original cause—**PARIENTE v. PENNELL** (1844), 7 Scott, N. R. 834; 2 L. T. O. S. 348.

**443. Action against sheriff for wrongful seizure—Issue decided in favour of claimant.]—**A judge's order, made under Interpleader Act, 1831 (c. 58), directed that the goods should be sold by the sheriff, & the money paid into ct. to abide the event of an issue to be tried between claimant & the execution creditor. The issue was tried,

& a verdict found for claimant, who thereupon brought an action of trespass against the sheriff, for breaking & entering his dwelling house, & seizing his goods & converting them to his own use. The ct. made absolute a rule for striking out so much of the declaration as charges the seizure & conversion of the goods.

*Semble*: the proceedings ought in such a case to be stayed altogether—**ABBOTT v. RICHARDS** (1846), 15 M. & W. 194; 3 Dow. & L. 487; 15 L. J. Ex. 330; 6 L. T. O. S. 395; 153 E. R. 819.

*Annotations:—***Consd. Mercer v. Stanberry** (1856), 20 J. P. 407; **Cramer v. Matthews** (1881), 7 Q. B. D. 425. *Refd.* **Jessop v. Crawley** (1850), 19 L. J. Q. B. 319; **Jones v. Williams** (1859), 28 L. J. Ex. 324; **Jousiffe v. Bayley** (1866), 15 L. T. 219.

*Compare* No. 285, *ante*.

## SECT. 10.—APPEAL.

## SUB-SECT. 1.—DECISION OF MASTER.

*See* R. S. C., Ord. 54, r. 21, Ord. 57, rr. 8, 9, 11; C. L. P. Act, 1860 (c. 126), s. 17; R. S. C., Ord. 54, r. 22A (1) (b).

**444. Summary decision—Appeal to judge—With leave.]—**Where a master summarily decides an interpleader matter under R. S. C., Ord. 57, r. 8, & gives leave to appeal, a judge at chambers has jurisdiction to entertain such appeal by virtue of the provisions of R. S. C., Ord. 57, r. 11.

It appears that these rules were intended to form a code giving a new procedure in interpleader cases (**MATHEW, J.**).—**WEBB v. SHAW** (1886), 16 Q. B. D. 658; 55 L. J. Q. B. 249; 54 L. T. 216; 34 W. R. 415; 2 T. L. R. 398, D. C.

*Annotation:—***Refd. Williams Deacon's Bank v. Bradshaw**, [1925] 1 K. B. 442.

**445. — — — — — Without leave.]—**(1) On an interpleader summons at chambers the master decided, at the request of one of the parties, & having regard to the value of the subject-matter in dispute, to dispose of the claims in a summary manner, & he adjourned the summons for the production of evidence. The claimant objected that it was a case for an issue, & appealed to a judge at chambers, who dismissed the appeal on the ground that the decision of the master was final. An appeal from the judge at chambers to the Div. Ct. was dismissed. On appeal to the Ct. of Appeal:—*Held*: the decision of the master was a summary decision within R. S. C., Ord. 57, r. 8, therefore **Waterhouse v. Gilbert**, No. 454, *post*, applied, & the Ct. of Appeal could not entertain the appeal:—(2) *Qu.*: whether under R. S. C., Ord. 54, r. 21, all decisions of a master, including a decision in a summary way in interpleader, are not the subject of appeal to a judge at chambers.—**BRYANT v. READING** (1886), 17 Q. B. D. 128; 55 L. J. Q. B. 253; 54 L. T. 524; 34 W. R. 496; 2 T. L. R. 505, C. A.

*Annotations:—**As to* (1) **Folld. Van Laun v. Baring**, [1903] 2 K. B. 277; **Harbottle v. Roberts**, [1905] 1 K. B. 572. *Refd. Re Tarn*, [1893] 2 Ch. 280. *As to* (2) **Consd. Clench v. Dooley** (1886), 56 L. T. 122.

**446. — — — — —.]—**(1) Upon the true construction of R. S. C., Ord. 54, rr. 12, 21, & R. S. C., Ord. 57, rr. 8, 11, an appeal lies from a summary decision of a master in an interpleader proceeding to a judge at chambers.

(2) A stakeholder interpleading, who acts with good faith, is entitled, although not debt. in an

## PART II. SECT. 10, SUB-SECT. 1.

*h. Party not appealing but served with notice of appeal—Right to be heard.]—*A claimant who is served with notice of appeal from an order made by

a local master, in connection with an interpleader action in which he is interested, but who has given no notice of appeal from the order, may be heard in appeal. Such appeal is a re-hearing

& the whole case can be gone into.—**MACDONALD CO. v. NICHOLSON & NATIONAL CASH REGISTER CO. & TUDHOPE ANDERSON CO.** (1915), 31 W. L. R. 510.—**CAN.**



*Sect. 10.—Appeal: Sub-sects. 1 & 2, A. & B.; sects. 3, 4 & 5.]*

action, to deduct from the fund in dispute the costs occasioned by the interpleader proceedings.—*CLENCH v. DOOLEY* (1886), 56 L. T. 122; 3 T. L. R. 173, D. C.

*See, now, R. S. C., Ord. 54, r. 22A.*

**447. Trial of issue by master—Appeal to divisional court—Without leave.]**—Where an interpleader issue is, under R. S. C., Ord. 57, r. 7, ordered to be tried by a master, & the master at the trial has made an order determining the issue & finally disposing of the whole matter of the interpleader proceedings, an appeal lies without leave to the Div. Ct. from that part of the order which determines the issue.—*COX v. BOWEN*, [1911] 2 K. B. 611; 80 L. J. K. B. 1149; 105 L. T. 141; 55 Sol. Jo. 581, D. C.

*Annotation:—Reid. Mason v. Bolton's Library*, [1913] 1 K. B. 83.

**448. Trial by district registrar—Appeal to Divisional Court—R. S. C., Ord. 54, r. 22a (1) (b).]**—Where, on the hearing of an interpleader summons, a district registrar, with the consent of the parties, decides the matter in a summary manner, an appeal lies from his order to the Div. Ct.—*WILLIAMS DEACON'S BANK, LTD. v. BRADSHAW*, [1925] 1 K. B. 442; 94 L. J. K. B. 464; 132 L. T. 829; 41 T. L. R. 188, D. C.

#### SUB-SECT. 2.—SUMMARY DECISION OF JUDGE IN CHAMBERS.

##### A. Appeal by Sheriff.

**449. Appeal lies.]**—On Feb. 17, 1881, the sheriff seized goods under an *elegit* against D. for £72, & interest, & costs. W. claimed the goods as his. On Feb. 19, the sheriff took out an interpleader summons. On July 15, an order was made for the sheriff to withdraw on W. giving security, in default of security the sheriff was ordered to sell the goods & pay the net proceeds into ct. Security was not given, & on Aug. 12, the sheriff paid £52, the net proceeds of the goods, into ct. On June 21, 1882, the judge made an order that W. should be barred, that the fund in ct. should be paid to the execution creditor, & that W. should pay to the execution creditor & the sheriff their costs of the interpleader summons, including in the costs of the sheriff his possession money caused by W.'s claim. The sheriff, not being satisfied that W. could pay him, appealed, asking that his possession money might be paid out of the fund in ct. in priority to the claim of the execution creditor. In the meantime the money had been paid to pltf.:—*Held*: (1) C. L. P. Act, 1860 (c. 126), s. 17, making a summary decision under the Act final & conclusive against "the parties," did not make it final against the sheriff, & he could appeal; (2) where an interpleader has been directed on the application of the sheriff, & the claim of the third party fails, the strict form of order upon which the sheriff is entitled to insist, is to direct the execution creditor to pay the sheriff's charges of the interpleader, with a remedy over to the execution creditor against the third party, though it is a common form of order simply to order the third party to pay them to the sheriff.—*SMITH v. DARLOW* (1884), 26 Ch. D. 605; 53 L. J. Ch. 696; 50 L. T. 571; 32 W. R. 665, C. A.

*Annotations:—As to (2) Reid. Bramsdon v. Parker* (1885), 1 T. L. R. 510; *Montague v. Davies, Benachi*, [1911] 2 K. B. 595; *Re Rogers, Ex p. Sussex Sheriff*, [1911] 1 K. B. 104.

##### B. Appeal by Claimant.

*See R. S. C., Ord. 57, rr. 2, 8, 9, 11; C. L. P. Act, 1860 (c. 126), s. 17.*

**450. No appeal—Consent of all parties.]**—When a judge at chambers disposes of the merits of an interpleader in a summary manner under C. L. P. Act, 1860 (c. 126), s. 14, his decision is, by sect. 17, final, & he cannot, even with consent of parties, give a right of appeal to the ct., & no alteration in this respect is made by Jud. Act, 1873 (c. 66), ss. 19, 50, taken together with R. S. C., Ord. 1, r. 2.—*DODDS v. SHEPHERD* (1876), 1 Ex. D. 75; 45 L. J. Q. B. 457; 34 L. T. 358; 24 W. R. 322; 2 Char. Pr. Cas. 173.

*Annotations:—Folld. Buse v. Roper* (1879), 41 L. T. 457. *Dbtd. Re Morris, Ex p. Streeter* (1881), 19 Ch. D. 216. *Reid. Witt v. Parker* (1877), 36 L. T. 538; *Hartmont v. Foster* (1881), 8 Q. B. D. 82; *Turner v. Bridgett* (1882), 51 L. J. Q. B. 377; *Re Tarn*, [1893] 2 Ch. 280. *Mentd. Parsons v. Tining* (1877), 2 C. P. D. 119.

**451. ———.]**—Where upon an attachment under a garnishee order by a judgment creditor of moneys due to the judgment debtor, a third party claims such moneys for a debt due to him from the judgment debtor, & consents to a judge at chambers deciding the issue summarily between him & the judgment creditor, instead of asking under R. S. C., Ord. 45, r. 7, for an issue to be tried in the usual way, such decision of the judge is final, & cannot be appealed against by such third party.—*EADE v. WINNER & SON* (1878), 47 L. J. Q. B. 584, D. C.

**452. ———.]**—An order having been made upon a summons in chambers, directing an interpleader issue to be tried in Glamorganshire, the parties agreed that the case should be tried before a judge in chambers, with the understanding that there should be a right of appeal.

The judge thereupon heard the case & made an order:—*Held*: while the order to try the issue in Glamorganshire was subsisting, the judge had no jurisdiction to try the case in chambers as a judge without a jury, any agreement between the parties to the contrary notwithstanding, & the judge had in effect disposed of the case in chambers in a summary manner within C. L. P. Act, 1860 (c. 126), s. 14, & there was therefore no right of appeal against his decision.—*BUSE v. ROPER* (1879), 41 L. T. 457; 28 W. R. 87, C. A.

*Annotation:—Reid. Turner v. Bridgett* (1882), 51 L. J. Q. B. 377.

**453. ———.]**—*LYON v. MORRIS*, No. 14, *ante*.

**454. ———.]**—By the combined operation of Common Law Procedure Act, 1860 (c. 126), s. 17, & of Appellate Jurisdiction Act, 1876 (c. 59), s. 20, no appeal lies to the Ct. of Appeal from a decision of the Q. B. Div. upon an appeal from the summary decision at chambers of an interpleader summons, & R. S. C., Ord. 57, r. 11, does not confer any power to give leave to appeal.—*WATERHOUSE v. GILBERT* (1885), 15 Q. B. D. 569; 54 L. J. Q. B. 440; 52 L. T. 784; 1 T. L. R. 540, C. A.

*Annotations:—Consd. Webb v. Shaw* (1886), 16 Q. B. D. 658. *Folld. Bryant v. Reading* (1886), 17 Q. B. D. 128; *Lyon v. Morris* (1887), 19 Q. B. D. 139. *Appld. Field v. Rivington* (1889), 5 T. L. R. 642. *Folld. Van Laun v. Baring*, [1903] 2 K. B. 277. *Reid. Re Tarn* (1893), 68 L. T. 311.

**455. ——— Question of law.]**—Where in interpleader proceedings a judge decides a question under R. S. C., Ord. 57, r. 9, without directing an issue or stating a special case, his decision is a summary decision within C. L. P. Act, 1860 (c. 126), s. 17, & is not subject to appeal.—*RE TARN, TARN v. TARN*, [1893] 2 Ch. 280; 62 L. J.



Ch. 564; 68 L. T. 311; 41 W. R. 397; 9 T. L. R. 366; 37 Sol. Jo. 372; 2 R. 407, C. A.

*Annotation*: *Folld. Van Laun v. Baring*, [1903] 2 K. B. 277.

456. *S. P. VAN LAUN & Co. v. BARING BROTHERS & Co.*, [1903] 2 K. B. 277; 72 L. J. K. B. 756; 89 L. T. 120; 52 W. R. 59, C. A.

*Annotations*:—*Folld. Harbottle v. Roberts*, [1905] 1 K. B. 572. *Refd. Cox v. Bowen*, [1911] 2 K. B. 611.

457. —.]—Where, on interpleader proceedings, the amount in dispute exceeded £50, & a judge ordered that the matter should be decided in a summary manner under R. S. C., Ord. 57, r. 8, but gave leave to appeal:—*Held*: the judge had jurisdiction to make the order, & no appeal lay against it.

The jurisdiction under R. S. C., Ord. 57, r. 8, to dispose of an interpleader matter in a summary manner is not limited by any rule of practice to cases in which the value of the subject-matter in dispute does not exceed £50.

The case of *Bryant v. Reading*, No. 445, *ante*, shows that a decision upon an interpleader summons to dispose of the matter in a summary manner under R. S. C., Ord. 57, r. 8, is the same thing as a summary decision itself. Here the master decided to deal with the matter summarily, & that decision was the same thing as a summary decision within the rule (*COLLINS, M.R.*).—*HARBOTTLE v. ROBERTS*, [1905] 1 K. B. 572; 74 L. J. K. B. 310; 92 L. T. 723; 53 W. R. 291; 21 T. L. R. 273; 49 Sol. Jo. 313, C. A.

458. —.]—Rule 8 of that order [R. S. C., Ord. 57] gives the judge power in cases of small value, with the consent of the parties to decide the case in a summary manner. In that case there is no appeal; but even if the case comes within rule 9, I do not think I ought to give leave to appeal (*NORTH, J.*).—*TOPHAM v. GREENSIDE GLAZED & FIREBRICK CO., LTD.* (1887), as reported in 58 L. T. 274.

### SUB-SECT. 3.—SUMMARY DECISION OF DIVISIONAL COURT.

*See* C. L. P. Act, 1860 (c. 126), s. 14.

459. Summons referred by judge in chambers—*No appeal.*—A judge at chambers referred an interpleader summons to a div. ct. The ct. barred claimant & decided the case without ordering an interpleader issue:—*Held*: such a decision was given in exercise of the summary jurisdiction of a ct. or judge under C. L. P. Act, 1860 (c. 126), s. 14, & was therefore final & without appeal.—*TURNER v. BRIDGETT* (1882), 9 Q. B. D. 55; 51 L. J. Q. B. 377; 46 L. T. 517; 30 W. R. 586, C. A.

*Annotation*:—*Mentd. Mostyn v. Stock* (1882), 9 Q. B. D. 432.

### PART II. SECT. 10, SUB-SECT. 3.

k. *No appeal.*—There is no right of appeal from the decision of the judge in an interpleader suit in a Div. Ct.—*Re TURNER v. IMPERIAL BANK OF CANADA* (1881), 9 P. R. 19.—CAN.

l. *Order in two actions—Appeal from.*—Where an interpleader order is intitled in two actions, in different divisions of the High Ct., there being two executions in the sheriff's hands, — may be — either division, although one of the execution creditors has been barred by the order, from which there is — appeal on that ground.—*HOGA-BOOM v. GRUNDY* (1894), 16 P. R. 47. CAN.

### PART II. SECT. 10, SUB-SECT. 4.

m. *Appeal lies.*—Special leave to appeal from the decision of a judge at *nisi prius*, in an interpleader issue, will be given by the Full Ct., on good cause shown, though no application for leave has been made to the judge.—*IDA H. GOLD MINING CO. v. JONES* (1904), 7 W. A. L. R. 29.—AUS.

n. —.]—*O'CONNOR v. QUINN* (1911), 12 C. L. R. 239.—AUS.

o. —.]—*WILSON v. KERR* (1860), 18 U. C. R. 470.—CAN.

p. —.]—The decision of a judge of the High Ct. on an interpleader issue to try the title to property

### SUB-SECT. 4.—TRIAL OF ISSUE BY JUDGE ALONE.

*See* Jud. Act, 1873 (c. 66), s. 19; R. S. C., Ord. 57, r. 11; PRACTICE.

460. *Appeal lies—Without leave—To Court of Appeal.*—An appeal will lie to the Ct. of Appeal from a judgment on the trial of an interpleader issue, notwithstanding C. L. P. Act, 1860 (c. 126), s. 17, & Ord. 1, r. 2 of the Jud. Act, 1875 (c. 77).—*WITT v. PARKER* (1877), 46 L. J. Q. B. 450; 36 L. T. 538; 25 W. R. 518, C. A.

*Annotations*:—*Refd. Turner v. Bridgett* (1882), 51 L. J. Q. B. 377; *Smith v. Darlow* (1884), 53 L. J. Ch. 696.

461. — — —.]—*DAWSON v. FOX*, No. 10, *ante*.

462. — — —.]—He [the judge of first instance] had to try an interpleader issue without a jury, & therefore, as regards the decision of matters of fact, he stood in the same position as if he were a jury. An appeal lies upon his findings of fact (*LORD ESHER, M.R.*).—*RAMSAY v. MARGRETT*, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788; 10 T. L. R. 355; 1 Mans. 184; 9 R. 407, C. A.

*Annotations*:—*Mentd. Re Satterthwaite, Ex p. Trustee* (1895), 2 Mans. 52; *Withers v. Berry* (1895), 39 Sol. Jo. 559; *Clapham v. Ives* (1904), 91 L. T. 69; *Re Reis, Ex p. Clough*, [1904] 1 K. B. 451; *Re Magnus, Ex p. Salaman* (1910), 80 L. J. K. B. 71; *Rogers, Eungblut v. Martin* (1910), 103 L. T. 527; *Re Lavey, Ex p. Trustee*, [1918–19] B. & C. R. 116; *Canvey Island Comrs. v. Preedy*, [1922] 1 Ch. 179; *French v. Gething*, [1922] 1 K. B. 236.

### SUB-SECT. 5.—TRIAL OF ISSUE BY JUDGE AND JURY.

*See* R. S. C., Ord. 57, rr. 11, 13; Judicature Act, 1873 (c. 66), s. 19; PRACTICE.

463. *Application for new trial—Powers of Court of Appeal—Judgment in lieu of new trial.*—R. S. C., Ord. 40, r. 10 applies as well to proceedings in interpleader as to ordinary actions, although the old practice in interpleader is preserved by Ord. 50, r. 2; therefore, on a rule for a new trial of an interpleader issue, the ct. has jurisdiction to direct judgment to be entered instead of ordering a new trial.—*WILLIAMS v. MERCIER* (1882), 9 Q. B. D. 337; 51 L. J. Q. B. 594; 47 L. T. 140; 30 W. R. 720, C. A.; *affd.* on other grounds (1884), 10 App. Cas. 1, H. L.

*Annotations*:—*Mentd. Perks v. Mylrea*, [1884] W. N. 64; *Re Garnett, Robinson v. Gandy* (1886), 33 Ch. D. 300; *Floyd v. Lyons* (1897), 76 L. T. 251; *Masson, Templier v. De Fries*, [1909] 2 K. B. 831.

464. — *To Divisional Court.*—Where an interpleader issue is tried by a judge & a jury, the judge can, by R. S. C., Ord. 57, r. 13, finally dispose of the whole matter of the interpleader proceedings; & his judgment is final, unless leave to appeal is given. When in an interpleader issue a party desires to obtain a new trial, the application must be made to a Div. Ct. If in such a case

taken under execution on a final judgment in the suit in which it is issued is appealable to the Ct. of Appeal.—*HOVEY v. WHITING* (1887), 14 S. C. R. 515.—CAN.

q. —.]—There may be an appeal to the Ct. of Appeal from a judgment in an interpleader issue as to the ownership of goods seized under an execution.—*LAIRD v. LAIRD*, [1920] 3 W. W. R. 1; 51 D. L. R. 642.—CAN.

r. —.]—*MAHARAJ SINGH v. CHITTAR MAL* (1907), 1 L. R. 30 All. 22.—IND.

t. *No appeal on question of fact.*—*MCASKILL v. SMITH* (1882), 24 N. S. R. (12 R. & G.) 247.—CAN.

# INTERPLEADER.

## Sect. 10.—Appeal: Sub-sects. 5, 6, 7, 8 & 9.

it is desired to appeal from the final judgment of the judge, leave must be obtained, & then that appeal lies to the Ct. of Appeal. If it is desired both to move for a new trial & to appeal from the final judgment of the judge, then by R. S. C., Ord. 40, r. 5, both applications must be made, in interpleader as in other cases, in the first instance to a Div. Ct., from the judgment of which Ct. an appeal lies to the Ct. of Appeal.

*Burstall v. Bryant*, No. 467, *post*, *overd.*—*ROBINSON v. TUCKER* (1884), 14 Q. B. D. 371; 53 L. J. Q. B. 317; 50 L. T. 380; 32 W. R. 697, C. A.

*Annotations*:—*Consd. Webb v. Shaw* (1886), 16 Q. B. D. 658. *Refd. McNair v. Audenshaw Paint & Colour Co.*, [1891] 2 Q. B. 502; *Cox v. Bowen*, [1911] 2 K. B. 611.

**465. Appeal from findings of fact of jury—To divisional court.]**—*DAWSON v. FOX*, No. 10, *ante*.

**466. ———.]**—*ROBINSON v. TUCKER*, No. 464, *ante*.

**Appeal against final order.]**—*See* Sub-sect. 6, *post*.

### SUB-SECT. 6.—WHERE JUDGE DISPOSES OF WHOLE MATTER.

*See* R. S. C., Ord. 57, r. 13, Ord. 40, r. 5.

*See* C. L. P. Act, 1860 (c. 126), s. 17; Jud. Act, 1873 (c. 66), s. 19.

**467. Appeal against final judgment—To Court of Appeal.]**—Under R. S. C., Ord. 57, r. 11, where an interpleader issue has been tried by a jury, & judgment given according to their finding by the presiding judge, application for a new trial must be made to the Ct. of Appeal & not to the Div. Ct.

The judgment in the present case is in truth a judgment by the presiding judge, from which there is no appeal unless he grants leave, & then by R. S. C., Ord. 57, r. 11, the appeal is to the Ct. of Appeal & not to this ct. (*COLERIDGE, L.J.*).—*BURSTALL v. BRYANT* (1883), 12 Q. B. D. 103; 32 W. R. 495; *sub nom. PARNELL v. STEADMAN, BURSTALL & Co. v. BRYANT & Co.*, 49 L. T. 712; 48 J. P. 119, D. C.

*Annotation*:—*Refd. Robinson v. Tucker* (1884), 53 L. J. Q. B. 317.

**468. ——— With leave.]**—*ROBINSON v. TUCKER*, No. 464, *ante*.

**469. ———.]**—*DAWSON v. FOX*, No. 10, *ante*.

**470. Appeal on ground of error in trial of issue & also against judgment—Leave to appeal from judgment—To Divisional Court—& Court of Appeal.]**—*ROBINSON v. TUCKER*, No. 464, *ante*.

### PART II. SECT. 10, SUB-SECT. 7.

**a. Appeal from order of judge in chambers as to costs of motion before local master—Right of party not having appealed from master's order to be heard.]**—*PIONEER LUMBER Co. v. DIETZ*, [1923] 4 D. L. R. 432; 2 W. W. R. 363.

**b. Appeal from judge's order.]**—Where an application was made by a sheriff for an interpleader order in respect of goods seized by him under an execution against *pltf.*, & claimed by a brother of *pltf.* as purchaser of the goods, the judge decided the question in favour of claimant, without directing the trial of an issue, & made an order refusing the application, directing the sheriff to withdraw from possession of

the goods, ordering the execution creditors to pay the sheriff's costs & possession money & claimant's costs, & directing that no action should be brought by claimant against the sheriff in respect of the seizure:—*Held*: the execution creditors had the right to appeal against this order.—*RONDOT v. MONETARY TIMES PRINTING Co. OF CANADA* (1899), 19 P. R. 23.—CAN.

**c. ———.]**—An order of a district ct. judge dismissing a motion for a review of the taxation of costs on an interpleader issue as to the ownership of certain moneys is an interlocutory order, & an appeal therefrom does not lie to the Ct. of Appeal.—*BEAVER LUMBER Co. v. CAIN*, [1924] 4 D. L. R. 438; 3 W. W. R. 332; 19 Sask. L. R.

## SUB-SECT. 7.—APPEALS AGAINST ORDER

TO

*See* R. S. C., Ord. 57, r. 11.

Costs generally, *see* Sect. 11, *post*.

**471. ———.]**—*See* R. S. C., Ord. 1, r. 2, which preserves the procedure & practice under the Interpleader Acts in actions in the High Ct., does not contradict Jud. Act, 1873 (c. 66), s. 49, which enacts that no order of a judge of the High Ct. as to costs only, shall be subject to appeal without leave of such judge; & such enactment applies to a judge's order in interpleader as well as in other proceedings.—*HARTMONT v. FOSTER* (1881), 8 Q. B. D. 82; 51 L. J. Q. B. 12; 45 L. T. 429; 30 W. R. 129, C. A.

*Annotation*:—*Folld. Field v. Rivington* (1889), 5 T. L. R. 642.

**472. ———.]**—*FIELD v. RIVINGTON* (1889), 5 T. L. R. 642, C. A.

### SUB-SECT. 8.—TIME FOR APPEALING.

*See* R. S. C., Ord. 58, rr. 13, 15, Ord. 39, r. 4; PRACTICE.

**473. Order on further consideration—Varying master's certificate—Interlocutory.]**—Goods seized in execution were claimed by the trustees of a settlement made by debtor. A decree was made in an interpleader suit directing an inquiry whether the settlement was a valid settlement of the goods & who were entitled to them. The chief clerk certified that the settlement was invalid, & the judgment creditor entitled. By an order made on further consideration & on adjourned summons to vary the certificate, the ct. declared the settlement valid, & ordered the certificate to be varied accordingly, & directed the proceeds of the goods to be paid to the trustees:—*Held*: the substantial part of this order was an order to vary the certificate, which was an interlocutory order, & an appeal brought after twenty-one days was too late.—*WHITE v. WITT* (1877), 5 Ch. D. 589; 46 L. J. Ch. 560; 37 L. T. 110; 25 W. R. 435, C. A.

*Annotation*:—*Apld. Standard Discount Co. v. La Grange* (1877), 3 C. P. D. 67.

**474. Judge's order on trial of issue—Interlocutory.]**—Two actions having been brought relating to a cargo, an interpleader issue was directed to try the question to whom it belonged. The Master of the Rolls made an order finding in favour of *defts.*, & declared them to be entitled to the cargo. Subsequently an order was made in the actions directing the proceeds of the cargo, which were in ct., to be paid to *defts.*:—*Held*: the former order was an interlocutory order, from which an appeal could not be brought after twenty-one days. Leave to appeal notwithstanding the

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**d. Appeal from master's order.]**—Under an execution issued from the Q. B. Div., a sheriff seized certain goods, some of which were claimed by *pltf.* The master in chambers, on the application of the sheriff, directed an interpleader issue in the Q. B. Div., reserving the question of costs, which he subsequently directed to be taxed on the county ct. scale:—*Held*: the master's discretion was open to review by an appeal to a judge in chambers.—*CHRISTIE v. CONWAY* (1883), 9 P. R. 529.—CAN.

**e. Appeal from referee's order.]**—*STEPHENS v. ROGERS, Ex p. LIVINGSTONE* (1889), 6 Man. L. R. 298.—CAN.

lapse of time, refused; resps. not having done anything to raise an equity against them.

**BARKER** (1878), 7 Ch. D. 701; 47 L. J. Ch. 340; 87 L. T. 810; 26 W. R. 317, C. A.

—**Foll.** *McNair v. Audenshaw Paint & Colour Co.*, [1891] 2 Q. B. 502. **Reid.** *Collins v. Paddington Vestry* (1880), 5 Q. B. D. 368; *Hamlyn v. Betteley* (1880),

**Mentd.** *Krehl v. Burrell* (1878), 10 Ch. D. 13; *Blyth & Young* (1880), 13 Ch. D. 416; *Carter v. Burrell* (1880), 29 W. R. 132; *Re New Callao* (1882), 22 Ch. D. 484; *Re Gardner, Long v. Gardner* (1894), 71 L. T. 412.

**475.** — — —.]—An appeal from decision of a judge on an interpleader issue tried by him without a jury must, under R. S. C., Ord. 58, r. 15, be brought within twenty-one days.—**McNAIR & CO. v. AUDENSHAW PAINT & COLOUR CO., LTD.**, [1891] 2 Q. B. 502; 60 L. J. Q. B. 770; 65 L. T. 292; 40 W. R. 36; 7 T. L. R. 741, C. A.

**Annotation:**—**Mentd.** *Re Gardner, Long v. Gardner* (1894), 71 L. T. 412.

**476. Order of divisional court on appeal from county court—Final order.]**—A fourteen days' notice of appeal against a judgment of the Divl. Ct., affirming the decision of a county ct. judge in an interpleader matter is a good notice, the judgment of the Divl. Ct. being a final order under R. S. C., Ord. 58, r. 3.—**HUGHES v. LITTLE** (1886), 18 Q. B. D. 32; 56 L. J. Q. B. 96; 55 L. T. 476; 35 W. R. 36; 3 T. L. R. 14, C. A.

**Annotations:**—**Consd.** *McNair v. Audenshaw Paint & Colour Co.*, [1891] 2 Q. B. 502. **Mentd.** *Cook v. Taylor* (1887), 3 T. L. R. 800; *Pulbrook v. Ashby* (1887), 56 L. J. Q. B. 376; *Stevens v. Marston* (1890), 60 L. J. Q. B. 192; *Re Hill, Official Receiver v. Ellis* (1895), 2 Mans. 208; *De Braam v. Ford* (1899), 69 L. J. Ch. 82.

#### SUB-SECT. 9.—BANKRUPTCY.

**477. Order by judge in bankruptcy—Appeal lies to Court of Appeal.]**—Any order in interpleader made by the chief judge in bkpcy. can be appealed from. The proper mode for the sheriff to apply to the Ct. of Bkpcy. for an interpleader order under Interpleader Act, 1831 (c. 58), is by motion, of which notice is served on claimants, & on the hearing of the motion the ct. can determine their rights, without first making an order that they attend & interplead. A person against whom an order is made on his default in appearing may appeal from the order on its merits. On the hearing of a motion by a sheriff in the Ct. of Bkpcy. for an interpleader order, one of the claimants was represented by the managing clerk of his solrs., who was not himself a solr. The registrar, supposing him to be a solr., allowed him to cross-examine the witnesses on the other side, but, when he discovered the mistake, he declined to hear him as an advocate, & decided against his client, & he afterwards refused an application by the client for a rehearing:—**Held:** the registrar ought to have adjourned the case to give the client an opportunity of being represented by counsel or a solr., & the client was entitled to a rehearing.—The sheriff's costs of the appeal were ordered to be paid by the party who should ultimately be decided to be in the wrong.—**Re MORRIS, Ex p. STREETER** (1881), 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127, C. A.

**Annotations:**—**Reid.** *Turner v. Bridgett* (1882), 51 L. J. Q. B. 377. **Mentd.** *Hession v. Jones*, [1914] 2 K. B. 421.

**See, now, Bkpcy. Act, 1914 (c. 59), s. 108 (2).**

#### PART II. SECT. 11, SUB-SECT. 1.

**478 i. General rule.]**—An interpleader suit must be dismissed with costs, if pltf. does not establish at the hearing a case making interpleader proper.

**1. Application for—To whom made.]**

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—Where an interpleader order has been granted by a judge, an application for costs of the issue must also be made to a judge, & not to the ct.; but *semble*, that it need not be to the judge who granted the order.—**SEWELL v. BUFFALO, BRANTFORD & GODERICH RY. CO.** (1856), 2 P. R. 56; 3 C. L. J. O. S. 29.—**CAN.**

#### SECT. 11.—COSTS AND CHARGES.

##### SUB-SECT. 1.—STAKEHOLDER.

**See R. S. C., Ord. 57, r. 15.**

**478. General rule.]**—**SEARLE v. MATTHEWS**, No. 501, *post*.

**479. Payable out of fund.]**—Tenants filing a bill of interpleader against annuitants, & bringing rents into ct., paid their costs out of the rents.—**ALDRICH v. THOMPSON** (1787), 2 Bro. C. C. 149; 29 E. R. 86, L. C.

**Annotations:**—**Distd.** *Dungey v. Angove* (1794), 2 Ves. 304. **Foll.** *Angell v. Hadden* (1809), 16 Ves. 202.

**480.** — — —.]—Upon a bill of interpleader deft., who made it necessary, was ordered to pay all the costs; & pltf. has a lien for his costs upon the fund paid into ct.—**ALDRIDGE v. MESNER** (1801), 6 Ves. 418; 31 E. R. 1122, L. C.

**Annotations:**—**Foll.** *Mason v. Hamilton* (1831), 5 Sim. 19. **Consd.** *Agar v. Blethyn* (1835), Tyr. & Gr. 160. **Foll.** *East India Co. v. Campion & Bazett* (1837), 1 Jur. 422. **Reid.** *Martinius v. Helmuth* (1817), 2 Ves. & B. 412, n.

**481.** — — —.]—Pltf. in an interpleading suit is entitled to be paid his costs out of the fund.—**CAMPBELL v. SOLOMANS** (1823), 1 Sim. & St. 462; 57 E. R. 184.

**482.** — — —.]—**COTTER v. BANK OF ENGLAND**, No. 192, *ante*.

**483.** — — —.]—A married woman, living apart from her husband in adultery, acquired moneys, which she deposited with bankers. She then married again, her first husband being still alive, & on such marriage settled the money so deposited for the benefit of herself & second husband & two illegitimate children. Shortly afterwards she was convicted of murder, & executed. Previous to her trial, she & her trustees applied to the bankers for the fund, in order to employ it in her defence, which the trustees conducted in an extravagant manner, but the bankers refused to pay it over. After her execution, the trustees & the first husband severally brought actions against the bankers to recover the money, which were stayed under an interpleader rule, & an issue was directed to try the question between the first husband & the trustees, under which a verdict was found for the first husband:—**Held:** (1) on showing cause against a rule for paying over the money to pltf., the bankers should be allowed their costs out of the fund, which were to be retained by them on paying it over to pltf.; (2) the trustees, not having acted *bond fide*, should repay the costs of the bankers to pltf., & also pay all the costs incurred by him in the course of the proceedings. *Semble:* if the trustees had acted *bond fide*, they would not only not have been charged with such costs, but possibly might have been allowed their own costs out of the fund.—**AGAR v. BLETHYN** (1835), 2 Cr. M. & R. 699; Tyr. & Gr. 160; 5 L. J. Ex. 36; 150 E. R. 296.

**Annotation:**—**Generally, Reid.** *Shingler v. Holt* (1861), 7 H. & N. 65.

**484.** — — —.]—**Stakeholder acting in good faith.]**—A stakeholder acting with good faith is entitled to his costs of coming to ct. out of the fund in dispute which are ultimately paid by the unsuccessful party.—**PARKER v. LINNETT** (1834), 2 Dowl. 562.

**485.** — — —.]—If a party applying under Interpleader Act, 1831 (c. 58), acts fairly, he will

**g. Payable out of fund—By agreement—Fund transferred to new trustees—Sheriff's fees still unpaid—Jurisdiction to order.]**—**DUNN v. BOULTON** (circa 1852), 2 C. L. Ch. 195.—**CAN.**

**h. Deduction out of fund—Ultimately payable by unsuccessful party.]**—Where a stakeholder interpleads in good faith, he will be allowed to deduct



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be allowed his costs out of the proceeds of the thing in dispute, & the party ultimately unsuccessful must repay them.—**DUEAR v. MACKINTOSH** (1833), 2 Dowl. 730; 3 Moo. & S. 174.

**Annotation:—***Reid. Cotter v. Bank of England* (1833), 3 Moo. & S. 180.

**486. ———.]**—A stakeholder who *bond fide* comes to the ct. under Interpleader Act, 1831 (c. 58), is entitled to his costs out of the fund or the produce of the subject-matter in dispute, to be repaid by the party ultimately unsuccessful.—**REEVES v. BARRAUD** (1839), 7 Scott, 281.

**487. ———.]**—**CLENCH v. DOOLEY**, No. 446, *ante*.

**488. ———.]**—An auctioneer, who is sued for deposit money received on a purchase, & who pays it into ct., under an order for the vendor & purchaser to interplead is entitled upon the termination of proceedings between vendor & purchaser to receive his costs out of the deposit money.—**PITCHERS v. EDNEY** (1838), 4 Bing. N. C. 721; 6 Scott, 582; 7 L. J. C. P. 276; 132 E. R. 966.

**489. ———.]**—**SEARLE v. MATTHEWS**, No. 501, *post*.

**490. ———.]**—**READING v. LONDON SCHOOL BOARD**, No. 75, *ante*.

**491. Collusive proceedings.]**—(1) Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger, under a title adverse to that of the landlord.

(2) On suspicion of collusion, an inquiry into the circumstances was directed: & the report confirming the fraud the bill was dismissed, with costs to the landlord, as between attorney & client, to be paid by pltf. & his solr.; the latter to show cause why he should not be struck off the roll.—**DUNGEY v. ANGOVE** (1794), 2 Ves. 304; 30 E. R. 644, L. C.

**Annotations:—***As to* (1) *Follid. Johnson v. Atkinson* (1796), 3 Anst. 798. *Distd. Clarke v. Byne* (1807), 13 Ves. 383; *Bowyer v. Pritchard* (1822), 11 Price, 103; *Stephens v. Callanan & Salwey* (1823), 12 Price, 158. *Follid. Cook v. Rosslyn* (1859), 1 Giff. 167. *As to* (2) *Reid. Gore v. Bowser* (1855), 3 W. R. 430; *Andrews v. Barnes* (1888), 39 Ch. D. 133. *Generally, Mentd. Goodwin v. Gosnell* (1846), 2 Coll. 457; *Wheatley v. Bastow* (1855), 7 De G. M. & G. 261.

**492. Where costs needlessly incurred — Stakeholder must pay extra costs—Proceedings vexatious.]**—**CRAWFORD v. FISHER**, No. 71, *ante*.

**493. ———.]**—**Continuance after withdrawal of claim.]**—Pltf. in an interpleader suit disallowed the costs of proceedings taken by him in the suit, subsequent to his receiving notice of the withdrawal of the adverse claims.—**SYMES v. MAGNAY** (1855), 20 Beav. 47; 3 W. R. 193; 52 E. R. 520.

**494. ———.]**—**Prolix affidavit.]**—Where, in an interpleader suit, pltf. filed an affidavit of some length as to merits:—*Held*: in making the usual order on defts. to interplead, & for taxation of costs, there should be a direction to the taxing master to have regard to any prolixity in pltf.'s affidavits.—**SCOTTISH UNION INSURANCE CO. v. STEELE** (1864), 9 L. T. 677.

**495. ———.]**—Pltf., who had been negotiating for the purchase of a house, handed to deft., as his agent, the amount of the deposit & the balance of £490 payable to the vendor on completion & instructed deft. to pay this balance to the vendor when completion took place. Completion did not

take place, & pltf. demanded the above balance from deft. & brought an action against him to recover it. The vendor claimed that pltf. was liable to him for £100 damages & directed deft. not to pay over that sum to pltf. Deft. thereupon issued an interpleader summons in respect of the £100, & the master directed an issue, & ordered that deft. should pay into ct. the £100 less his costs. On the trial of the issue the vendor's claim was dismissed. Pltf. then obtained leave to sign judgment for £390, for which deft. admitted liability. Pltf. now claimed the additional £100 in full without any deduction of deft.'s costs. Deft. contended that the master's order allowing deft. to deduct his costs was final:—*Held*: the master's order allowing the deduction of costs was not *res judicata*, but merely relieved deft. from paying the full £100 until the decision of the interpleader issue & the result of the action, & therefore pltf. was entitled to recover the full £100.

Deft. misconceived the situation & there was no justification for his refusal to pay the £100 to pltf. He had no defence to the action & no right to start interpleader proceedings. It was not right to make pltf. pay deft.'s costs out of that £100, when he [def't.] was keeping back money which belonged to pltf. (**SWIFT, J.**).—**ALLNUTT v. MILLS** (1925), 42 T. L. R. 68.

**496. Order directing issue wrongly made.]**—**ALLNUTT v. MILLS**, No. 495, *ante*.

**497. What may be included in costs of stakeholder—Warehouse charges.]**—**ATTENBOROUGH v. ST. KATHARINE'S DOCK CO.**, No. 40, *ante*.

**498. ———.]**—**Wharfinger charges.]**—The ct. or a judge has power, under R. S. C., Ord. 57, r. 15, to make an order for payment of the charges of a wharfinger who has interpleaded.—**DE ROTHSCHILD FRÈRES v. MORRISON, KEKEWICH & CO., BANQUE DE PARIS ET DES PAYS BAS v. SAME, BANQUE DE FRANCE v. SAME** (1890), 24 Q. B. D. 750; 59 L. J. Q. B. 557; 63 L. T. 46; 38 W. R. 635; 6 T. L. R. 305, C. A.

**499. ———.]**—**Costs of action—Jurisdiction of master to include.]**—**HANSEN v. MADDOX**, No. 567, *post*.  
*See, now, R. S. C., Ord. 54, r. 12.*

**500. Where stakeholder sues one claimant—No right to costs.]**—A. & B. both claimed goods which were in the hands of shipowners. B. had mortgaged to C. A. filed a bill against the shipowners & B., claiming the goods. Then C. brought an action against the shipowners for non-delivery, after which C. was added as a deft. to A.'s suit. Then the shipowners filed a bill against C. to restrain the action, & an injunction was granted on an undertaking for damages:—*Held*: as the second suit was against one only of the claimants, pltf. in the second suit could not have their costs as on a bill of interpleader, & must pay costs & damages to the mtgee.—**LAING v. ZEDEN** (1874), 9 Ch. App. 736; 43 L. J. Ch. 626; 31 L. T. 284; 2 Asp. M. L. C. 396, L. JJ.

### SUB-SECT. 2.—SHERIFF.

#### A. In General.

*See R. S. C., Ord. 57, rr. 15–17.*

**501. General rule.]**—There have been recently before me several cases of interpleader, both by

his costs out of the fund in dispute, but they will be borne & paid by the party ultimately unsuccessful.—**SHAW v. WELDON** (1884), 2 N. Z. L. R. 395 (S. C.).—*l*

**k. Costs not deducted from fund—Amount claimed paid into court.]**—

**DOYLE v. DUMONCEL** (1847), 11 I. Eq. R. 517.—*IR.*

**l. Costs allowed — Although agreement possible.]**—Pltf. in an interpleader suit was allowed his costs although he might have brought the parties together in some garnishee proceedings; an

injunction being necessary to protect his goods pending litigation.—**HENRY v. GLASS** (1884), 2 Man. L. R. 97.—*CAN.*

### PART II. SECT. 11, SUB-SECT. 2.—A.

**501 l. General rule.]**—Claimant of goods seized under two executions

sheriffs & parties in which the question raised has been whether the sheriff or party interpleading is entitled to costs & if so, at what point of time his right to them commences. . . . Where an order is made on the application of a sheriff, he is entitled to his costs from the period at which he has been called into interpleading action, that is to say, he is entitled as against an unsuccessful claimant, to costs & possession money from the time of the notice of claim or from the time of sale, whichever would be first; & where a sheriff is ordered to withdraw he is entitled to costs as against the execution creditor from the time at which the latter authorised the carrying on of the interpleader proceedings, that is, generally from the return of the interpleader summons. In cases where the interpleader summons is taken out by deft. in an action, he is entitled, on bringing into ct. the amount claimed, to deduct from it the amount of his taxed costs up to that period, the question as to on which of the parties the ultimate liability for those costs is to fall, being reserved. Of course, these rules are general only; & if, in any particular case, the sheriff or party interpleading has unnecessarily caused any portion of the costs he will not be entitled to recover & may be called upon to pay costs (FIELD, J.).—SEARLE v. MATTHEWS (1883), 19 Q. B. D. 77, n.; Bitt. Rep. in Ch. 113.

*Annotations*:—*Apprvd.* Goodman v. Blake (1887), 19 Q. B. D. 77. *Reid.* Hansen v. Maddox (1883), 12 Q. B. D. 100; Clench v. Dooley (1886), 56 L. T. 122; Moore v. Hawkins (1894), 43 W. R. 235.

502. In discretion of court.]—The costs of a sheriff in interpleader proceedings are in the discretion of the judge.—BRAMSDEN v. PARKER (1885), 1 T. L. R. 510, C. A.

503. —.]—In an interpleader proceeding on the application of the sheriff, claimant, if successful, is entitled to recover as costs from the execution creditor the sheriff's charges subsequent to the interpleader order. The incidence of such charges is a matter of law & a proper subject of appeal from a county ct. to the High Ct. under County Courts Act, 1850 (c. 61), s. 14.—GOODMAN v. BLAKE

brought trespass against the sheriff, & an interpleader was directed between claimant as pltf. & the two execution creditors as defts. The claimant having succeeded in such issue:—*Held*: the sheriff should be paid his costs of defence of the action against him & of the interpleader application.—CARTER v. STEWART (1877), 7 P. R. 85.—CAN.

501 ii. —.]—Where an interpleader issue between an execution creditor & a claimant to the goods seized under execution results in claimant's claim being barred with costs, to execution creditor, the sheriff, rather than to have to look to claimant for his costs of the interpleader, should be permitted to pay himself out of the proceeds of the sale of the goods, execution creditor having his remedy over against claimant, against whom he may issue execution.—CRAWFORD v. HARRISON, [1923] 3 W. W. R. 372.—CAN.

502 i. In discretion of court.]—In interpleader proceedings the sheriff does not stand in the position of a stakeholder, & *semble*, he is not entitled to his costs of interpleader out of the proceeds of the sale in any event; the reasonable & well established practice of leaving interpleader costs to be disposed of by the judge trying the issue should be followed.—SMITH v. FARQUHARSON, [1917] 1 W. W. R. 1302; 10 Sask. L. R. 54.—CAN.

506 i. Sale by order of court—Wrongful seizure—Sheriff's charges.]—Where a sheriff, under an interpleader order

of the ct., sold goods which were found by the event of an interpleader issue not to have been the goods of the execution debtor, but of the claimant, & paid the proceeds into ct. less his charges for possession money & expenses of sale, etc.:—*Held*: he was not liable to refund to the claimant the amount deducted for such charges.—REID v. MURPHY (1887), 12 P. R. 338.—CAN.

m. How taxed.]—*Held*: the sheriff was entitled to his costs under the interpleader order to be taxed on the scale of the ct. out of which the process under which he seized the goods issued.—ARKELL v. GEIGER (1883), 9 P. R. 523.—CAN.

n. —.]—In an interpleader application the sheriff obtained a copy of claimant's examination. This was disallowed on taxation.—CROSS v. CROSS (1909), 12 W. L. R. 433; 3 Sask. L. R. 1.—CAN.

o. —.]—Interpleader proceedings arising out of a seizure by the sheriff of goods under an execution against A., which goods are claimed by B., are interlocutory proceedings, & the costs of an interpleader order, made on the application of the sheriff, should be taxed & allowed according to item 9 of tariff "A" (Rules of 1913).—WESTERN CANADA FLOUR MILLS CO., LTD. v. MATHESON & SONS (1917), 39 O. L. R. 59.—CAN.

p. Costs of superfluous proceeding.]—A successful party in an interpleader

19 Q. B. D. 77; 56 L. J. Q. B. 441; 57 L. T. 494; 35 W. R. 812, D. C.

504. Claim made by one on behalf of another—Claimant not appearing.]—Where a claim is made by one on behalf of another to goods seized by the sheriff in execution, & upon a rule being obtained under Interpleader Act, 1831 (c. 58), neither party appears to show cause, pltf. is not entitled to receive his costs from the sheriff, but the sheriff & pltf. are both entitled to their costs from claimant or his agent, upon a rule to show cause.—PHILBY v. IKEY (1833), 2 Dowl. 222; *subsequent proceedings*, *sub nom.* LEWIS v. EICKEY (1834), 2 Cr. & M. 321.

*Annotations*:—*Reid.* Shuttleworth v. Clark (1836), 1 Har. & W. 662; Murdock v. Taylor (1840), 8 Scott, 604.

505. —.]—Where the sheriff took goods under an execution, & deft. gave the sheriff notice that the goods were the property of A., the sheriff having obtained a rule under Interpleader Act, 1831 (c. 58), & A. not appearing to show cause, the ct. made the rule absolute for barring A.'s claim, & made deft. pay the costs of the sheriff's application.

*Semble*: a notice of claim to goods seized by a sheriff need not be given by the actual claimant in order to entitle the sheriff to protection under the above Act.—LEWIS v. EICKEY (1834), 2 Cr. & M. 321; 2 Dowl. 337; 4 Tyr. 157; 3 L. J. Ex. 23; 149 E. R. 783.

*Annotation*:—*Reid.* Shuttleworth v. Clark (1836), 1 Har. & W. 662.

506. Sale by order of court—Wrongful seizure—Sheriff's charges.]—The ct. will allow a sheriff to deduct the expenses of a sale effected by the authority of the ct. under Interpleader Act, 1831 (c. 58), although it appears on the trial of an issue that the seizure was wrongful.—BLAND v. DELANO (1838), 6 Dowl. 293; 1 Will. Woll. & H. 75.

B. Where Claimants Abandon or do not Appear.

507. Whether costs payable—By execution creditor abandoning after issue ordered.]—Where an execution creditor appears under Interpleader Act, 1831 (c. 58), & consents with claimant that

issue moving for an order barring execution creditors, having given the sheriff notice of the motion, was ordered to pay the sheriff's costs of appearing on the motion, for such notice is unnecessary.—O'BRIEN v. BULL (1883), 9 P. R. 494.—CAN.

q. Costs of appearing on motion to bar execution creditor.]—On appeal by a sheriff from the order of the master in chambers striking out so much of a former order as awarded the sheriff his costs of appearing on a motion made by claimant in an interpleader for a final order barring execution creditor for default in giving security for costs, as directed by the order granting the interpleader:—*Held*: the sheriff was properly served with notice of such motion, & was entitled to his costs thereof.—GRAY v. ALEXANDER (1884), 10 P. R. 358.—CAN.

r. Pounding fee.]—A sheriff is not entitled to a poundage fee where the claimant of the goods seized succeeds on an interpleader issue, although the seizure was made under the explicit instructions of the solrs. for execution creditors.—MACDONALD (A.) Co. v. CUSHING, [1918] 3 W. W. R. 89.—CAN.

PART II. SECT. 11, SUB-SECT. 2.—B.

507 i. Whether costs payable—By execution creditor abandoning after issue ordered.]—*Re* CREAGH & WILLIAMS, *Ex p.* SHERIFF (1890), 11 N. S. W. L. R. 16.—AUS.



*Sect. 11.—Costs and charges: Sub-sect. 2, B., C., D., E., F., G. & H.: sub-sect. 3, A. (a).]*

the sheriff shall sell the goods, & that their produce shall abide the event of an issue to be tried, but subsequently abandons his claim, the ct. will compel him to pay the sheriff the costs of selling the goods.—*DABBS v. HUMPHRIES* (1835), 1 Bing. N. C. 412; 3 Dowl. 377; 1 Hodg. 4; 1 Scott, 325; 4 L. J. C. P. 101; 131 E. R. 1176.

**508. — By claimant abandoning after issue ordered.]**—Where claimant, after an application under Interpleader Act, 1831 (c. 58), abandons his claims after an issue directed, the sheriff is entitled to his costs from the time of directing the issue & of the application for those costs.—*SCALES v. SARGESON* (1835), 4 Dowl. 231.

**509. — By execution creditor not appearing.]**—If the execution creditor does not appear upon a rule to relieve the sheriff under Interpleader Act, 1831 (c. 58), the ct. will order the sheriff to withdraw from possession, but will not direct the execution creditor to pay the sheriff the costs of keeping possession.—*FIELD v. COPE* (1832), 2 Cr. & J. 480; 1 Dowl. 567; 2 Tyr. 458; 1 L. J. Ex. 175; 149 E. R. 204.

**510. — —.]**—*BRYANT v. IKEY*, No. 542, *post*.

**511. — —.]**—On a sheriff's rule under Interpleader Act, 1831 (c. 58), he is not entitled to costs, notwithstanding the execution creditor fails to appear.—*BESWICK v. THOMAS* (1837), 5 Dowl. 458.

**512. — By claimant not appearing.]**—*BOWDLER v. SMITH*, No. 544, *post*.

**513. — —.]**—Where the sheriff applies for relief under Interpleader Act, 1831 (c. 58), & claimant does not appear, the judgment creditor is entitled to have his costs from claimant, but the sheriff has no costs; but, if the rule does not pray for costs, the order upon claimant to pay costs is only conditional, unless he shows cause within four days.—*PERKINS v. BURTON (OR BENTON)* (1833), 2 Dowl. 108; 3 Tyr. 51.

*Annotations:—Consd. Shuttleworth v. Clark* (1836), 4 Dowl. 561. *Refd. Murdock v. Taylor* (1840), 8 Scott, 604.

**514. — —.]**—Claimant did not appear to a sheriff's rule under Interpleader Act, 1831 (c. 58): *Held*: neither the sheriff nor the execution creditor were, under the circumstances, entitled to costs.—*ORAM v. SHELDON* (1835), 3 Dowl. 640; 1

*Hodg.* 92; *sub nom. THOMPSON v. SHEDDON*, 1 Scott, 697.

**515. — —.]**—On an application under Interpleader Act, 1831 (c. 58), if claimant does not appear, the ct. will not order him to pay the costs of applying to the ct. or such costs to be paid out of the fund in dispute.—*LAMBERT v. COOPER* (1837), 5 Dowl. 547; Will. Woll. & Dav. 204.

**516. — —.]**—If, upon an interpleader rule obtained by the sheriff, claimant does not appear, & is therefore barred, the sheriff is not entitled to costs against claimant.—*JONES v. LEWIS* (1841), 8 M. & W. 264; Woll. 94; 10 L. J. Ex. 320; 5 Jur. 873; 151 E. R. 1037. *Annotation:—Distd. Shoulkswith v. Gillard* (1854), 18 J. P. Jo. 426.

**517. — Both claimants not appearing.]**—*EVELEIGH v. SALSURY*, No. 296, *ante*.

*Compare No. 501, ante.*

*See, also, Nos. 504, 505, ante.*

#### C. Where Execution Creditor withdraws.

**518. Costs refused—Claim contested without authority.]**—The question referred to me by the master is whether the sheriff is entitled to any costs as against the execution creditor. The facts are that a claim was made; the sheriff served an interpleader summons, & upon the return of the interpleader summons, the execution creditor withdrew, not having previously given any authority to the sheriff to contest the claim. Under these circumstances I think that the sheriff is not entitled to any costs. The law imposes upon the sheriff the duty of executing the writ, but relieves him from the consequences of taking another person's goods by allowing him to take out a summons to interplead (*FIELD, J.*).—*C. v. D.* (1883), 28 Sol. Jo. 102; Bitt. Rep. in Ch. 114.

*Annotation:—Apprvd. Prosser v. Mallinson* (1884), 28 Sol. Jo. 411.

**519. — —.]**—*PROSSER v. MALLINSON* (1884), 28 Sol. Jo. 411, D. C.

#### D. Improper Proceedings by Sheriff.

**520. Ordered to pay costs—Occasioned by own misconduct—Claim clearly bad in law.]**—*BISHOP v. HINXMAN*, No. 125, *ante*.

**521. — — Claim under bill of sale.]**—Where goods were taken in execution, & a claim was set up under a bill of sale which bore date

**508 i. — By claimant abandoning after issue ordered.]**—*Held*: where a pltf. examines a claimant upon his affidavit, & the claimant subsequently abandons his claim & is barred, & ordered to pay the costs of the sheriff & pltf., the proper order is that the sheriff's costs be taxed to him.—*PATTERSON v. KENNEDY* (1884), 2 Man. L. R. 63.—CAN.

**508 ii. — —.]**—Where a claimant does not appear, or appears & abandons, no costs are awarded.—*ARMIT v. HUDSON'S BAY CO.* (1886), 3 Man. L. R. 529.—CAN.

**508 iii. — —.]**—A person served a notice upon a sheriff claiming, as his, goods seized under writ against another. Upon the return of an interpleader summons claimant appeared, obtained two enlargements &, doing nothing to substantiate his claim, was barred:—*Held*: claimant should pay the sheriff's costs.—*COCHRANE v. MCFARLANE* (1888), 5 Man. L. R. 120.—CAN.

**i. — Execution creditor consenting to be barred after issue.]**—An execution creditor, consenting to be barred after an interpleader order has been made, must pay the costs of a

sale by the sheriff of the goods seized as well as the costs of the application for the interpleader order, possession money, etc.—*MANITOBA & NORTH-WEST LOAN CO. v. ROUTLEY* (1886), 3 Man. L. R. 296.—CAN.

**a. Scale of costs.]**—The sheriff seized under an execution against debt, a car which was claimed by claimant. An issue was directed. Defts. in issue admitted the claim of claimant. The value of the car seized was less than \$800, & defts. in the issue claimed that rule 683 should apply:—*Held*: the costs of the interpleader proceedings should be on the K. B. scale.—*CATTANACH v. GUSA*, [1925] 1 D. L. R. 48; [1924] 3 W. W. R. 832.—CAN.

#### PART II. SECT. 11, SUB-SECT. 2.—C.

**b. Costs refused.]**—B. placed a *fi. fa.* in the hands of a sheriff who seized certain goods, which were claimed by A. The sheriff notified B.'s solrs. who replied advising him to interplead. On the first return of the interpleader summons, B. abandoned:—*Held*: B. was not liable for costs.—*BLAKE v. MANITOBA MILLING CO.* (1891), 8 Man. L. R. 427.—CAN.

**c. Costs allowed—Seizure of specified goods.]**—When a writ of *fi. fa.* goods is placed in a sheriff's hands, & special directions are given to him to seize particular goods, though not in contemplation of an adverse claim, if the execution creditor abandons after interpleader proceedings have been taken, he must pay the sheriff's & claimant's costs.—*VANSTADEN v. VANSTADEN* (1884), 10 P. R. 428.—CAN.

**d. — Abandonment after enlargement.]**—An execution creditor directed a sheriff to interplead between him & a claimant to some seized goods. Upon the return of the interpleader summons the creditor obtained an enlargement to examine claimant. Upon the further return the creditor abandoned:—*Held*: creditor ought to pay the sheriff's costs of the proceeding.—*STEPHENS v. ROGERS, Ex LIVINGSTONE* (1889), 6 Man. L. 298.—CAN.

**e. —.]**—*Semble*: execution creditors can abandon the seizure or the prosecution of the issue, but only on the terms of answering all costs.—*HOGABOOM v. GILLIES* (1895), 16 P. R. 402.—CAN.



after the levy, the ct. discharged the sheriff's application for relief, & made him pay the costs of the execution creditor.—*Re OXFORDSHIRE SHERIFF* (1837), 6 Dowl. 136.

*See, now, R. S. C., Ord. 57, r. 12.*

**522. ——— Failure to give notice of claim.]**

—*DALTON v. FURNESS*, No. 140, *ante*.

**523. Costs refused—Possession money—Improperly incurred.]**—The ct. will not, under Interpleader Act, 1831 (c. 58), allow the sheriff his costs incurred by keeping possession, in consequence of a party refusing to consent to a judge at chambers making an order in the case; no authority for that purpose being given by the above Act.—*CLARK v. CHETWODE* (1836), 4 Dowl. 635.

**524. Costs allowed—After orders of court—Sheriff in possession for benefit of parties.]**—The sheriff will be allowed his costs of keeping possession after applying to the ct., where it is for the benefit of the parties & not in furtherance of his duty.—*UNDERDEN v. BURGESS* (1835), 4 Dowl. 104.

**525. Overcharge for possession money—Relief on taxation.]**—When a judge in an interpleader summons has ordered that claimant as a condition of a relief shall pay possession money, the claim of an overcharge is not extortion within the statute, but a ground for relief on taxation of costs.—*LONG v. BRAY, Ex p. WRIGHT* (1862), 10 W. R. 841.

#### *E. Costs on Appeal.*

**526. Sheriff's interest not involved.]**—The order on an interpleader issue between a bill of sale holder & an execution creditor gave the sheriff his costs, to be paid by the bill of sale holder. The bill of sale holder appealed, & by the notice of appeal asked that the sheriff's costs might be paid by the execution creditor. The notice was served on the sheriff, & he appeared by counsel on the hearing of the appeal. His counsel took no part in the argument of the appeal, but only asked for costs. It was not suggested that the execution creditor was not as well able to pay the sheriff's costs as the bill of sale holder:—*Held*: though it was an error to serve the sheriff with a formal notice of the appeal, he ought not to have appeared on the hearing, & he was not entitled to any costs of the appeal.—*Re MORRIS, Ex p. WEBSTER* (1882), 22 Ch. D. 136; 52 L. J. Ch. 375; 48 L. T. 295; 31 W. R. 111, C. A.

*Annotation:—Mentd. Tuck v. Southern Counties Deposit Bank* (1889), 42 Ch. D. 471.

**527. Sheriff interested in result of appeal.]**—*TRICKETT & Co. v. GIRDLESTONE* (1897), 103 L. T. Jo. 81, D. C.

*See, also, Part III., Sect. 8, sub-sect. 3, post.*

#### *F. Costs of Keeping Subject-Matter of Dispute.*

**528. Costs of agistment—Right to detain animals—After order to withdraw.]**—A sheriff having seized certain horses which were claimed by a third party, an interpleader order was made that on payment of a sum of money into ct. & "possession money" from the date of the order, the sheriff should withdraw from possession:—*Held*: the sheriff had no right to detain the horses

for the expense of their keep; but should have applied to the judge to allow those expenses.—*GASKELL v. SEFTON* (1845), 14 M. & W. 802; 3 Dow. & L. 267; 15 L. J. Ex. 107; 9 Jur. 996; 153 E. R. 700.

#### *G. Form of Order.*

**529. Claimant unsuccessful—Order against execution creditor in first instance—To be recovered from unsuccessful claimant.]**—*SMITH v. DARLOW*, No. 449, *ante*.

**530. ———.]**—Where upon a seizure under a *fi. fa.* a claimant appears & interpleader proceedings follow, as between disputants, the usual practice is to treat them as ordinary litigants & in proper cases make the unsuccessful party pay the costs of the successful party. The sheriff may also have an order for his costs directly against an unsuccessful claimant. But if he prefers he may have the order against the successful judgment creditor leaving the latter to add the sheriff's costs to his own & recover them against the unsuccessful claimant (*PHILLIMORE, J.*).—*Re ROGERS, Ex p. SUSSEX SHERIFF*, [1911] 1 K. B. 104; 80 L. J. K. B. 204; 103 L. T. 576; 27 T. L. R. 59; 55 Sol. Jo. 78; *on appeal*, [1911] 1 K. B. 641, C. A.

**531. Claim for rent after issue ordered—Proceedings on issue abandoned—Order against execution creditor in first instance—Repayment as to half by claimant.]**—A claim having been made to goods of an execution debtor in the possession of the sheriff under writ of *fi. fa.* taken out by the execution creditor, the sheriff applied for & obtained an order for an interpleader issue to be tried. Subsequent to this order the landlord of the debtor claimed the goods for rent. The execution creditor declined to pay the rent & the goods being distrained by the landlord, the trial of the issue was not proceeded with. The sheriff applied for a discharge of the order & for his costs to be paid by the execution creditor. The execution creditor applied for an order to bar claimant's claim & for payment of his costs by claimant:—*Held*: the execution creditor should first pay the sheriff's costs, & claimant should then pay to the execution creditor half the sheriff's costs from the date of the claim.—*LAWSON v. CARTER* (1893), 63 L. J. Q. B. 159, D. C.

#### *H. When Bankruptcy Supervenes.*

*See, now, Bkpcy. Act, 1914 (c. 59), s. 41.*

*See title BANKRUPTCY, Vol. V., pp. 822–823, Nos. 6981–6995.*

#### SUB-SECT. 3.—PARTIES OTHER THAN APPLICANT.

##### *A. Successful Party.*

##### *(a) When Claim Contested.*

*See, now, R. S. C., Ord. 57, r. 15.*

**532. Borne by unsuccessful claimant—Bill in Chancery.]**—After the right is decided between the parties, the costs must be paid by deft., who is found in the wrong, to pltf. & the other defts.—

*h. ———.]—MALONE v. ROSS*, [1900] 2 I. R. 586.—IR.

#### PART II. SECT. 11, SUB-SECT. 2.—G.

**529 i. Claimant unsuccessful—Order against execution creditor in first instance—To be recovered from unsuccessful claimant.]**—*TODD v. M'KEEVIR*, [1895] 2 I. R. 400.—IR.

#### PART II. SECT. 11, SUB-SECT. 2.—F.

**i. Costs of agistment.]**—Execution creditors successfully attacked a bargainee's right to cattle which he had seized under a defective bill of sale. The ct. stated they should allow him for expenses incurred for feed & care of the cattle which would have been incurred by the sheriff but for such seizure. No order was made in the

interpleader issue for such allowance but leave was given to make a substantive motion therefor in the action in which execution creditors had recovered their judgment.—*LIVERGOOD v. HOME*, [1920] 3 W. W. R. 67.—CAN.

*g. ———.]—BRADY v. WILLIAMS*, [1898] 2 I. R. 703.—IR.

**Sect. 11.—Costs and charges: Sub-sect. 3, A. (a) & (b) i. & ii., (c) i. & ii.]**

**DOWSON v. HARDCASTLE** (1791), 2 Cox, Eq. Cas. 278; 1 Ves. 368; 30 E. R. 129, L. C.

*Annotations:—*Folld. **Mason v. Hamilton** (1831), 5 Sim. 19. *Refd.* **Martinius v. Helmuth** (1817), 2 Ves. & B. 412, n.

**533. ———.] —ALDRIDGE v. MESNER**, No. 480, *ante*.

**534. ——— Issue.] —**Where an issue is tried by direction of the ct. under Interpleader Act, 1831 (c. 58), the unsuccessful party is liable for the costs.—**BOWEN v. BRAMIDGE** (1833), 2 Dowl. 213; *sub nom.* **BRAMADGE v. ADSHEAD**, **BOWEN v. BRAMADGE**, 3 L. J. Ex. 54.

*Annotation:—**Refd.* **Barnes v. Bank of England** (1838), 7 Dowl. 319.

**535. ———.] —**The directors of the E. I. Co. having in their hands the sum of £5,577 arising from the sale of goods consigned to B. & Co. on which C., owner of the ship on board of which the goods had been brought into the E. I. Co.'s docks, claimed to have a lien for freight, paid £2,000, part of said sum, to B. & Co. on account, & £849 to C. An action having been afterwards brought by C. for £1,908 the residue of his claim, & B. & Co. having threatened an action for the whole balance remaining in the directors' hands, the latter filed a bill of interpleader against C. & B. & Co., & paying that balance into ct., obtained an injunction to restrain the proceedings at law. The cause was heard & a decree pronounced, directing an issue to be tried at law between C. & B. & Co., in which C. ultimately established his claim, the directors taking no part in that proceeding. The sum paid into ct. being insufficient to answer C.'s claim with the interest that had accrued thereon during a protracted litigation, the directors were ordered, on the hearing of the cause on further directions, to pay into ct., as subject to C.'s lien, the £2,000 which they had already paid to B. & Co.:—*Held*: (1) this latter order was inconsistent with the principles of an interpleader suit; (2) pl'tfs. in that suit having paid into ct. under its order the whole sum which was the subject of interpleader were discharged from further obligation; (3) the protracted litigation which increased the claim of one of the conflicting debts. beyond the sum in ct., being caused not by pl'tfs., but by the other conflicting debts., who were parties to the appeal, & the money being paid to them, & never having been the subject of the interpleader suit, they were the parties really liable to satisfy the claim established by C., with costs.—**EAST INDIA CO.**

**PART II. SECT. 11, SUB-SECT. 3.—**  
**A. (a).**

*unsuccessful claimant.] —*Where claimant established his right to all except a small portion of the goods:—*Held*: he was entitled to the costs of the interpleader rule, & of the feigned issue & trial, from which debt. might deduct the costs incurred in proving his claim to those goods found to belong to him.—**DEMPSEY v. CASPAR** (1854), 1 P. R. 134.—**CAN.**

**535 ii. ———.] —**Two interpleader actions having been twice tried, resulted in favour of pl'tf., claimant, & on application to the judge who granted the orders to dispose of the costs, the matter was referred to the full ct.:—*Held*: pl'tf. was entitled as of right to the costs of the actions: & the costs incurred before the issues, *id.* also **GUNN** (1861), 20 U. C. R. 555.—**CAN.**

*Annotation:—**Refd.* **SCONES** (1885), 3 Man. L. R. 238.—**CAN.**

**535 iv. ———.] —**A sheriff had seized goods under writs of *fi. fa.* in his hands, when the goods were claimed by a chattel mtgee. An interpleader issue was directed, & an order was made for the sheriff to sell the goods & pay the proceeds into ct., which was done:—*Held*: execution creditors who contested the chattel mtgee.'s claim in the interpleader were entitled to their costs of the interpleader as "costs of the execution" if they failed to recover them from claimant.—**LEVY v. DAVIES** (1886), 12 P. R. 93.—**CAN.**

**535 v. ———.] —**Where in an interpleader, execution creditors join on the issue as debts. & claimant is successful & costs are given to the sheriff & claimant, execution creditors are jointly & severally liable for those costs which may not be apportioned.—**MACDONALD CO. v. NICHOLSON & NATIONAL CASH REGISTER CO. & TUDHOPE ANDERSON CO.** (1915), 31 W. L. R. 510.—**CAN.**

**535 vi. ———.] —**Where on an interpleader issue it is determined that goods

**v. CAMPION** (1837), 4 Cl. & Fin. 616; 11 Bli. N. S. 158; 7 E. R. 234, H. L.

**536. ———.] —**Where an issue has been directed under Interpleader Act, 1831 (c. 58), to try the right to a bill of exchange, the *bona fide* owner of it is entitled to the amount of the bill, & of all costs from the wrongful claimant, so as completely to indemnify himself.—**JONES v. REGAN** (1841), 9 Dowl. 580; *sub nom.* **REGAN v. JONES**, 5 Jur. 607.

**537. ———.] —**Where claimants of goods taken in execution fail upon an issue directed to try the validity of the claim, under Interpleader Act, 1831 (c. 58), the course is, to require them to pay the costs of the application & of the subsequent proceedings. So, when claimants set up a claim as assignees of a bkpt., & they fail upon the insufficiency of proof of the bkpcy.—**MELVILLE v. SMARK** (1841), 3 Man. & G. 57; 3 Scott, N. R. 357; 133 E. R. 1056.

**538. ———.] —ELLERSHAW v. TERRY, MAGNIAC v. HULL DOCK CO.** (1843), 1 L. T. O. S. 231.

**539. ———.] —**Where claimant in an interpleader issue goes down to trial claiming all the goods seized, notwithstanding an order of the ct. directing him to specify what goods he claims, & some of the goods seized are found to belong to a third party, the execution creditor is entitled to the money that has been paid into ct. by claimant & to the costs of the issue, as being the successful party.—**PLUMMER v. PRICE** (1878), 39 L. T. 38; 26 W. R. 682; *on appeal*, 39 L. T. 657, C. A.

*Annotation:—**Mentd.* **Peake v. Carter**, [1916] 1 K. B. 652.

**540. ———.] —***Re* **ROGERS, Ex p. SUSSEX SHERIFF**, No. 530, *ante*.

**541. ——— Married woman—Costs out of separate estate restrained from anticipation.] —**A written claim made by a married woman to goods or chattels taken in execution under the process of the ct. & served by her on the sheriff or high bailiff of a county ct., is a "proceeding instituted" by her within Married Women's Property Act, 1893 (c. 63), s. 2. Where, therefore, in the subsequent interpleader proceedings she fails to establish her claim to the goods, the ct. has jurisdiction under that sect. to order payment of the execution creditor's costs of the interpleader proceedings out of property of claimant which is subject to a restraint on anticipation & to enforce payment by the appointment of a receiver.—**NUNN & CO. v. TYSON**, [1901] 2 K. B. 487; 70 L. J. K. B. 854; 85 L. T. 123; 50 W. R. 16; 17 T. L. R. 624; 45 Sol. Jo. 619, D. C.

*Annotation:—**Refd.* **Crickitt v. Crickitt** (1902), 18 T. L. R. 584.

seized under an execution belonged to claimant & should not have been seized as the property of the execution debtor, claimant should not be called on to pay any of the sheriff's costs, even with the right to recover from execution creditor.—**COLLINS v. KELSEY**, [1924] 3 W. W. R. 370.—**CAN.**

*taxed.] —*In an interpleader matter where several writs were placed in the sheriff's hands, one from a county ct., the others from the superior cts., a successful claimant was held entitled to superior ct. costs, as against the county ct. execution creditor.—**PHIPPS v. BEAMER** (1879), 8 P. R. 181.—**CAN.**

**1. Discretion of court.] —**Although claimant upon the trial of an interpleader issue succeeds, yet the ct. may, in its discretion, refuse to give him costs against execution creditor.—**MASSEY MANUFACTURING CO. v. GAUDRY** (1886), 4 Man. L. R. 229.—**CAN.**

**m. ———.] —****HOTHAM v. BRIGHT**, [1923] 3 W. W. R. 94.—**CAN.**



(b) *Party not Appearing.*i. *Execution Creditor.*542. *Whether liable for costs—On summons.]—*

Where a *fi. fa.* has issued, goods seized under it & an adverse claim set up, & the sheriff has applied for relief under Interpleader Act, 1831 (c. 58), & the execution creditor does not appear to support his *fi. fa.*, the ct. will grant the costs of the adverse claimant's appearing to support his claim, to be paid by the execution creditor, but not those of the sheriff; yet if the execution creditor afterwards appears & opens the rule, the ct. will grant the sheriff the costs of his second appearance.—*BRYANT v. IKEY* (1832), 1 Dowl. 428.

*Annotations:—*Fold. *Tomlinson v. Done* (1835), 1 Har. & W. 123. *Distd. Swaine v. Spencer* (1841), 9 Dowl. 347.

543. ———.]—On an application by the sheriff under Interpleader Act, 1831 (c. 58), s. 6, if the judgment creditor does not appeal, the ct. will order him to pay the costs of the application to the adverse claimant.—*TOMLINSON v. DONE* (1835), 1 Har. & W. 123.

ii. *Claimant.*

*See, now, R. S. C., Ord. 57, r. 15.*

544. *Whether liable for costs—On summons.]—*

Where an adverse claim is set up to goods seized by the sheriff & the latter applies to the ct. for relief under Interpleader Act, 1831 (c. 58), s. 6, & the adverse party does not appear to support his claim, the ct. will bar his claim as to the sheriff, & make him pay the judgment creditor his costs of appearing on the sheriff's rule, but will not allow the sheriff his costs.—*BOWDLER v. SMITH* (1832), 1 Dowl. 417.

*Annotations:—**Distd. Shuttleworth v. Clark* (1836), 4 Dowl. 561; *Murdock v. Taylor* (1840), 8 Scott, 604.

545. ———.]—*PERKINS v. BURTON* (OR BENTON), No. 513, *ante*.

546. ———.]—*ORAM v. SHELDON*, No. 514, *ante*.

547. ———.]—Where the sheriff's rule under the Interpleader Act, 1831 (c. 58), does not pray costs, & claimant does not appear, the ct. will not, on disposing of the rule, at once order claimant to pay costs, but will make an order conditional on his not appearing within a certain period.—*SHUTTLEWORTH v. CLARK* (1836), 4 Dowl. 561; 1 Har. & W. 662.

*Annotation:—**Distd. Murdock v. Taylor* (1840), 8 Scott, 604.

548. ———.]—*LAMBERT v. COOPER*, No. 515, *ante*.

549. ———.]—Deft. being sued for arrears of rent, & having received notice from one claiming to be entitled as mtgee. of the premises not to pay the rent to pltf., obtained a rule under Interpleader Act, 1831 (c. 58), s. 1.

Claimant not appearing to maintain his claim, the ct. ordered that the claim should be barred, & that pltf. & deft. respectively should each bear his own costs of the rule; the proceedings in the action being stayed on payment by deft. of the

rent & costs.—*MURDOCH v. TAYLOR* (1840), 6 Bing. N. C. 293; 8 Scott, 604; 9 L. J. C. P. 188; 133 E. R. 116.

550. ———.]—The assignees of a bkpt. to whom certain goods were consigned, having set up a claim to the goods in the hands of defts., the carriers, defts. applied to a judge under Interpleader Act, 1831 (c. 58), s. 1, & obtained an order, that unless cause were shown to the contrary on a day named, the assignees should be barred their claim, & pay defts.' costs. The assignees attended on the day named, & objected to the payment of the costs by them; & the order was discharged. Several summonses were subsequently served, calling on pltf., the vendors, & the assignees to state the nature & particulars of their respective claims. The assignees did not attend on any of these summonses:—*Held*: the judge had no jurisdiction under the Act to order the assignees to pay costs.—*GRAZEBROOK v. PICKFORD* (1842), 10 M. & W. 279; 2 Dowl. N. S. 248; 152 E. R. 475; *sub nom. GRAZEBROOK v. PICKFORD*, 12 L. J. Ex. 171.

*Annotation:—**Apld. Rooda v. Gun & Shot & Griffins Wharves Co.* (1873), 28 L. T. 635.

551. ———.]—Where claimant does not appear, he cannot be made pay the cost of the interpleader rule.—*CHILD v. BURNETT* (1843), 2 L. T. O. S. 169.

(c) *Party Abandoning.*i. *Execution Creditor.*

552. *Whether liable for costs—To time of abandonment.]—*An interpleader rule was granted in Hilary term but not decided until Easter term, when the execution creditor consented to abandon his execution: the ct. refused to compel him to pay the costs of the rule, because he had not abandoned the execution sooner.—*EDMONDS v. FLETCHER* (1837), Will. Woll. & Dav. 188.

553. ———.]—Where an application had been made to a judge at chambers under Interpleader Act, 1831 (c. 58), & 1 & 2 Vict. c. 45, s. 2, & the parties do not go before a judge at the instance of the execution creditor & the sheriff, & inquiries having been made, the execution creditor abandons his execution, the ct. will not grant summarily to claimant the costs of attending at chambers but will leave him to his actions.—*SWAINE v. SPENCER* (1841), 9 Dowl. 347; Woll. 114; 5 J. P. 241; 5 Jur. 319.

ii. *Claimant.*

*See R. S. C., Ord. 57, r. 15.*

554. *Whether liable for costs—To time of abandonment.]—*Where an issue is directed to be tried between an execution creditor & a claimant brought before the ct. by the sheriff under Interpleader Act, 1831 (c. 58), but claimant refuses to try, & abandons his claim, he will be liable to pay the execution creditor's costs down to the time of the claim being abandoned & of applying to

## PART II. SECT. 11, SUB-SECT. 3.—

## A. (b) ii.

n. *Whether liable for costs.]—*Where a sheriff obtains a rule calling upon parties to sustain their claims to property seized, & one party fails to appear, his claim as against the sheriff is barred, & the party appearing is entitled to have his costs paid by the party failing to appear.—*JOHNSON v. BALDWIN* (1844), 1 U. C. R. 280.—CAN.

o. ———.]—A writ of attachment issued, under which the assignee in insolvency seized goods, which were

claimed by a person to whom it was alleged the debtor had transferred them. The assignee thereupon filed a bill of interpleader against claimant & the creditors who had sued out the writ, on which relief was afforded to the assignee, & claimant failing to appear was ordered to be debarred of all interest in the goods in question, & to pay the costs of suit.—*WELLS v. HEWS* (1876), 24 Gr. 131.—CAN.

## PART II. SECT. 11, SUB-SECT. 3.—

## A. (c) i.

p. *Whether liable for costs.]—*A sheriff having made a seizure of goods

under a writ of execution, which seizure execution creditor had not specially directed, & a claimant to the goods having appeared, execution creditor refused to allow the sheriff to withdraw. On the return of an interpleader summons obtained by the sheriff, execution creditor abandoned his claim:—*Held*: execution creditor might abandon at that stage of the proceedings without costs, & no order was made as to the costs of the sheriff.—*CANADIAN BANK OF COMMERCE v. TASKER* (1880), 8 P. R. 351.—CAN.

———.]—*HYLAND v. LENNOX* (1891), 28 L. R. Ir. 286.—IR.



11.—*Costs and charges: Sub-sect. 3, A. (c) ii., B. & C.; sub-sect. 4. Part III. Sect. 1.]*

take the money paid in by the sheriff out of ct.—*WILLS v. HOPKINS, BRAGG v. HOPKINS* (1835), 3 Dowl. 346.

555. — *Claim abandoned at hearing.*—Upon the hearing of an interpleader summons, claimant's attorney appeared without any affidavit, & after the statement of deft.'s case, he said he would consent to an order, barring the claim, but asked that the order might provide that no action should be brought by or against either party concerning the goods in question. The claim had been persisted in until the moment of the hearing. The judge made an order barring claimant, & directing him to pay all costs:—*Held*: although a judge has jurisdiction upon an interpleader summons to order a claimant to pay costs only when he appears to litigate his claim, these facts raised a question for his discretion as to whether this was such an appearance.—*ROODA v. GUN & SHOT & GRIFFIN'S WHARVES CO., LTD.* (1873), 28 L. T. 635.

*B. Each Party Partially Successful.*

See R. S. C., Ord. 57, r. 15.

556. *Costs apportioned—According to result of issues.*—The ct. will, when necessary, apportion the costs of an issue under Interpleader Act, 1831 (c. 58), among the different parties, according to the result of the issue upon their different interests.—*DIXON v. YATES* (1833), 5 B. & Ad. 313; 2 Nev. & M. K. B. 177; 2 L. J. K. B. 198; 110 E. R. 806.

*Annotations*:—*Mentd.* *Townley v. Crump* (1835), 4 Ad. & El. 58; *Jones v. Jones* (1841), 8 M. & W. 431; *Lackington v. Atherton* (1844), 7 Man. & G. 360; *Scott v. England* (1844), 2 Dowl. & L. 520; *Tanner v. Scovell* (1845), 14 M. & W. 28; *Davies v. Lowndes* (1847), 3 C. B. 808; *Logan v. Le Mesurier* (1847), 11 Jur. 1091; *Anon.* (1849), 14 L. T. O. S. 138; *Godts v. Rose* (1855), 17 C. B. 229; *Pearson v. Dawson* (1858), 27 L. J. Q. B. 248; *Meyerstein v. Barber* (1866), L. R. 2 C. P. 38; *Hellbutt v. Hickson* (1872), L. R. 7 C. P. 438; *Re McLaren, Ex p. Cooper* (1879), 27 W. R. 518; *Kemp v. Falk* (1882), 7 App. Cas. 573; *Badische Anilin Und Soda Fabrik v. Hickson*, [1906] A. C. 419.

557. — — — — —.]—An interpleader rule directed the sheriff to sell the goods claimed, & pay the proceeds into ct. to abide the event of an issue between claimant & the execution creditor, to try the right to them. The jury, on the trial of the issue, found that part of the goods were the sole property of claimant, & the residue the joint property of claimant & the party levied upon:—*Held*: claimant was entitled to be paid by the execution creditor the general costs of the feigned issue, deducting the costs of the issues found for the latter, & also the costs of appearing to the interpleader rule, & of his subsequent application for the money paid into ct. & for his costs; & the sheriff was refused his costs of the interpleader rule.—*STALEY v. BEDWELL* (1839), 10 Ad. & El. 145; 2 Per. & Dav. 309; 8 L. J. Q. B. 233; 113 E. R. 55.

*Annotation*:—*Refd.* *MacCarthy v. Nepean* (1844), 6 Q. B. 252.

558. — — — — —.]—An issue was directed under

Interpleader Act, 1831 (c. 58), between A., claimant, & B., execution creditor, to try whether five horses, or one or some of them, were or was, when taken in execution, the property of A. The jury found that two horses only belonged to A. A. obtained a rule nisi for payment to him of the general costs of the issue, the costs of the application under the Act, & the costs of the rule. The ct. gave neither party the general costs of the issue nor the costs of the rule, but gave to each such portion of the costs as applied to the part on which he had succeeded, & allowed A. his costs of the application under the Act.—*LEWIS v. HOLDING* (1841), 2 Man. & G. 875; 9 Dowl. 652; *Drinkwater*, 195; 3 Scott, N. R. 191; *Woll*, 178; 10 L. J. C. P. 204; 133 E. R. 998.

*Annotation*:—*Consd.* *MacCarthy v. Nepean* (1844), 6 Q. B. 252.

559. — — — — —.]—C. claimed property seized under a *fi. fa.* in an action of D. against A. The sheriff having applied under Interpleader Act, 1831 (c. 58), s. 6, a judge ordered an issue to try C.'s right, C. to be pltf., D. deft. By the verdict C.'s claim was affirmed for more than five sixths, but negatived as to the residue. The ct. directed the costs to be taxed upon the principle of each party having succeeded as to a part, without reference to the fact which was pltf. & which deft.—*CLIFTON v. DAVIS* (1856), 6 E. & B. 392; 27 L. T. O. S. 104; 4 W. R. 546; 119 E. R. 911; *sub nom.* *DAVIS v. CLIFTON*, 25 L. J. Q. B. 344; 2 Jur. N. S. 490.

560. *Each party to pay his own costs.*—Upon an issue under Interpleader Act, 1831 (c. 58), s. 1, pltf. claimed £183 for work & labour, etc., & recovered £50. A judge at chambers having made an order directing that each party should pay his own costs of the cause & issue & of all applications & proceedings in & connected with the cause & issue, the ct. declined to interfere.—*CARR v. EDWARDS* (1839), 8 Dowl. 29; *sub nom.* *KERR v. EDWARDS*, 8 Scott, 337.

*Annotation*:—*Refd.* *Lewis v. Holding* (1841), 2 Man. & G. 875.

*Claimant succeeding in substance.*—See No. 377, *ante*.

*C. New Trial.*

See R. S. C., Ord. 57, r. 15.

561. *Costs of new trial—Misconduct of party.*—*TYSON v. WILLIS* (1851), cited in 11 C. B. at p. 418; 20 L. J. C. P. at p. 220; 138 E. R. 535.

*Annotation*:—*Distd.* *Janes v. Whitbread* (1851), 11 C. B. 406.

562. — — — — —.]—Where a new trial of an interpleader issue is rendered necessary by the miscarriage of the jury, the general rule as to costs prevails; *aliter*, where by the misconduct of the party.—*JANES v. WHITBREAD* (1851), 11 C. B. 406; 20 L. J. C. P. 217; 17 L. T. O. S. 78, 155; 15 Jur. 612; 138 E. R. 530.

*Annotations*:—*Mentd.* *Coates v. Williams* (1852), 7 Exch. 205; *Cox v. Hickman* (1860), 8 H. L. Cas. 268; *Hidson v. Barclay* (1864), 3 H. & C. 361; *Mason v. Briton Medical & General Life Assocn.* (1888), 4 T. L. R. 755.

**PART II. SECT. 11, SUB-SECT. 3.—B.**

556 i. *Costs apportioned—According to result of issues.*—Where a mtgee. claimed all the goods seized by a sheriff under execution, but it appeared on the trial of an interpleader issue between the mtgee. & execution creditors that some of the goods seized, amounting to one-sixth of the total value, were not covered by the mtgee.:—*Semble*: although the mtgee. was entitled to the general costs of the

issue, a deduction of one-sixth should be made in respect of the goods as to which he failed.—*SEGSWORTH v. MERIDEN SILVER PLATING CO.* (1883), 3 O. R. 413.—*CAN.*

556 ii. — — — — —.]—*McLAREN v. CANADA CENTRAL RY. CO.* (1884), 10 P. R. 328.—*CAN.*

556 iii. — — — — —.]—*ONTARIO SILVER CO. v. TASKER* (1893), 15 P. R. 180.—*CAN.*

556 iv. — — — — —.]—*CUMMINS v. KAVANAGH* (1890), 25 I. L. T. 24.—*IR.*

*r. — Discretion of court.*—*Held*: in an interpleader issue, where each party succeeds as to part of the goods, there should be a division of costs, & the ratio of that division is in the discretion of the judge.—*BURNHAM v. WALTON* (1885), 2 Man. L. R. 180.—*CAN.*

## SUB-SECT. 4.—WHAT MAY BE INCLUDED.

**563. Costs of obtaining subject-matter—From stakeholder.]**—Where a party has succeeded on an issue directed under Interpleader Act, 1831 (c. 58), to try the right to certain property, he is entitled as against the unsuccessful party to the costs of applying to the ct., in order to obtain the property in question from the stakeholder, an application having been made to the latter & he having properly awaited the decision of the ct. before he gave it up.—*BARNES v. BANK OF ENGLAND* (1838), 7 Dowl. 319; 1 Will. Woll. & H. 291.

*Annotation:—Folld. Meredith v. Rogers* (1839), 7 Dowl. 596.

**564. — Out of court.]**—Where a party succeeds on an issue directed under Interpleader Act, 1831 (c. 58), he has a right to his costs of applying to take the proceeds of the sale out of ct., although he has not applied to the opposite side, for their consent to take the money out.—*MEREDITH v. ROGERS* (1839), 7 Dowl. 596; 2 Will. Woll. & H. 69; 3 Jur. 1191.

**565. — — —.]**—A feigned issue having been directed upon an interpleader rule, between A. & B., to try the right to certain goods, A. obtained a judge's order for the sale of the goods, & the proceeds were paid into ct. The issue having been found against A.:—*Held*: upon motion for the payment of the money out of ct., B. was entitled to the costs of the order for the sale & of the application to the ct.—*CUSEL v. PARIENTE*

. 527; 8 Scott, N. R. 240; 135 211; *sub nom.* *PUSEL v. PARIENTE*, 3 L. T. O. S. 163.

**566. Costs of compelling claimant to go to trial.]**—The costs of an application under an interpleader rule to compel pltf. who has made default to go to trial are costs in the cause.—*KIMBERLEY v. HICKMAN* (1846), 1 New Pract. Cas. 468.

**567. Costs of original action—Power of master.]**—Under R. S. C., Ord. 54, r. 12 (i), limiting the power of the master to award costs other than those of any proceeding before him or those specially authorised, the master in making an order barring claimant upon an interpleader summons under R. S. C., Ord. 57, when applt. is deft., has no power under r. 15 to make it a term of the order that pltf. shall pay the costs of deft. in the original action, apart from those in the interpleader proceedings, & an order to this effect is, notwithstanding Jud. Act, 1893 (c. 66), s. 49, subject to appeal.—*HANSEN v. MADDOX* (1883), 12 Q. B. D. 100; 53 L. J. Q. B. 67; 50 L. T. 123; 32 W. R. 183, D. C. See, now, R. S. C., Ord. 54, r. 12.

**568. Sheriff's charges deducted from levy.]**—The execution creditor who is unsuccessful in an interpleader issue is liable to repay to claimant the charges of the sheriff which he has deducted from the amount of the levy.—*BLAKER v. SEAGER* (1897), 76 L. T. 392.

**569. Costs of sheriff's affidavit in support of application.]**—*STOCKER v. HEGGERTY*, No. 273, ante.

## Part III.—Interpleader in County Courts.

## SECT. 1.—JURISDICTION.

Jurisdiction generally, *see* County Courts Act, 1888 (c. 43), ss. 120, 156, 157; C. C. R., Ord. 27.

**570. Duty of judge to adjudicate.]**—*BESWICK v. BOFFEY, Re MOSES' CLAIM*, No. 608, *post*.

**571. Excessive levy—Jurisdiction of High Court to interfere—By prohibition—By certiorari.]**—A writ of *certiorari* does not lie to remove into the superior cts. an interpleader summons issued by the county ct. Nor does a writ of prohibition lie on the ground that the jurisdiction of the county ct. ceases the moment the interpleader summons issues, or on the ground that the levy is excessive & the value of the goods taken far exceeds £50.—*M'KELLAR v. SUMMERS* (1854), 23 L. T. O. S. 146; *sub nom.* *Re MACKELLAR v. SUMMERS, Ex p. SUMMERS*, 2 C. L. R. 1284; 18 J. P. 362; 2 W. R. 477; *sub nom.* *M'KILLAR v. SUMMERS, Ex p. SUMMERS*, 18 Jur. 522.

**572. Trespass against bailiff for wrongful seizure.]**—On the hearing of an interpleader

summons in the county ct. under County Courts Act, 1846 (c. 95), in respect of goods which had been taken in execution under an order of the county ct., upon a judgment recovered in the said ct. at the suit of A. against B., the judge of the county ct. decided that the goods were the property of claimant, the present pltf., & thereupon made the following order: "That the goods are the property of claimant; that A. do pay the costs of the proceedings, with 1s. damages for the seizure of the goods; & that the high bailiff do pay 1s. damages for the seizure of the said goods." Such damages & costs were duly paid to & received by claimant, who then brought the present action against deft., the high bailiff, for trespass to his house, & for seizing his goods, to which deft. pleaded "Not guilty by statute":—*Held*: the proceedings in the county ct. under Interpleader Act, 1831 (c. 58), & the award of damages by the judge of the county ct. in respect of the seizure of the goods, did not bar pltf.'s right of action against the high bailiff for the trespass to his

## PART III. SECT. 1.

**t. General rule.]**—The county ct. has power to grant relief under Practice Act "of interpleader."—*COOPER v. MYLNE* (1877), 11 N. S. R. (2 R. & C.) 382.—CAN.

**a. —.]**—*Held*: interpleader being a proceeding in the action, a county ct. judge had jurisdiction to entertain it, but in this case the judge having disposed of the matter summarily without the consent of the parties, an issue was directed.—*SWAIN STODDART* (1888), 12 P. R. 490.—CAN.

**b. —.]**—*Re ANDERSON & BARBER* (1889), 13 P. R. 21.—CAN.

**c. —.]**—*PIKE v. LAVER*, [1919] 1 W. W. R. 420.—CAN.

**d. Issues involving under \$400.]**—All interpleader issues involving under \$400 in whatever division arising, are now to be disposed of by reference to county cts.—*BEATY v. BRYCE* (1882), 9 P. R. 320.—CAN.

**e. Issue involving title to lands.]**—The interpleader issue to be tried being one which involved the title to lands, the question was raised as to whether it would be proper to send the issue to the county ct. for trial, although the amount garnished was under \$250:—*Held*: the issue might be sent to the county ct. as it was a remedy provided

by special statute directing the trial in a county ct.—*HOUGH v. DOLL* (1895), 10 Man. L. R. 679.—CAN.

**f. Whole proceedings must be disposed of—In same court.]**—The judge of a county ct. has no power to refer an interpleader issue to be tried before the judge of the county ct. from which the execution issued, reserving to himself the question of the costs & all other questions. He must either dispose of the whole proceedings himself or order them to be disposed of before the judge of the ct. from which the process issued.—*NICHOLLS v. LUNDY* (1864), 16 C. P. 160.—CAN.

**g. Place of trial.]**—An interpleader

**Sect. 1.—Jurisdiction. Sects. 2 & 3: Sub-sects. 1,**

house in respect of which no damages had been awarded & no adjudication had been made by the judge of the county ct. *Qu.*: whether there was any power in the judge of the county ct., on the hearing of the interpleader summons, to make an order restraining claimant from bringing the present action.

There is no jurisdiction in the county ct. judge to entertain this question [of trespass]; his jurisdiction is limited to deciding whose is the property in the goods seized, & what may be said to arise incidentally from the seizure of those goods, in relation to the goods themselves (*BRAMWELL, B.*). —*JOUSIFFE v. BAYLEY* (1866), 15 L. T. 219; 30 J. P. 808.

**573. To restrain claimant from bringing action for trespass—In High Court.]** — *JOUSIFFE v. BAYLEY*, No. 572, *ante*.

**SECT. 2.—WHEN RELIEF GRANTED.**

*See C. C. R., Ord. 27, r. 15.*

**574. Claim must be adverse—House agent's commission—Claim of different amounts by two agents.]** — *GREATOREX v. SHACKLE*, No. 69, *ante*.

**575. Goods sold under execution—Claim by assignee of debts of execution creditor—County Courts Act, 1888 (c. 43), ss. 156, 157.]** — Where a creditor, who has assigned a debt together with all securities for the same, subsequently recovers judgment against the debtor in the county ct., & the goods of the judgment debtor are taken in execution & sold, the assignee of the debt cannot claim the proceeds of sale under the above sects. — *PLANT v. COLLINS*, [1913] 1 K. B. 242; 82 L. J. K. B. 467; 108 L. T. 177; 29 T. L. R. 129, C. A.

As to bills of sale, *see* *BILLS OF SALE*, Vol. VII., p. 128, Nos. 724–730.

**SECT. 3.—THE CLAIM.****SUB-SECT. 1.—PARTICULARS OF CLAIM.**

*See C. C. R., Ord. 27, r. 5.*

**576. Sufficiency of—Grounds must be stated.]** — By County Courts Act, 1846 (c. 95), s. 118, the county ct. has power to adjudicate on any claim in respect of goods taken in execution under its process: & by rule 39, framed by the judges in pursuance of sect. 78, claimant is to deliver “a particular of any goods or chattels alleged to be the property of claimant, & the grounds of his claim”:—*Held*: the rule is authorised by sect. 78; & under such rule, it is not sufficient to state that the goods are, & were when taken, the property of claimant, & not the property of the execution debtor.—*R. v. CHILTON* (1850), 15 Q. B. 220; *Cox, M. & H.* 293; *Rob. L. & W.* 352; 15 L. T. O. S. 135; 117 E. R. 441; *sub nom. Re CULLUM v. ROSS, Ex p. TANNER*, 19 L. J. Q. B. 318; *sub nom. R. v. LAMBETH COUNTY COURT JUDGE, Re CULLUM v. ROSS*, 14 Jur. 696.

*Annotation*:—*Distd. R. v. Richards* (1851), 2 L. M. & P. 263.

issue should ordinarily be tried, in the county where the goods are seized, but where the sheriff is to remain in possession of the goods of a going concern, a speedy trial is so important that for the purpose of securing it, the issue may be sent to another county, having regard to considerations of expense & con-

venience.—*FARLEY v. PEDLAR* (1901), 21 C. L. T. 294; 1 O. L. R. 570.—*CAN.*

*h. Writ served outside jurisdiction.]*—The county ct. has no jurisdiction to pronounce a decree upon an interpleader, the service of which was effected upon debt. at his residence in England.—*SPENCE v. PARKES*, [1900]

**577. — “Goods seized by virtue of the warrant.”]**—By County Courts Act, 1867 (c. 142), r. 174, claimant in an interpleader is required, five clear days before the day appointed for hearing the summons, to deliver to the bailiff or leave at the office of the registrar a particular of the goods alleged to be his property, & also the grounds of his claim. Goods & money which had been seized under an execution upon a county ct. judgment were claimed by W., who delivered to the registrar a particular describing them as “the goods & money seized by virtue of the warrant.” In the grounds of claim it was stated that the goods were the property of claimant, & were at the time of the seizure in his possession. This particular was held insufficient by the judge, who refused to go further into the case, & made an order in favour of the execution creditors with costs. Upon a rule calling upon the execution creditors & judge to show cause why the judge should not hear & adjudicate upon the claim:—*Held*: (1) (*KELLY, C.B., AMPHLETT, B.*) the particular was sufficient; (2) (*BRAMWELL, CLEASBY, B.B.*), it was insufficient.—*RICHARDSON v. WRIGHT* (1875), L. R. 10 Exch. 367; 44 L. J. Ex. 230; 33 L. T. 579; 23 W. R. 878.

**578. — Assignment stated with date & parties—Whether good claim necessary—Mandamus.]**—(1) Where the judge of a county ct., upon an interpleader summons, erroneously decides against claimant, on the ground that the notice of claim is insufficient, this ct. will issue a *mandamus* to him to adjudicate upon the claim.

(2) A particular of the grounds of claim, which states that the goods were assigned to claimant by an indenture, etc., of which it gives the date & the parties, sufficiently sets forth the grounds of the claim within C. C. R., r. 39.—*R. v. RICHARDS* (1851), 2 L. M. & P. 263; *Rob. L. & W.* 571; 20 L. J. Q. B. 351; 15 Jur. 358; *sub nom. R. v. OSWESTRY COUNTY COURT JUDGE, Ex p. HARPER, Cox, M. & H.* 492; 17 L. T. O. S. 55; 5 J. P. 275.

*Annotations*:—As to (1) *Distd. Milner v. Rhoden* (1851), *Cox, M. & H.* 532. *Consd. Ex p. M'Fee* (1853), 9 Exch. 261; *Richardson v. Wright* (1875), L. R. 10 Exch. 367. *Generally, Mentd. R. v. London JJ.*, [1895] 1 Q. B. 214; *R. v. Hudson*, [1915] 1 K. B. 133.

**579. — Necessity for schedule of goods—Mandamus.]**—The particulars of claim upon an interpleader summons in the county ct. recited a deed assigning all the goods “then or thereafter being” upon debtor's premises; & claimed “all & singular the said goods,” etc., “mentioned & intended to be assigned by the deed,” “& which said goods,” etc., “or some part thereof have been seized,” etc. The judge of the county ct. having refused to adjudicate upon the claim, on the ground that the particulars should have contained a schedule or inventory of the goods:—*Held*: a *mandamus* would lie to compel him to adjudicate upon the claim.—*R. v. STAPYLTON* (1851), 2 L. M. & P. 603; 21 L. J. Q. B. 8; 15 Jur. 1177.

**580. — — —.]**—Goods having been seized under an execution out of a county ct., a third party claimed them under an assignment, whereupon the bailiff took out an interpleader summons. Claimant in due time delivered a particular of the goods he claimed, stating (without

2 I. R. 619.—*IR.*

**PART III. SECT. 2.**

*k. Action of replevin.]*—Orders were granted by a county ct. judge to allow two parties to interplead in an action of replevin.—*MCDONALD v. MCKENZIE* (1888), 20 N. S. R. (8 R. & G.) 527.—*CAN.*



specifying them individually) that he claimed all the goods possessed by deft., & stating his title. On the hearing it was objected that the claim was bad, in not specifying the goods or setting them forth in a schedule, which objection the judge held to be good, & refused to hear the case. Upon a motion for a *mandamus* to compel him to hear:—*Held*: the particular was sufficient.—*HESLOP v. McGEORGE* (1851), Cox, M. & H. 570; 18 L. T. O. S. 109; 16 J. P. 24.

**581. — Erroneous address of claimant—Not calculated to mislead — Prohibition.]**—Certain goods taken in execution under a judgment in a county ct. were claimed by a third person, whereupon an interpleader summons issued. A rule of the county cts. requires claimant in such case to deliver a particular of his claim, in which his address "shall be fully set forth." Claimant delivered a particular of his claim, in which his address was stated as Elizabeth street, Islington, whereas it was in fact Elizabeth terrace, Islington. On the hearing of the interpleader claim, the county ct. judge decided that the statement of claimant's address was insufficient, & dismissed the claim. A writ of prohibition having issued by order of a judge to stay the execution in the original plaint:—*Held*: (1) the decision of the county ct. judge with respect to the sufficiency of the statement of claimant's address was not conclusive, but subject to review by the superior ct. on motion for a prohibition; (2) the statement of claimant's address, though erroneous, was not calculated to mislead, & was therefore sufficient within the rule of the county ct.; (3) as that rule had been complied with, the county ct. judge had no jurisdiction to proceed with the original plaint, & consequently the order for the prohibition was correct.—*HARDY v. WALKER, Ex p. M'FEE* (1853), 9 Exch. 261; 2 C. L. R. 278; 23 L. J. Ex. 57; 17 J. P. 824; 156 E. R. 112; *sub nom.* *ROBERTS v. WARDELL, Ex p. McFEE*, Saund. & M. 159; 22 L. T. O. S. 89.

*Annotation*:—*Generally, Refd. M'Callum v. Cookson* (1858), 5 C. B. N. S. 498.

**582. Particulars insufficient—Duty of judge to allow amendment.]**—*BESWICK v. BOFFEY, Re MOSES' CLAIM*, No. 608, *post*.

**583. Particulars out of time—Discretion of judge to adjourn.]**—*Ex p. SMITH* (1852), 19 L. T. O. S. 208; 16 J. P. Jo. 423.

**584. — — —.]**—*BESWICK v. BOFFEY, Re MOSES' CLAIM*, No. 608, *post*.

**585. By whom signed — Solicitor's clerk.]**—Claimant's particulars in an interpleader issue in a county ct. were signed by his solr.'s clerk, with the name of his solr.:—*Held*: they were properly signed by the solr. within C. C. R., 1889, & claimant was entitled to the costs of the particulars. The maxim *Qui facit per alium facit per se* applied, & the case did not fall within the principle of *R. v. Cowper* (1890), 24 Q. B. D. 533.—*FRANCE v. DUTTON*, [1891] 2 Q. B. 208; 60 L. J. Q. B. 488; 64 L. T. 793; 39 W. R. 716, D. C.

#### SUB-SECT. 2.—ADMISSION OF CLAIM.

*See C. C. R., Ord. 27, r. 1 (2).*

**586. Possession money—To date of admission—Right to recover by action.]**—Where a claim is made to goods taken in execution by the high bailiff of a county ct., & the execution creditor sends notice, under C. C. R., 1886, Ord. 27, r. 1, of his admission of the claim to the high bailiff, who withdraws from possession, the judge of the county ct. has power to award possession money

possession money from the execution creditor by action in the county ct., if the judge in the exercise of his discretion is of opinion that the circumstances of the case are such that possession money ought to be awarded. *THOMAS v. TEEB*

Q. B. D. 727; 57 L. J. Q. B. 497; 36 606, D. C.

*Annotation*:—*Apld. A. W. v. Cooper & Hall*, [1925] 2 K. B. 816.

*See, now, C. C. R., Ord. 27, r. 1 (2).*

#### SUB-SECT. 3.—DEPOSIT OR SECURITY BY CLAIMANT.

*See, now, County Court Act, 1883 (c. 43), s. 156; C. C. R., Ord. 27, r. 1 (3).*

**587. Necessity for request by high bailiff.]**—Under C. C. R., 1875, Ord. 21, r. 1, it is not necessary for the high bailiff, before selling goods seized in execution & claimed, to request claimant to deposit the amount of the value of the goods or possession money, & if no such deposit be made, the high bailiff is entitled under County Courts Act, 1856 (c. 108), s. 72, to sell the goods without first applying for an interpleader summons under County Courts Act, 1867 (c. 142), s. 31.—*CRAMER v. MATTHEWS* (1881), 7 Q. B. D. 425; *sub nom.* *DAVIES v. WISE*, 50 L. J. Q. B. 651; 45 L. T. 26; 29 W. R. 804, D. C.

*See, now, C. C. R., Ord. 27, r. 1 (3).*

**588. Deposit of value of goods—Payment out to creditor—Second execution on same goods.]**—A claimant in interpleader deposited the value of the goods to abide the event of the issue. She failed to establish her claim & the money was paid to the judgment creditor in part satisfaction. The judgment creditor levied again on the same goods:—*Held*: the judgment creditor by taking the deposit out of ct. was estopped in respect of the same judgment from disputing that claimant was the owner of the goods.—*HADDOW v. MORTON*, [1894] 1 Q. B. 565; 63 L. J. Q. B. 431; 70 L. T. 470; 9 R. 275, C. A.

*Annotation*:—*Apld. Kotchie v. Golden Sovereigns*, [1898] 2 Q. B. 164.

**589. — Failure by claimant to prove title to any of goods—Part of goods property of second claimant—Right of creditor to money paid in.]**—Goods which had been taken in execution upon a county ct. judgment were claimed by the grantees of a bill of sale upon them, who deposited under County Courts Act, 1888 (c. 43), s. 156, a sum of money as representing the value of the goods. The high bailiff of the county ct. thereupon withdrew from possession of the goods, & issued an interpleader summons in the county ct. with regard to the money in ct. Subsequently D. & Co. gave notice to the high bailiff of a claim to part of the goods, as having been let by them to the execution debtor on a hire purchase agreement, & claimants gave notice to the high bailiff that they withdrew their claim to those goods. The high bailiff gave notice of the claim of D. & Co. to the execution creditor, who thereupon gave notice to the high bailiff that he admitted their title to those goods. Upon the hearing of the interpleader summons the county ct. judge held that the bill of sale was invalid, & he thereupon ordered that a part of the money in ct. proportionate to the value of the goods which had not been claimed by D. & Co. should be paid out to the execution creditor, but that the remainder of the money should be paid back to claimants:—*Held*: the execution creditor,

**Sect. 3.—The claim: Sub-sect. 3. Sects. 4 & 5:**  
**Sub-sects. 1 & 2. Sect. 6.]**

upon the failure of claimants to prove a title to any of the goods, was entitled to the whole of the money in ct.—*WELLS v. HUGHES*, [1907] 2 K. B. 845; 76 L. J. K. B. 1125; 97 L. T. 469; 23 T. L. R. 733, C. A.

*Annotation* :—*Distd. Flude v. Goldberg*, [1915] 2 K. B. 157.

**590. Deposit of less than value of goods—Right of high bailiff to withdraw.]—**Goods which had been taken in execution under a county ct. judgment were claimed by a bill of sale holder. Notice of the claim was given by the bailiff to the execution creditor. The claim not having been admitted claimant deposited with the bailiff under County Courts Act, 1888 (c. 43), s. 156, the amount of the judgment debt & costs as being the value of the goods. The money was paid into ct. by the bailiff who then withdrew from possession & applied for an interpleader summons. On the same day that the summons was issued the execution creditor gave notice of his intention to apply for an order for the sale of the goods under C. C. R., 1903, Ord. 27, r. 13. On the hearing of the application the execution creditor, who had been given no opportunity of being heard as to the value of the goods before pltf. withdrew, admitted claimant's title, but alleged & was prepared with evidence to prove, that the value of the goods was sufficient to satisfy the amount due on the bill of sale & the judgment debt & costs. The county ct. judge without hearing the evidence held that, the bailiff having withdrawn from possession he had no power to order a sale:—*Held*: if the amount deposited with the bailiff was not the value of the goods his withdrawal from possession was wrongful & the county ct. judge had power in that case to order him to retake possession; & the case must go back to the county ct. judge for him to determine after hearing the evidence whether the circumstances were such that an order for sale ought to be made.—*MILLER & Co. v. SOLOMON*, [1906] 2 K. B. 91; 75 L. J. K. B. 671, D. C.

*Annotation* :—*Apld. Newsum v. James*, [1909] 2 K. B. 384.

**591. ———.]—**Goods which had been taken in execution under a county ct. judgment were claimed by A. The execution creditor did not admit the claim & A. deposited with the bailiff under County Courts Act, 1888 (c. 43), s. 156, £26, which was considerably less than the value of the goods claimed, but was more than sufficient to cover the judgment debt & costs of the execution. The money was paid into ct. by the bailiff, who remained in possession of the goods, & an interpleader summons was issued. Before the return day of the interpleader summons the execution creditor gave notice that he admitted the title of A. to the goods, & the bailiff withdrew from possession. Upon the taxation of the costs the bailiff claimed possession fees up to the date when the execution creditor admitted A.'s title, upon the ground that under sect. 156 he was bound to remain in possession until the amount of the value of the goods was deposited with him:—*Held*: as the £26 was deposited with & taken by the bailiff under sect. 156 of the Act, he must be deemed to have taken it upon the assumption that it represented the amount of the value of the goods & therefore he had no right to remain in possession or to possession fees after the date of the deposit.—*NEWSUM SONS & Co., LTD. v. JAMES*, [1909] 2 K. B. 384; 78 L. J. K. B. 761; 100 L. T. 852 53 Sol. Jo. 521, D. C.

#### SECT. 4.—SALE BY HIGH BAILIFF.

*See County Courts Act, 1888 (c. 43), s. 156.*

**592. Sale at undervalue—After refusal to make deposit.]—***LEWIS v. COLE* (1862), 3 F. & F. 17, N. P.

**593. Sale without issue of summons.]—***CRAMER v. MATTHEWS*, No. 587, *ante*.

**594. Jurisdiction of court to order sale—Goods claimed under bill of sale.]—***MILLER & Co. v. SOLOMON*, No. 590, *ante*.

**Title acquired by purchaser.]—***See EXECUTION*, Vol. XXI., pp. 502, 518, Nos. 766, 935, 936.

#### SECT. 5.—CLAIM FOR DAMAGES.

##### SUB-SECT. 1.—IN GENERAL.

*See County Courts Act, 1888 (c. 43), s. 157; C. C. R., Ord. 27, rr. 7, 8.*

**595. Claim not made in interpleader proceedings—Subsequent claim by action—Order of county court conclusive.]—**Pltf. having claimed goods, seized under an execution from a county ct., an interpleader summons issued under County Courts Act, 1867 (c. 142), s. 31, & pltf. gave particulars, but did not therein claim damages as directed by rule 175. His claim to the goods was adjudicated upon by the county ct. judge, who made an order which was in pltf.'s favour with respect to part of the goods. An action was subsequently brought by pltf. in the Ct. of Exchequer against the execution creditor for special damages resulting from the seizure of the goods:—*Held*: the claim of damages should have been made at the time & in the manner prescribed by the above mentioned Act & rule, & the order of the county ct. judge being "final & conclusive," the action could not be maintained.—*DEATH v. HARRISON* (1870), L. R. 6 Exch. 15; 40 L. J. Ex. 26; 23 L. T. 495.

*Annotations* :—*Folld. Hills v. Renny* (1880), 5 Ex. D. 313. *Refd. Cramer v. Matthews* (1881), 7 Q. B. D. 425.

**596. Claim made in interpleader proceedings—Claim exceeding amount under ordinary jurisdiction—Jurisdiction of county court.]—***SMITH v. BEN-SKIN* (1893), 94 L. T. Jo. 285, D. C.

**597. ——— Substantial loss to claimants—Damages awarded.]—**Damages are recoverable on an interpleader summons against a high bailiff of a county ct. for the seizure of the goods of third persons, claimants, by way of execution on the premises of debtor, where claimants have suffered a substantial grievance, although the seizure was *bonâ fide* & there was no misconduct.—*LONDON, CHATHAM & DOVER RY. Co. v. CABLE* (1899), 80 L. T. 119, D. C.

**598. ———.]—**Furniture was let for hire with an option to purchase under a hire-purchase agreement, which contained a clause giving the owners the right without previous notice to determine the hiring & retake possession of the furniture, if it should at any time be seized or taken in execution. The furniture was taken in execution by the high bailiff of a county ct., & no claim having been made to it, was appraised & sold under the execution & the proceeds paid into ct., & the furniture delivered to the purchaser. On the day after the sale the owners heard for the first time of the seizure & sale of the furniture, & gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high bailiff, & in the course of the interpleader proceedings the execution creditor admitted the title of claimants, who gave a notice claiming damages against the high bailiff in

respect of the alleged conversion of the furniture by selling it:—*Held*: as under the hiring agreement claimants had a right to retake possession immediately upon its being taken in execution, the sale by the high bailiff amounted to an act of conversion for which he was responsible in damages to them.—*JELKS v. HAYWARD*, [1905] 2 K. B. 460; 74 L. J. K. B. 717; 92 L. T. 692; 53 W. R. 686; 21 T. L. R. 527; 49 Sol. Jo. 685, D. C.

*In transferred actions.*—See Sub-sect. 2, *post*.

*Stay of actions for damage.*—See Sect. 6, *post*.

#### SUB-SECT. 2.—REMITTED PROCEEDINGS.

See C. C. R., Ord. 33, r. 11; County Courts Act, 1888 (c. 43), ss. 157, 158.

**599. Jurisdiction of county court—To award damages.**—*OLIVER v. LEWIS*, [1889] W. N. 224, D. C.

*Annotation*:—*Folld. Salbstein v. Isaacs*, [1916] 1 K. B. 1.

**600. Whether claim for damages allowed—**C. C. R., Ord. 33, r. 11.]—The above rule which provides that no claim for damages shall be allowed in any interpleader proceeding commenced at the instance of the sheriff & remitted from the High Ct. is not *ultra vires*. Therefore the successful claimant to goods in such a proceeding is not precluded from bringing a subsequent action against the execution creditor & his solr. for damages for trespass to his goods.—*SALBSTEIN v. ISAACS & SON*, [1916] 1 K. B. 1; 85 L. J. K. B. 109; 114 L. T. 235; 60 Sol. Jo. 106, D. C.

#### SECT. 6.—STAY OF PROCEEDINGS.

See County Courts Act, 1888 (c. 43), s. 157.

**601. Interpleader by high bailiff—Jurisdiction of county court to stay—Actions at time of adjudication.**—By County Courts Act, 1846 (c. 95), s. 118, it is enacted that if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any county ct., a summons may issue calling before the said ct. the party issuing the process as well as claimant, & thereupon any action which shall have been brought in respect of such claim shall be stayed, & the judge of the county ct. shall adjudicate upon such claim, & make such order between the parties in respect thereof as to him shall seem fit. Where the judge of the county ct. had made an order adverse to claimant:—*Held*: an order to stay proceedings in an action of trespass for breaking & entering the house of claimant, & taking the goods in question, was proper.—*JESSOP v. CRAWLEY* (1850), 15 Q. B. 212; Rob. L. & W. 357; Cox, M. & H. 296; 19 L. J. Q. B. 319; 15 L. T. O. S. 135; 14 Jur. 697; 117 E. R. 438.

*Annotations*:—*Distd. Cater v. Chignell* (1850), 15 Q. B. 217. *Consd. Jousiffe v. Bayley* (1866), 15 L. T. 219.

**602.** — — — — —.]—Brewing utensils, hops, etc., having been seized under a warrant of execution from a county ct. against the goods of R., were claimed by one J. On Oct. 5 the bailiff caused an interpleader summons to be issued, calling on the parties to appear on Oct. 18, when the claim would be adjudicated upon. The county ct. judge decided that the goods were the property of J. The goods having been given up,

J. commenced an action against the execution creditor for damages, for wrongfully depriving him of the possession of the goods, by means whereof he was prevented from carrying on his trade as a brewer, alleging special damage. The ct. refused to interfere to stay the proceedings at the instance of deft. *Semble*, the power to stay proceedings, under County Courts Act, 1846 (c. 95), s. 118, is confined to actions brought before the adjudication by the county ct. judge.—*JONES v. WILLIAMS* (1859), 4 H. & N. 706; 28 L. J. Ex. 324; 33 L. T. O. S. 185; 157 E. R. 1019.

**603.** — — — — — Where no adjudication in county court.]—*Qu.*: whether the county ct. judge has jurisdiction on an interpleader application, besides adjudging in favour of claimant as to the right to the goods, to give damages for breaking & entering his house or premises, or for special damage arising from the taking of the goods. But the ct. will not, on motion in an action for such trespass, where it does not appear that the county ct. judge has exercised such jurisdiction, stay the action or even strike out of the declaration such part as relates to the taking of the goods, & the special damage laid as resulting therefrom.—*MERCER v. STANBURY* (1857), 2 H. & N. 155, n.; 25 L. J. Ex. 316; 20 J. P. 407; 4 W. R. 649; 157 E. R. 65.

*Annotations*:—*Refd. Foster v. Pritchard* (1857), 2 H. & N. 151; *Jousiffe v. Bayley* (1866), 15 L. T. 219.

**604.** — — — — —.]—A claimant of goods seized under a county ct. execution, who is summoned by interpleader summons before the county ct., but does not prosecute his claim, may sue in the superior for the wrongful conversion, unless it appears that there was an adjudication upon the claim in the county ct.—*CHALLINER v. BURGESS* (1856), 27 L. T. O. S. 78.

**605.** — — — — —.]—*JONES v. WILLIAMS*, No. 602, *ante*.

**606.** — — — — — Action begun after issue of summons.]—With regard to County Courts Act, 1888 (c. 43), s. 157, the subject-matter of the claim arose out of an execution by the high bailiff & it was therefore a matter which the county ct. judge might have dealt with on the interpleader summons. If the interpleader summons had been proceeded with an order might have been made barring pltf.'s claim. No such order has been asked for or made. The contention that s. 157 was an automatic bar to this action fails because the sect. only applies to actions which have been brought prior to the issue of the interpleader summons, & this action was not commenced till afterwards (*WILIS, J.*).—*DENNY v. BENNETT* (1896), 44 W. R. 333; 40 Sol. Jo. 298, D. C.

**607.** — — — — — Action against purchaser from bailiff.]—Where goods are seized under an execution issued on a judgment in a county ct. & sold, & an interpleader summons is taken out at the instance of the high bailiff, under County Courts Act, 1867 (c. 142), s. 31, the county ct. judge has power to adjudicate upon the damages, to which claimant of the goods may be entitled, arising out of the execution, although the goods have been sold, & therefore are no longer in the control of the county ct., & any action against the officers of the ct. for wrongfully depriving pltf. of his goods will be stayed; but an action against the purchasers of the goods from the officers of the county ct. will not be stayed.—*HILLS v. RENNY*

#### PART III. SECT. 6.

*Jurisdiction of county court to*  
—An interpleader issue arising

out of an action in the High Ct. was directed to be tried in a county ct.:—*Held*: a motion to postpone the trial of the issue should have been made in

the county ct.—*LONDON & CANADIAN LOAN & AGENCY CO. v. MORPHY* (1885), 11 P. R. 86.—CAN.



**Sect. 6.—Stay of proceedings.** **Sect. 7: Sub-sects.** 1, 2, 3, 4, 5, 6 & 7. **Sect. 8: Sub-sects. 1 & 2.]**

(1880), 5 Ex. D. 313; 49 L. J. Q. B. 710; 42 L. T. 671; 29 W. R. 328, C. A.

**Annotations:—***Reid. Cramer v. Matthews* (1881), 7 Q. B. D. 425; *Goodlock v. Cousins*, [1897] 1 Q. B. 348.

**Interpleader by stakeholder.]—***See* C. C. R., Ord. 27, r. 15 (4).

## SECT. 7.—APPEAL.

### SUB-SECT. 1.—IN GENERAL.

*See* County Courts Act, 1888 (c. 43), s. 120.

**608. General rule.]—**(1) No appeal lies against the decision of a county ct. judge on an interpleader summons.

(2) Where a summons has issued on an interpleader claim in a county ct. the judge is bound to adjudicate upon it; & if claimant has not delivered a sufficient particular, or not delivered it in the time required by the rule of ct., the judge should either amend the particular, or order a new summons to issue, so that he may determine the case on the merits.—*BESWICK v. BOFFEY, Re MOSES' CLAIM* (1854), 9 Exch. 315; 2 C. L. R. 503; 23 L. J. Ex. 89; 156 E. R. 134; *sub nom.* *BESWICK v. BOFFEY, Ex p. MOSES*, 22 L. T. O. S. 214; 18 J. P. 151; 2 W. R. 156.

**Annotations:—***As to* (1) *Consd. Fraser v. Fothergill* (1854), 23 L. J. C. P. 53. *Apld. Mason v. Wirral Highway Board* (1879), 4 Q. B. D. 459.

**609. —.]—**The ct. has no jurisdiction to hear an appeal from the decision of a judge of a county ct. on an interpleader proceeding in respect of goods taken in execution to satisfy a judgment of that ct.

**Qu.: whether the ct. has power to give costs on striking out such an appeal.—***FRASER v. FOTHERGILL* (1854), 14 C. B. 298; 23 L. J. C. P. 53; 139 E. R. 122.

Appeals from county courts generally, *see* COUNTY COURTS, Vol. XIII., pp. 525 *et seq.*

### SUB-SECT. 2.—BY CLAIMANT.

*See* County Courts Act, 1888 (c. 43), s. 120.

**610. Right of appeal.]—***WILCOXON v. SEARBY, Re FOULGAR v. TAYLOR*, No. 616, *post*.

**611. — Value of goods seized exceeding amount allowed by jurisdiction—Judgment debt for**

**less sum — Amount of judgment debt paid.]—**Under County Courts Act, 1856 (c. 108), s. 68, an appeal from the decision of a county ct. in proceedings in interpleader, lies where the value of the goods claimed against the execution creditor exceeds £20, though the execution is for a sum less than £20; & claimant, to prevent the goods from being sold, has paid such sum.—*VALLANCE v. NASH* (1858), 2 H. & N. 712; 27 L. J. Ex. 142; 30 L. T. O. S. 261; 22 J. P. 98; 4 Jur. N. S. 31; 6 W. R. 227; 157 E. R. 294.

**Annotation:—***Distd. White v. Milne* (1887), 58 L. T. 225.

**612. — Less sum deposited as appraised value.]—**Where in an interpleader proceeding in a county ct., claimant deposits the amount of the value of the goods claimed as fixed by appraisal under County Courts Act, 1856 (c. 108), s. 72, he cannot, if the amount so deposited be less than £20, claim to appeal under sect. 68 of the Act on the ground that the value of the goods was over £20, & that a less amount was deposited because it was sufficient to satisfy the execution creditor's judgment.—*WHITE & Co. v. MILNE* (1887), 58 L. T. 225, D. C.

**Annotations:—***Reid. Lumb v. Teal* (1889), 22 Q. B. D. 675; *Smith v. Enright* (1893), 69 L. T. 724.

### SUB-SECT. 3.—BY EXECUTION CREDITOR.

*See* County Courts Act, 1888 (c. 43), ss. 120, 157.

**613. Right of appeal.]—***WILCOXON v. SEARBY, Re FOULGAR v. TAYLOR*, No. 616, *post*.

**614. Value of money or goods claimed less than amount under jurisdiction—Joinder of claim for damages exceeding amount—Leave necessary.]—**In an interpleader proceeding under County Courts Act, 1888 (c. 43), s. 157, the value of the goods claimed was less than £20, & claimant claimed damages, exceeding £20, against the high bailiff, & the execution creditor. At the hearing the judge gave judgment for £15 for claimant against the execution creditor, & did not grant leave to appeal:—*Held*: the execution creditor had no right of appeal under sect. 120, which provides that there shall be no right to appeal in proceedings in interpleader, where the money claimed, or the value of the goods & chattels claimed, or of the proceeds thereof, does not exceed £20, unless the judge shall grant leave to appeal.—

## PART III. SECT. 7, SUB-SECT. 1.

**608 i. General rule.]—**An appeal will lie from the county ct. to the superior cts. upon an interpleader as well as other matters.—*FEEHAN v. BANK OF TORONTO* (1860), 10 C. P. 32.—CAN.

**608 ii. —.]—**A verdict was entered for pltf. on the trial of an issue directed by the Ct. of Ch. to be tried at the sittings of the county ct. The county ct. judge set aside the verdict, & entered a nonsuit, on grounds embracing matters of law as well as of fact & evidence:—*Held*: he had no power to do so, & the application should have been made to the ct. that directed the issue.—*BARKER v. LEESON* (1881), 9 P. R. 107.—CAN.

**608 iii. —.]—***ISBISTER v. SULLIVAN* (1888), 16 O. R. 418.—CAN.

**m. Whether appeal allowed—From order directing issue on security given.]—**An order made in county ct. chambers in an interpleader application directing an issue in the event of security being given, & in default a sale of the goods & payment of the proceeds to the execution creditor:—*Held*: not appealable.—*HUNTER v. HUNTER*, 18

C. L. T. Occ. N. 114.—CAN.

**n. — Question of fact.]—***MALCOLMSON v. HAMILTON PROVIDENT & LOAN SOCIETY* (1884), 10 A. R. 610.—CAN.

**o. — To Divisional Court.]—**An interpleader issue arising out of an action in the Ch. Div. was sent to a county ct. for trial by order made in chambers:—*Held*: a Div. Ct. had no jurisdiction to hear an appeal from the judgment of the county ct. on such issue, & such appeal should have been made to the Ct. of Appeal.—*CLOSE v. EXCHANGE BANK* (1885), 11 P. R. 186.—CAN.

**p. — To High Court—Issue sent from High Court to county court.]—**The Ct. of Appeal has no jurisdiction to entertain an appeal from the decision of a county ct. upon an interpleader issue sent for trial by an order made in an action in the High Ct., upon the application of a stakeholder.—*Semle*: the appeal from the decision upon the issue is, in the first instance at all events, to the High Ct., & not to the Ct. of Appeal.—*CLANCEY v. YOUNG* (1893), 15 P. R. 248.—CAN.

**over involved.]—**

An appeal lies without leave from the order of a county ct. judge disposing of an interpleader action on the merits where the amount involved is \$100 or over.—*RITCHIE CONTRACTING Co. v. BROWN* (1915), 30 W. L. R. 723; 8 W. W. R. 84; 21 D. L. R. 86.—CAN.

**From order of district court judge.]—**An order made by a district ct. judge, on an interpleader issue, deciding favourably or adversely, to the validity of the claim of claimant is a final order, & no appeal lies therefrom to a Supreme Ct. judge.—*WALTON v. BERRY & WATCHLER*, [1918] 1 W. W. R. 564; 11 Sask. L. R. 66.—CAN.

**t. — To judge of assize—Order made by consent.]—**When an interpleader issue is ordered by consent to be tried in the county ct., there is no appeal to the judge of assize from the decree of the county ct. judge.—*LAWLER v. KELLY* (1897), 33 I. L. T.

## PART III. SECT. 7, SUB-SECT. 2.

**Right of appeal—Delay.]—***BANK OF HAMILTON v. HODGES, CRANE & Co.*, [1919] 1 W. W. R. 342.—CAN.

**LUMB v. TEAL & Co.** (1889), 22 Q. B. D. 675 ; 58 L. J. Q. B. 298 ; 60 L. T. 451, D. C.  
*Annotation* :—**Mentd.** **King v. Charing Cross Bank** (1889), 62 L. T. 42.

SUB-SECT. 4.—BY SHERIFF OR BAILIFF.

**615. Transferred proceedings—Sheriff not party to proceedings—Costs against sheriff.**—Where interpleader proceedings are transferred, by an order in the ordinary form, to the county ct., the sheriff is not a party to the interpleader issue, & the county ct. judge has no jurisdiction to order him to pay costs. On the making of such an order the sheriff should apply for a prohibition, & is not entitled to appeal.—**TEMPLE v. TEMPLE** (1894), 63 L. J. Q. B. 556 ; 10 R. 251.

SUB-SECT. 5.—BY LANDLORD.

See County Courts Act, 1888 (c. 43), s. 120.

**616. Where landlord appears on summons.**—Where the landlord appears upon the hearing of an interpleader summons in the county ct., he, as well as the execution creditor, & claimant, has a right of appeal.—**WILCOXON v. SEARBY, Re FOULGAR v. TAYLOR** (1860), as reported in 29 L. J. Ex. 154.

*Annotation* :—**Mentd.** **Hughes v. Smallwood** (1890), 25 Q. B. D. 306.

SUB-SECT. 6.—APPEALS AGAINST ORDER AS TO COSTS.

**617. Successful appeal—Jurisdiction of High Court to deal with costs in county court.**—A county ct. judge gave judgment on an interpleader issue for the execution creditor, with costs. The ct. upon appeal reversed that judgment, & ordered a new trial ; holding, that the whole judgment, including that part of it which related to the costs, was thereby reversed.—**GAGE v. COLLINS** (1867), L. R. 2 C. P. 381 ; 36 L. J. C. P. 144 ; 15 W. R. 568.

**618. Sheriff's charges subsequent to order—Subject of appeal.**—**GOODMAN v. BLAKE**, No. 503, *ante*.

SUB-SECT. 7.—IN TRANSFERRED PROCEEDINGS.

See Jud. Act, 1873 (c. 66), s. 45 ; 13 & 14 Vict. c. 61, s. 14 ; Appellate Jurisdiction Act, 1876 (c. 66), s. 20 ; County Courts Act, 1888 (c. 43), s. 120.

**619. From Divisional Court—To Court of Appeal—By leave.**—Interpleader proceedings were transferred under Jud. Act, 1884 (c. 61), s. 17, from the Q. B. Div. to a county ct. On appeal from the judgment of the county ct. the Q. B. Div. affirmed that judgment, but gave leave to appeal to the Ct. of Appeal :—**Held** : the Ct. of Appeal had jurisdiction under Jud. Act, 1873 (c. 66), s. 45, to hear the appeal, that jurisdiction not having been taken away by Appellate Jurisdiction Act, 1876 (c. 66), s. 20.—**THOMAS v. KELLY** (1888), 13 App. Cas. 506 ; 58 L. J. Q. B. 66 ; 60 L. T. 114 ; 37 W. R. 353 ; 4 T. L. R. 683, H. L. ; *affg*.

PART III. SECT. 8, SUB-SECT. 1.

**a. Costs of trial—Notwithstanding notice of appeal.**—**WILSON v. WILSON** (1878), 7 P. R. 407.—**CAN.**

**c. Conduct disentitling to.**—**MACDONALD v. CARRODI** (circa 1873), 1 Ch. 145.—**CAN.**

**d. —.**—**GREEN v. BELL** (1909), 43 I. L. T. 236.—**IR.**

*Annotations* :—**Mentd.** **Bouchette v. Attenborough, Consolidated Credit & Mortgage Corpn.** (1887), 3 T. L. R. 813 ; **Tailby v. Official Receiver** (1888), 13 App. Cas. 523 ; **Hadden, Best v. Oppenheim** (1889), 60 L. T. 962 ; **Parsons v. Brand, Coulson v. Dickson** (1890), 25 Q. B. 110 ; **Bird v. Davey**, [1891] 1 Q. B. 29 ; **Re Heseltine, Woodward v. Heseltine**, [1891] 1 Ch. 464 ; **Heseltine v. Simmons**, [1892] 2 Q. B. 547 ; **Re Tweedale, Ex p. Tweedale**, [1892] 2 Q. B. 216 ; **Seed v. Bradley**, [1894] 1 Q. B. 319 ; **Peace v. Brookes**, [1895] 2 Q. R. 451 ; **Sims v. Trollope** (1896), 75 L. T. 351 ; **De Braam v. Ford**, [1900] 1 Ch. 142 ; **Lysons v. Knowles, Stuart v. Nixon & Bruce**, [1901] A. C. 79 ; **Saunders v. White**, [1902] 1 K. B. 472 ; **Coates v. Moore**, [1903] 2 K. B. 140 ; **Mourmand v. Le Clair** (1903), 51 W. R. 589 ; **Ball v. Hunt**, [1912] A. C. 496 ; **Ryan v. Steam Navigation Co., O'Connell v. Same, Scanlon v. Same, O'Brien v. Same**, [1914] 3 K. B. 731 ; **Brandon Hill v. Lane**, [1915] 1 K. B. 250 ; **Burchell v. Thompson**, [1920] 2 K. B. 80 ; **Commercial Credit Co. of Canada v. Fulton**, [1923] A. C. 798.

SECT. 8.—COSTS.

SUB-SECT. 1.—IN GENERAL.

See County Courts Act, 1888 (c. 43), s. 113.

Costs in county courts generally, see COUNTY COURTS, Vol. XIII., pp. 518 *et seq*.

**620. Abandonment of claim at hearing—Costs ordered against solicitor of claimant.**—**WILLIAMS v. HOLDSWORTH** (1851), 17 L. T. O. S. 169.

**621. Refusal by county court to adjudicate—Order on claimant to pay costs—Power of high court to vary order.**—A county ct. judge having refused to hear an interpleader summons, & ordered money to be paid out of ct., with costs to be paid by claimant, on the ground of the insufficiency of the particulars, a rule was obtained, under County Courts Act, 1856 (c. 108), s. 43, calling on the county ct. judge to hear the summons. No cause being shown the ct. made the rule absolute ; ordering the costs of the rule to abide the event of the interpleader issue, & discharging claimant from the costs in the ct. below.—**WHITEHEAD v. PROCTER** (1858), 3 H. & N. 532 ; 31 L. T. O. S. 205 ; 157 E. R. 580.

*Annotations* :—**Expld.** **Churchward v. Coleman** (1866), L. R. 2 Q. B. 18. **Consd.** **Gage v. Collins** (1867), L. R. 2 C. P. 381. **Mentd.** **Richardson v. Wright** (1875), L. R. 10 Exch. 367.

**622. —. —. —.**—A judge of a county ct. having refused to hear an interpleader claim on the ground of insufficiency of particulars & having ordered claimant to pay costs the ct., on ruling the judge under County Courts Act, 1856 (c. 108), s. 43, to hear the claim, has no jurisdiction to set aside the order as to costs.—**CHURCHWARD v. COLEMAN** (1866), L. R. 2 Q. B. 18 ; 7 B. & S. 843 ; 36 L. J. Q. B. 57.

*Annotations* :—**Consd.** **Gage v. Collins** (1867), L. R. 2 C. P. 381. **Refd.** **R. v. Mellor**, [1914] 2 K. B. 588. **Mentd.** **Richardson v. Wright** (1875), L. R. 10 Exch. 367.

**623. Transferred proceedings—Sheriff cannot be ordered to pay costs.**—**TEMPLE v. TEMPLE**, No. 615, *ante*.

SUB-SECT. 2.—SCALE OF COSTS.

See, now, O. C. R., Ord. 53, r. 15.

**624. How regulated—"Sum paid into court."**—**BROWN v. LILLEY** (1891), 7 T. L. R. 427, D. C.  
*Annotations* :—**N.F.** **Studham v. Stanbridge**, [1895] 1 Q. B. 870 ; **Tarry v. Witt** (1915), 84 L. J. K. B. 950.

PART III. SECT. 8, SUB-SECT. 2.

**a. How regulated.**—**BEATY v. BRYCE** (1882), 9 P. R. 320.—**CAN.**

**f. County court writs—Application to High Court.**—Several executions

*Sect. 8.—Costs: Sub-sects. 2, 3 & 4. Parts IV. & V.]*

**625. — Value of goods seized.]**—Column C of the higher scale of costs in force in county cts. applies “where the subject-matter or sum recovered exceeds £50”; & by C. C. R., 1889, Ord. 50A, r. 12, “the ‘subject-matter’ in an interpleader proceeding shall mean, in the case of a claimant, the amount of the value of the goods his claim to which is allowed, plus the amount of the damage, if any, adjudged.”

Claimant, in an interpleader proceeding to try the right to goods seized in execution on a judgment in the county ct., paid into ct. £36 to meet the amount in respect of which the execution was issued & all costs. At the trial of the claim, the county ct. judge adjudged that claimant was entitled to all the goods seized & £10 damages, with costs, & that the value of the goods seized was £51:—*Held*: claimant was entitled to have his costs taxed according to column C of the higher scale, because the “subject-matter” of the interpleader proceeding was the amount, plus the damages, found by the judge to be the value of the goods seized, & not the amount, plus the damages, paid into ct.—*STUDHAM v. STANBRIDGE*, [1895] 1 Q. B. 870; 64 L. J. Q. B. 473; 43 W. R. 543; 15 R. 406, D. C.

*Annotation*:—*Fold. Tarry v. Witt* (1915), 84 L. J. K. B. 950.

**626. — —.]**—By C. C. R., 1903 & 1914, Ord. 53, r. 15, “The ‘subject-matter’ in an interpleader proceeding shall mean in the case of a claimant the amount of the value of the goods his claim to which is allowed, plus the amount of the damage, if any, adjudged. . .”:—*Held*: the above rule applies to all interpleader proceedings in the county ct., & therefore the value of the goods seized, & not the amount paid into ct., determines the scale on which the costs of a successful claimant must be taxed.—*TARRY v.*

*WITT* (1915), 84 L. J. K. B. 950; 112 L. T. 1084; *sub nom. HORWOOD v. TARRY*, 31 T. L. R. 207, D. C.

**SUB-SECT. 3.—OF SHERIFF APPEARING ON APPEAL.**

**627. Appeal involving costs of sheriff.]**—*TRICKETT & Co. v. GIRDLESTONE* (1897), 103 L. T. Jo. 81, D. C.

**SUB-SECT. 4.—RECOVERY OF COSTS.**

**628. By sheriff—Against execution creditor—Proceeds paid over without deduction.]**—A. obtained judgment against B. in a county ct. & issued execution. C. claiming the goods, the high bailiff took out an interpleader summons & ultimately C.’s claim was disallowed & C. was ordered to pay the costs of the interpleader proceedings. The high bailiff paid the amount of the levy into ct., deducting the fees & expenses incident to the levy, but not the costs of the interpleader, & the balance was paid out of ct. to A.:—*Held*: the high bailiff could not maintain an action against A., for the interpleader costs. *Qu.*: whether he could have deducted them from the amount of the levy under the above order.—*BLOOR v. HUSTON* (1854), 15 C. B. 286; 3 C. L. R. 222; 24 L. J. O. P. 26; 1 Jur. N. S. 256; 3 W. R. 113; 139 E. R. 424; *sub nom. BLOWER v. HASTON*, 24 L. T. O. S. 115; *sub nom. BLORE v. HUSTON*, 18 J. P. 745.

*See, now*, C. C. R., Ord. 27, r. 6.

**629. By action.]**—An action is not maintainable upon an order of a county ct. for payment of costs.—*FURBER v. TAYLOR*, [1900] 2 Q. B. 719; 69 L. J. Q. B. 898; 83 L. T. 308; 48 W. R. 689 C. A.

*Annotation*:—*Reid. Savill v. Dalton*, [1915] 3 K. B. 174.

## Part IV.—Interpleader in Liverpool Court of Passage.

*See, now*, Liverpool Court of Passage Act, 1893 (c. 37); Court of Passage Rules, Ord. 57.

Liverpool Court of Passage generally, *see* COURTS, Vol. XVI., pp. 199, 200, Nos. 1053–1064.

**630. Jurisdiction of court.]**—(1) The assessor of the Liverpool Ct. of Passage was authorised by Act of Parliament to make rules regulating the practice & procedure of that ct. In Dec. 1876, he made the following rule: “The provisions of Jud. Acts, 1873, 1875, & such orders & rules made in pursuance thereof as are now in force, as well as any orders or rules which may hereafter be made & be in force for the time being by virtue of the said Act, shall” (with an immaterial exception) “extend & be applied to, & the forms therein contained shall be adopted in all actions, causes & matters which at or after the time of the coming into operation of these rules shall be within the cognisance of the Ct. of Passage of the borough of Liverpool, but so far only as such provisions, orders, rules & forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the description

of the ct., the character of the parties, & the circumstances of the case may render necessary”:—*Held*: this rule did not give the Passage Ct. the jurisdiction in interpleader contained in R. S. C., Ord. 57, r. 8, & even if it did give such a jurisdiction, the rule was in that respect *ultra vires*.

*Semble*: the above rule does not render the provisions of R. S. C., Ord. 14, applicable to the Passage Ct.

(2) Officers of the ct. are not protected in the case of process executed under an interpleader order made without jurisdiction, though good on the face of it, if such order was obtained on their own application.

(4) The relief or remedy, the power to grant which is conferred on inferior cts. by Jud. Act, 1873 (c. 66), s. 89, only refers to the relief & remedies to be administered in the action, & as the result of the action, & not to an incidental & extraneous proceeding arising out of the levy of execution, such as interpleader.

(5) The power to decide summarily without consent questions in interpleader is not a “rule

from different county cts. having been placed in the sheriff’s hands:—*Held*: on an interpleader application to the

superior ct., that all costs, including those of the sheriff, should be taxed on the county ct. scale.—*MASURET v.*

*LANSDALL* (1879), 8 P. R. 57.—CAN. *g.* —*PHIPPS v. BEAMER* (1879), 8 P. R. 181.—CAN.



of law" within Jud. Act, 1873 (c. 66), s.

**SPEERS v. DAGGERS** (1885), Cab. & El. 503.

(1) **Reid**. **Winfield v. Boothroyd** (1886), 54 L. T. 574; **Fellows v. The Lord Stanley (Owners)**, [1893] 1 Q. B. 98; **Spelman v. Empire Liverpool** (1895), 64 L. J. Q. B. 640.

*See, now, Liverpool Court of Passage Act, 1893 (c. 37).*

**631. Application for new trial—Lies to Court of Appeal.**—An application lies to the Ct. of Appeal for a new trial of an interpleader issue tried in the Liverpool Ct. of Passage as in the case of any other issue there tried.—**COATES v. MOORE**, [1903] 2 K. B. 140; 72 L. J. K. B. 539; 89 L. T. 8; 51 W. R. 648; 10 Mans. 271, C. A.

## Part V.—Interpleader in Salford Hundred Court.

*See Salford Hundred Court of Record Acts, 1868 (c. cxxx); 1911 (c. clxxii).*

*See Rules of Salford Hundred Court, 1902, Ord. 57; Salford Hundred Court, &, generally, see*

*COURTS, Vol. XVI., pp. 202, 203, Nos. 1111–1115.*

**632. Hearing by unauthorised person—No objection taken at hearing.**—**NATHAN v. BOTTOMLEY** (1903), 19 T. L. R. 421, D. C.

## INTERPRETATION OF DEED AND OTHER NON TESTAMENTARY DOCUMENTS.

*See DEEDS AND OTHER INSTRUMENTS.*

## INTERPRETATION OF STATUTES.

*See STATUTES.*

## INTERPRETATION OF WILLS.

*See WILLS.*

## INTERROGATORIES.

*See* DISCOVERY, INSPECTION AND INTERROGATORIES.

## INTERVENTION.

*See* HUSBAND AND WIFE.

## INTESTACY.

*See* DESCENT AND DISTRIBUTION ; EXECUTORS AND ADMINISTRATORS.

END OF VOL. XXIX.









